THE CODE OF CIVIL PROCEDURE;

BEING

ACT XIV OF 1882,

AS AMENDED BY ACTS VI, VII, AND X OF 1888;
ACT VIII OF 1890, AND ACT VI OF 1892

WITH

NOTES AND AN APPENDIX.

By J O'KINEALY,
BENGAL CIVIL SERVICE.

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ABBREVIATIONS.

AGRA	.	Reports of Cases decided in the High Court of the North-West Provinces at Agra, 1866 to 1868.
ALLA.	...	Report of Cases decided in the High Court of the North-West Provinces at Allahabad, 1869 to 1875.
B. L. R.	...	Bengal Law Reports.
B. L. R., F. B.	.	Bengal Law Reports, Supplementary Volume.
BOM.	.	Bombay High Court Reports.
BOULN.	.	Boulnois' Reports.
C. L. R.	...	Calcutta Law Reports.
COR. or CORYT.	...	Coryton's Reports.
IND. JUR.	.	Indian Jurist.
IND. JUR. (N. S.)	...	Indian Jurist, New Series.
I L. R., CAL.	...	Indian Law Reports, Calcutta Series.
I. L. R., BOM.	...	" " " Bombay Series.
I. L. R., MAD.	..	" " " Madras Series.
I. L. R., ALLA.	...	" " " Allahabad Series.
MARSH.	.	Marshall's Reports.
MOORE	.	Moore's Indian Appeals.
SEL. REP.	...	Select Reports of Cases determined in the Court of Sudder Dewanny Adawlut.
S. D. A., 1860	...	Reports of the Sudder Dewanny Adawlut for 1860.
S. D., N.-W., 1860	...	Reports of the Sudder Dewanny Adawlut of the North-West Provinces for 1860.
TAYL. AND BELL	...	Taylor and Bell's Reports.
W. R.	...	Sutherland's Weekly Reporter.
W. R., Sp. No.	...	" " Full Bench Rulings, 1862-64.

The English and Irish cases have been cited in the usual manner.

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BENGAL SECRETARIAT LIBRARY

THE

CODE OF CIVIL PROCEDURE.

ACT No. XIV OF 1882.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Received the assent of the Governor-General on the 17th March, 1882.

An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature.

Preamble.

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows :—

PRELIMINARY.

Short title.

1. This Act may be cited as "The Code of Civil Procedure :"

Commencement.

and it shall come into force on the first day of June, 1882.

Local extent.

This section and section 3 extend to the whole of British India. The other sections extend to the whole of British India except the Scheduled Districts as defined in Act No. XIV of 1874.

British India.—Apparently, any new province acquired would become, on its acquisition, part of British India—*Ouseley* vs. *Plowden*, Boulnois, 161 2.

The Code applies to suits in the Santhal Parganas above one thousand rupees in value—*Dungaram* vs. *Rajkishore*, I. L. R., 8 Cal., 133. See also the case of *Ram Churn* vs. *Dhaturi*, I. L. R., 18 Cal., 146.

PART I.

Scheduled Districts, Madras

I.—IN GANJAM.

(1) The Gumsur Maliahs, including Chokapad.
(2) The Surada Maliahs.
(3) The Chinna Kimedi Maliahs.
(4) The Pedda Kimedi Maliahs.
(5) The Bodaguda Maliahs.
(6) The Surangi Maliahs.
(7) The Parla Kimedi Maliahs.
(8) The Muttás of Koradá and Ronaba (otherwise called Srikarma).
(9) The Chighatti Maliah.
(10) The Juradá Maliah.
(11) The Jalantra Maliah.
(12) The Mandasa Maliah.
(13) The Budarasinghi Maliah.
(14) The Kuttingia Maliah.

II.—IN VIZAGAPATAM.

(1) The Jeypore Zamíndárí.
(2) Golcanda Hills, west of the River Boderu.
(3) The Madugol Maliahs.
(4) The Kasipur Zamíndárí.
(5) The Panchipeuta Maliahs.
(6) Moudemkollah, in the Merangi Zamíndárí.
(7) The Konda Muttá of Bolgám.
(8) The Gumma and Konda Muttás of Kurpam.
(9) The Kottam, Rám and Konda Muttás of Palkonda.

III.—IN THE GODAVARI DISTRICT.

(1) The Bhadráchalam Táluq. | (2) The Rákapilli Táluq. | (3) The Rampá Country

IV.—IN THE INDIAN OCEAN.

The Laccadive Islands, including Minicoy.

PART II.

Scheduled Districts, Bombay

I.—The Province of Sindh.
II.—The Panch Maháls.
III.—Aden.
IV.—The Villages belonging to the following Mehwassi Chiefs :—
(1) The Párví of Káthí.
(2) The Párví of Nál.
(3) The Párví of Singpur.
(4) Walwi of Gaohalli.
(5) The Wassáwá of Chikhlí.
(6) The Párví of Nawalpúr.

PART III.

Scheduled Districts, Bengal.

I.—The Jalpáigori and Darjeeling Divisions.
II.—The Hill Tracts of Chittagong.
III.—The Santhál Parganas.
IV.—The Chutiá Nágpur Division.
V.—The Mahúls of Ángál and Banki.

PART IV.

Scheduled Districts, North-Western Provinces.

I.—The Jhánsí Division, comprising the Districts of Jhánsí, Jalaun and Lalatpore.
II.—The Province of Kumáon and Garhwál.
III.—The Terai Parganas, comprising Bázpúr Káshipúr, Jaspur, Rudarpur, Gadarpúr, Kilpúri, Nanak-Matthá and Bilherí.
IV.—In the Mirzapúr District :—
(1) The Tappás of Agori Khás and South Kon in the Pargana of Agori.
(2) The Tappá of British Singrauli in the Pargana of Singrauli.
(3) The Tappas of Phulwá, Dudhi and Barhá in the Pargana of Bichipár.
(4) The portion lying to the south of the Kaimor Range.
V.—The Family Domains of the Mahárájá of Benares, comprising the following Parganas :—
Bhadohi and Kheyra Mángror in the Mirzapúr District, Kaswá Rájá in the Benares District.
VI.—The tract of country known as Jaunsar Báwar in the Dehra Dun District.

PART V.

Scheduled Districts, Punjab.

The Districts of Hazára, Pesháwar, Kohát, Bannu, Dera Ismail Khán, Dera Ghazi Khán, Lahaul and Spiti.

PART VI.

Scheduled Districts, Central Provinces.

Chhattisgarh Zamindáris, Viz. :—

1. Khariár.
2. Bindrá Nawagarh.
3. Shahezpúr.
4. Gándai.
5. Silhetí.
6. Barbaspúr.
7. Thákurtolá.
8. Lohárá.
9. Gondardehí.
10. Fingeswar.
11. Pándariá.
12. Pendrá.
13. Mátín.
14. Uprorá.
15. Kendá.
16. Láphá.
17. Chhúri.
18. Korbá.
19. Chapá.
20. Bará Sámbhár.
21. Phúljhar.
22. Kolahirá.
23. Rámpúr.

Chándá Zamindáris.

1. Ahírí.
2. Ambágarh Chauki.
3. Aundhi.
4. Dhanora.
5. Dúdhmálá.
6. Gewardá.
7. Jhárápárá.
8. Khutgáon.
9. Koráchá.
10. Kotgal.
11. Muramgáon.
12. Pánábáras.
13. Palasgarh.
14. Rángí.
15. Sirsundi.
16. Sousarí.
17. Chándálá.
18. Gilgáon.
19. Páwí Mutándá.
20. Pategáon.

Chhindwárá Jágirdáris.

1. Haraí.
2. Chháter.
3. Gorakhghát.
4. Gorpání.
5. Baktágarh.
6. Bardágarh.
7. Pachmarhí.
8. Partábgarh.
9. Almod.
10. Sonpúr.
11. Bariám Págárá.

PART VII.

The Chief Commissionership of Coorg.

PART VIII.

The Chief Commissionership of the Andaman and Nicobar Islands.

PART IX.

The Chief Commissionership of Ajmer and Mairwara.

PART X.

The Chief Commissionership of Assam.

PART XI.

The Hill Tracts of Arakan.

PART XII.

The Pargana of Mánpur.

PART XIII.

The Cantonment of Morar.

Interpretation-clause.

2. In this Act, unless there be something repugnant in the subject or context—

'chapter :' 'chapter' means a chapter of this Code:

'district :' 'District Court :' 'district' means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a 'District Court'), and includes the local limits of the ordinary original civil jurisdiction of a High Court: every Court of a grade inferior to that of a District Court and every Court of Small Causes shall,

for the purposes of this Code, be deemed to be subordinate to the High Court and the District Court :

High Court means the highest Civil Court of Appeal in any place—Clause 11, section 2, Act I, 1868.

District Court.—See *nJoyarayan Singh* vs. *Mudhoo Sudun*, I. L. R., 16 Cal., 13, and Clause 21, section 4, *post*.

'pleader :'

'pleader' means every person entitled to appear and plead for another in Court, and includes an advocate, a vakil, and an attorney of a High Court :

'Government Pleader :'

'Government Pleader' includes also any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader :

Precedence.—The Advocate-General and Officiating Advocate-General for the time being are entitled to pre-audience—Bourke, 422.

Advocates.—Advocates have precedence over pleaders—*Englishman, May 21st*, 1872. They can appear and plead on the Appellate Side of the High Court, but not act,—*i.e.*, they can appear and represent their clients in the various stages of the litigation at which it is necessary their clients should be present in person or by representative ; but they cannot take any steps in the Court or its offices necessary in order that the cause may be properly laid before the Court—*Kali Kumar* vs. *Nobin Chunder*, I. L. R., 6 Cal., 585, p. 590, and therefore cannot file an appeal or any other application in the Registrar's office—*Ram Taruck Barrik*, petitioner, 13 W. R., 60. They may be instructed by clients direct, without the intervention of any pleader—*Gobind Chunder* vs. *Andrews*, 24 W. R., 15. They cannot enter into any binding contract, sue, or be sued for their fees—*Reference*, I. L. R., 9 Mad., 140; *Smith* vs. *Guneshee Lall*, 3 Alla., 83 ; *Achamparambath* vs. *Ganz*, I. L. R., 3 Mad., 138. It is otherwise with a Barrister, who is not an Advocate—*Kristna Rowe* vs. *Muttukistna*, 4 Mad., 244 ; *Land Mortgage Bank* vs. *Elmes*, 25 W. R., 332.

Robing.—If an Advocate or Pleader appears before the Court as a litigant in person, he must not address the Court from the Advocate's table or in robes, but from the same place and in the same way as any ordinary member of the public—*In the matter of West Hopetown Co.*, I. L. R., 9 Alla., 180.

Authority to bind Client.—In England, counsel have complete authority over the suit, the mode of conducting it, and all that is incident to it ; such as withdrawing the record, withdrawing a juror, calling no witnesses, and other matters which properly belong to the suit and the management and conduct of the trial—*Swinfen* vs. *Lord Chelmsford*, 29 L. J. (Ex.), 397 ; *Jang Bahadur* vs. *Shankar*, I. L. R., 13 Alla., 272. See *Matthews* vs. *Munster*, 20 Q. B. D., 141 ; *Urquhart* vs. *Butterfield*, 37 C. D., 357, p. 369 ; *In re West Devon Mine*, 38 C. D., 51. And where a counsel consents to withdraw a juror, the compromise is binding on the client notwithstanding he may dissent, unless this dissent is brought to the knowledge of the opposite party at the time—*Strauss* vs. *Francis*, L. R. 1 Q. B., 379 ; and generally a consent order will not be set aside on the ground of mistake except for reasons sufficient to set aside an agreement—*Attorney-General* vs. *Tomline*, 7 C. D., 389 ; *Davis* vs. *Davis*, 13 C. D., 861. But if the consent has been given against the express wish of the client—*Carrison* vs. *Rodrigues*, I. L. R., 13 Cal., 115 ; or under a misapprehension ; or through a misstatement or want of materials, or if all the information which a counsel ought to have when he gives his consent is not before him, the client is not bound—*Holt* vs. *Jesse*, 3 C. D., 177.

In India an agreement by counsel, not to appeal provided the decision be confined to a certain point, is binding on the client—*Moonshee Amir Ali* vs. *Moharani Indarjeet Sing*, 14 Moore, 203.

Proof of Admission.—Where a High Court stated in its judgment that plaintiff had by way of confession agreed to take a certain boundary, their Lordships of the Privy Council upheld the consent, though denied, as there was nothing to show that the errors, if any, had been brought to the notice of the High Court—*Radha Gobind* vs. *Inglis*, 7 C. L. R., 364, p. 367.

Pleaders and Vakils.—Pleaders of the High Court in Calcutta are entitled to practise in the Calcutta Small Cause Court—*Re Toolsee Dass Seal*, 7 W. R., 228 ; but

not pleaders of the High Court in Bombay—*In re The Pleaders of the High Court*, I. L. R., 8 Bom., 105; nor pleaders of the Mofussil Courts in Bengal—*Shushee Bhoosun Bhadooree*, 10 W. R., 82. They can plead in the Criminal Courts on behalf of either prosecutor or prisoner—*Chunder Charan* vs. *Chunder Coomar*, 14 W. R., Cr., 23. The Courts in which a particular pleader is entitled to plead will depend upon the terms of his certificate—See The Legal Practitioners' Act, XVIII, 1879, sections 7, 10, and Schd. II.

Control of Case.—The senior pleader present has the entire control of the case; and a junior will not be allowed to argue points in appeal waived by him—*Sreenesbash Roy* vs. *Umbika Churn*, 12 W. R., 375. A pleader using improper expressions during the course of argument should be stopped—*In the matter of Cruise*, 14 W. R., Cr., 53; and if he misconducts himself, the Court may decline to hear him, but it cannot dismiss the case in which he is engaged without trying it on the merits—*Lal Chand* vs. *Shakeer Mahomed*, 6 W. R., 67. No pleader should be called upon to produce his instructions; he is responsible for any statement he may make—*Rajkessen Surmal*, petitioner, S. D. Sum. Dec., Sept. 16, 1846; see Evidence Act of 1872, sections 149 (*illus.*), 150.

Binding Client.—Parties are bound by the *bonâ fide* acts of their pleaders within the scope of their authority, and mere error of judgment affords no valid ground for avoiding them—*Pesh* vs. *Kasee Madud Hossein*, S. D. N. W., 1855, p. 66; *Sheik Burkut Hossein*, petitioner, S. D. Sum. Dec., March 29th, 1842; *Gour Churn Mookerjee* vs. *Kishen Mohini Dabee*, S. D. Sum. Dec., July 19th, 1843; but the greatest caution should be exercised by Courts before acting upon vakil's statements out of the ordinary scope of their authority in the peculiar matter in which they are employed—*Venkataramanna* vs. *Chavela*, 6 Mad., 127. If a pleader conducting a case makes an admission as to payments made and the state of an account between the parties, it is binding on his client—*Berkley* vs. *Chittur Kooar*, 5 Alla., 2; *Kaleekanund* vs. *Gireebala*, 10 W. R., 322; *Rajundar Narrain* vs. *Bijai Gorind Sing*, 2 Moore, 253, and a record of an admission made by a pleader, must be taken to be correct until contradicted by an affidavit of the pleader, or admitted to be wrong by the Judge—*Hur Dyal* vs. *Heera Lall*, 16 W. R., 107; but if a pleader be examined as a witness, his evidence is not treated as an admission—*Rash Behary Mookerjee* vs. *Juggadumba*, 2 Sev., 88. Under a vakalutnama couched in general terms, a vakil has power to withdraw a suit and bind his client—*Ram Coomar* vs. *Collector of Beerbhoom*, 5 W. R., 80; but it is not within the ordinary scope of his authority to compromise the suit he is engaged in—*Prem Shookh* vs. *Pirthee Ram*, 2 Agra, 222; *Sirdar Begum* vs. *Izzutoolnissa*, 2 Alla., 149; or, instead of conducting the defence in the usual way to refer it to arbitration—*Thakur Pershad* vs. *Kalka*, 6 Alla., 210; *Sadashiv* vs. *Maruti*, I. L. R., 14 Bom., 455; or bind his client to abide by plaintiff's oath—*Mussamut Hakeem Oonnissa* vs. *Beldeo*, 4 Agra, 3 61; *Sadashiv* vs. Maruti, I. L. R., 14 Bom., 453; (but see *Rajender Chunder* vs. *Mahmud Aymoodeen*, W. R., 1864, p. 143); or to give up a portion of the property in dispute—*Ram Kant* vs. *Brindabun Chunder*, 16 W. R., 246; *Gour Pershad* vs. *Seookdeb Ram*, 12 W. R., 279; *Sheikh Abdul Sobhan* vs. *Shib Kisto*, 3 B. L. R., App., 15; or to pay an exorbitant fee to an attorney or counsel—*Shamsoonisa Begum* vs. *Carrapiet*, 1 Boulnois, 339; and see *Keshav* vs. *Narayan*, I. L. R., 10 Bom. 18; or allow a decree to pass against other property—*Avul Khadar* vs. *Anthu Set*, 2 Mad., 423; or transfer a decree—*Nohur* vs. *Jaffer Hossein*, 2 Alla., 195. See on this subject, Story on Agency, *King* vs. *Pinsoneault*, L. R., 6 P. C., 245, and the authorities there referred to.

Certifying.—A pleader, appealing to the High Court, cannot certify his own grounds of appeal—*Thakoor Doss* vs. *Ameer Mundul*, 14 W. R., 168. If a pleader, having signed the memorandum of appeal, subsequently refuses to argue the case on the ground of being unprepared, he can be dealt with by the Court for neglect of duty as a pleader; or be sued by his clients—*Buldeo Misser* vs. *Syad Ahmed*, 15 W. R., 143.

In the High Court he is bound to move for an order as soon as the period fixed for the return has elapsed, and if he does not do so, the case may be taken up in his absence—*Hossanee Begum* vs. *Dumree Mahtoon*, 2 W. R., Mis., 51.

Remuneration.—Under Act XVIII of 1879 a pleader can agree with his client for past or future services, and such agreement excludes further claims if not excepted. It will not absolve the pleader for negligence and, unless it is in writing and registered within 15 days it cannot be enforced—*Krishnasami* vs. *Keyava*, I. L. R., 14 Mad., 63. This agreement does not refer to taxed costs but something different, and if the pleader cannot show that it was fair and reasonable, the Court may cancel it and assess the fees—*Raziuddin* vs. *Karim Baksh*, I. L. R., 12 Alla., 169; and in any case where there is no written registered agreement, a suit for work and labour done will lie—*Rama* vs. *Kunji*, I. L. R., 9 Mad., 375; *Krishnasami*, *supra*.

Where the Legal Practitioners' Act does not apply it had been decided that there is nothing wrong in a pleader contracting for additional remuneration if successful in gaining the suit—*Khajeh Ameen-oodeen* vs. *Mohomed Yahesa*, S. D., N. W., 1860, p. 405; before or at the same time he accepts the position of pleader to his client—*Parsham* vs. *Hiraman*, I. L. R., 8 Bom., 413; but when a pleader has accepted a vakalutnama or a certain suit, a subsequent agreement to give a sum over and

above the usual fees, if successful is *nudum pactum*—*Ramchandra* vs. *Kalu Ra'u*, I. L. R., 2 Bom., 362. A contract to be rewarded by a share of the amount in the suit could not be enforced in the North-West, unless the pleader could show its fairness, and that no undue advantage had been taken of his client—*Nuthoo Lall* vs. *Budree Pershad*, 1 Alla., 1; it is prohibited in Madras—*Achamparambath Cheria* vs. *Ganza*, I. L. R., 3 Mad., 138; and if a pleader acts under an engagement constituting himself the client's agent or legal adviser, the onus of showing the fairness of any contract between them lies on the pleader—*Ranee Usmut Koowar* vs. *Taylor*, 2 W. R., 307; 4 W. R., 86; *Fuzeelun Beebee* vs. *Omdah Beebee*, 10 W. R., 469; *Pushong* vs. *Munia Halwani*, 1 B. L. R. (A. C.), 95. In the North-West, a pleader receiving a fee for prosecuting or defending a suit is bound carry it to an end, and to make all applications in the execution department without further fee, and no second fee is allowable for applications in the execution-department unless it can be shown that the services of the pleader originally employed are not available—*Takee Ali* vs. *Gool Mahomed Khan*, 1 Alla., 123. In a suit for fees the cause of action does not ordinarily arise until the pleader has completely discharged his duty in the conduct of the suit, or his client has dispensed with his services—*Buckpatnam Thathacharlu* vs. *Kajamiya*, 6 Mad., 265.

Rules.—Changing sides.—As to the confidential nature of communications between client and pleader when he changes sides, see *Pallonji* vs. *Kallabhai*, I. L. R., 12 Bom., 85.

Dealing with Mukhtars.—A pleader cannot give a percentage on his fees to his client's mukhtar without his client's knowledge, especially before the fee has been earned—*In the matter of Peary Mohun Gooho*, 11 B. L. R., 312.

The rules relating to pleaders' fees in Lower Bengal do not apply to the case of defendants who have a separate interest and consent to a decree. The amount of costs in such case is in the discretion of the Court—*Ramputty Kooer* vs. *Kalee Churn Singh*, 14 W. R., 94.

Struck off the Rolls.—Pleaders cannot be removed except for a criminal offence, misbehaviour, or neglect of duty—*Noor Ahmed*, 17 W. R., 336; *Sree Nath Roy* (*id.*), 405; *petition of Mahomed Manaff*, 10 W. R., 332; *Vamanaji Konera's case*, 1 Bom., 136; *Kishoree Lall Sircar*, 14 W. R., 217; *In re Quarry*, I. L. R., 13 Alla., 93. See as to the procedure in such cases, Act XVIII of 1879; *Gonesh Chunder Gangooly*, 13 W. R., 456; *In the matter of Ram Kinkur Sein*, 13 W. R. 67; *Komla Kant Deghal*, petitioner, 11 W. R., 127.

Purchase by.—It is not expedient for a pleader to purchase the decree of his client—*Goshain Jug Roop* v. *Chingun Lal*, 2 Alla., 46; nor join with the decree-holder in purchasing the property of his client the debtor—*Nundeeput* vs. *Shaw*, 13 W. R., 209; and he is prohibited from purchasing any actionable claim falling under the jurisdiction of the Court in which he pleads—Act IV of 1882, section 136.

Attorneys and Solicitors—There is no rule which prevents an attorney from taking security from his client for the payment of costs actually due with interest thereon at a fair and reasonable rate—*Monohur Doss* vs. *Romanauth Law*, I. L. R., 3 Cal., 473; but he cannot take security for future costs—*In re Forster*, 2 D. F. & J., 105; (but *quære*, if this rule would apply to an attorney doing mofussil business for an attorney in the mofussil?—*Shumsoonnissa* vs. *Carrapiet*, Boulnois, 331); or agree to be remunerated conditional on success—*In re Attorneys' Act*, 1 C. D., 573. But though where an attorney acts regularly as a vakil in Mofussil Courts he may be entitled to the same remuneration as a vakil, yet where the business done in the mofussil does not fall within the duty of a vakil he will be dealt with as an attorney—*Shumsoonnissa Begum* vs. *Carrapiet*, Boulnois, 329, 331, 337. An attorney cannot take security for costs and charge 10 per cent. commission on the amount recovered, together with 10 per cent. on the amount of his client's claim—*ibid.*

Bind Client.—He has no power to compromise a suit after judgment, and his authority only extends to doing his best for the purpose of obtaining the fruits of the judgment for his client—*Lovegrove* vs. *White*, L. R., 6 C. P., 440; but see *Butler* vs. *Knight*, L. R., 2 Exch., 109; *Lady De La Pole* vs. *Dick*, 29 C.D., 351; *Hester* vs. *Hester*, 34 C. D., 607, p. 616.

Lien—A solicitor has the same lien on translations as on other documents, and cannot be compelled to produce them when discharged by his client unless on terms which will secure him from fraud—*Bai Kesserbai* vs. *Narranji*, I. L. R., 4 Bom., 353. If, in effecting a mortgage of his client's property, he also acts as solicitor for the mortgage, he cannot claim, as against the latter, a lien on the title-deeds or mortage deeds for costs due by the mortgagor—*In re Mason and Taylor*, 10 C. D., 729; *Sheffield* vs. *Eden*, 10 C. D., 291; *In re Snell*, 6 C. D., 105. In England the Courts will make an order to change a solicitor without making any provision for payment of his costs—*Grant* vs. *Holland*, 3 C. P. D., 180; it is not certain that this rule would be followed in India—*Ghose* vs. *Ghose*, Boulnois, 340. Where several defendants who have paid money into Court appear by one attorney, they can join and make one application for the payment of it out of Court—*Queen* vs. *Kurballi Mahomed*, Fulton, 328. An attorney who discharges himself from his client's service

loses his lien over his client's papers—*In re McCorkindale*, I. L. R., 6 Cal., 1; and will be prevented from acting for the opposite party in the suit—*Ramlall Agarwallah* vs. *Moonia Bebee*, I. L. R., 6 Cal., 79. An attorney has no lien for costs on papers belonging to an estate which is being administered by the Court—*Belaney* vs. *French*, L. R., 8 C. D., 918.

Infant—Where the client is an infant, the attorney may in some cases recover his costs as necessaries—*Watkins* vs. *Dhunnoo Baboo*, I. L. R., 7 Cal., 140; but see *Steed* vs. *Preece*, L. R., 18 Eq., 192.

Taxation.—Declining an attorney's offer to have his bills of costs taxed will not (at least in some cases) bind the client to pay without taxation—*Monohur Doss* vs *Romanath Law*, I. L. R., 3 Cal., 473.

'Collector:' 'Collector' means every officer performing the duties of a Collector of land-revenue:

This definition includes Deputy Commissioners in Non-Regulation Provinces.

'decree:' 'decree' means the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. An order rejecting a plaint, or directing accounts to be taken, or determining any question mentioned or referred to in section 244 but not specified in section 588, is within this definition: an order specified in section 588 is not within this definition:

Decree.—See note under section 206, *post*, and *Meenakshi* vs. *Subramaniya*, 14 Ind. App, 160; *Shanks* vs. *The Secretary of State*, I. L. R., 12 Mad., 120.

Suit.—Any proceeding which terminates in a decree, such as a proceeding in execution ending with an order under section 244, *post*, is a suit within this section—*Manjunath* vs. *Venkatesh*, I. L. R., 6 Bom., 54, and the decision in any such proceeding is binding on the parties in the original suit of which it is a continuation—*Ram Kirpal* vs. *Rup Kuari*, I. L. R., 6 Alla., 269.

An Order directing Accounts to be taken.—In a suit an order was made by which it was declared that defendants were liable to pay such sums as the Government Surveyor might certify. He declared his inability to decide one of the matters referred to him, and the suit was determined in Court. *Held*, the order was not an order directing accounts to be taken or a decree, and that the particular cases mentioned in the last sentence were not explanatory, but exhaustive—*Coverji* vs. *Morarji*, I. L. R., 9 Bom., 183.

'order:' 'order' means the formal expression of any decision of a Civil Court which is not a decree as above defined:

Order not Decree.—Admitting a plaint—*The Justices of the Peace for Calcutta* vs. *Oriental Gas Co.*, 8 B. L. R., 433; 17 W. R., 364. Order under section 97, *post*—*Bessessur* vs. *Murli*, I. L. R., 9 Cal., 163. Order refusing to restrain proceedings in a suit on the ground that the costs of a previous suit had not been paid—*id.*; *Chetto Sheikh* vs. *Kazee Muzzur Hossein*, Hyde, 212. Order directing the addition of a party to a suit—*Kumara Upendra Krishna Deb Bahadoor* vs. *Nobin Krishna Bose*, 3 B. L. R., 113. A decision given upon the settlement of issues, that a certain hibbanama relied upon by the defendants was invalid—*Ebrahim* vs. *Fuchhrunnissa Begum*, I. L. R., 4 Cal., 531; 3 Cal. L. R., 311. An order that when a condition should be performed, a decree should pass in due order in a suit—*Coverji* vs. *Morarji*, I. L. R., 9 Bom., 183. An order merely directing an award should be filed—*Ramadhin* vs. *Mahesh*, I. L. R., 2 Alla., 471; or refusing to file it—*Daya Nand* vs. *Singh*, I. L. R., 5 Alla., 333; *Bhola* vs. *Gobind Dayal*, I. L. R.,

6 Alla., 186. An order allowing a suit to be withdrawn—*Kallan Sheikh* vs. *Lekhraj*, I. L. R., 6 Alla., 211; *Patloji* vs. *Ganu*, I. L. R., 15 Bom., 370; but see *Gunga Ram* vs. *Data*, I. L. R., 8 All., 82; an order to pay costs under sections 47, 53, 103, 108, 116, 294, 366 para. 2, 370, 371, 454, 455, 458, 473*a*, 475, 476, 558 and 560.—*Shanks* vs. *The Secretary of State*, I. L. R., 12 Mad., 120. An order dismissing a review of judgment passed by the senior Judge, the junior disagreeing—*Raku Bibi* vs. *Khaja Mahomed Musa Khan*, 4 B. L. R., 10. An order for inspection of documents—*Sonbai* vs. *Ahmedbhai*, 9 Bom., 398. An order in the Privy Council Department granting a certificate that a case is a fit case for an appeal to Her Majesty in Council—*Mowla Baksh* vs. *Kissen Pertab Shahi*, I. L. R., 1 Cal., 102, or refusing it—*Manly* vs. *Patterson*, I. L. R., 7 Cal., 339. An order rejecting an application under section 93 of Act VIII of 1885 Bengal Tenancy Act)—*Hossain Bux* vs. *Muktoodharee*, I. L. R., 14 Cal., 312. An order under section 10, Act XX of 1863—*Minakshi* vs. *Subramanya* I. L. R., 11 Mad., 26. See also on this point the New York Procedure Code (11th ed.), pp. 354, 496, 627.

Order a Decree.—See note under section 206, *post*.

'judgment' means the statement given by the Judge of the grounds of a decree or order:

'judgment'

Judgment.—See section 203, *post*, *Husabin Begum* v. *Collector of Muzaffarnagar*, I. L. R., 9 Alla., 655.

Letters Patent.—See *Kishen Pershad* vs. *Tiluckdhari*, I. L. R., 18 Cal., 182.

'Judge' means the presiding officer of a Court:

'Judge:'

Judge.—Compare this definition with that given in section 19 of the Penal Code. An Additional Judge was a District Judge within the meaning of Act VIII of 1869 (B. C.), section 112; and an appeal did not lie from his decision in cases of the nature described in that section any more than from a District Judge—*Brojo Misser* vs. *Ahladee Misrain*, 21 W. R., 320.

Appearance.—It is not usual for a Judge to be represented in a rule to show cause unless in the whole jurisdiction of his Court is in question—*Reg.* vs. *Stonor*, 50 L. T. 99.

Death of.—The opinion of a Judge dying before judgment delivered is not a judgment—*The Queen* vs. *Keys*, 2 Ex. D., pp. 65, 238.

Consultation.—*Allcock* vs. *Hall*, 1 Q. B. (1891), 444.

Judicial Proceeding.—This term has not been defined. In the Criminal Procedure Code, section 4, it is described as meaning "any proceeding in the course of which evidence may be taken, or in which any judgment, sentence or final order is passed on recorded evidence;" see *Calder* vs. *Halket*, 2 Moore, 293, p. 308; *Sinclair* vs. *Broughton*, 9 Ind. App. 152.

'judgment-debtor' means any person against whom a decree or order has been made:

'judgment-debtor:'

'decree-holder' means any person in whose favour a decree or any order capable of execution has been made, and includes any person to whom such decree or order is transferred:

'decree-holder:'

Transferred.—The transferee gains by the transfer, the rights of the transferor, and if the latter could execute, the former is entitled to do so—*Vishnu* vs. *Krishnarao*, I. L. R., 11 Bom., 153. See section 232, *post*.

'written' includes printed and lithographed, and 'writing' includes print and lithograph:

'written:'

'signed' includes marked, when the person making the mark is unable to write his name; it also includes stamped with the name of the person referred to:

'signed:'

As to initialling a warrant, see the case of *Queen-Empress* vs. *Jankí*, I. L. R., 8 Alla., 293.

'foreign Court' means a Court situate beyond the limits of British India and not having authority in British India nor established by the Governor-General in Council:

'foreign Court:'

'foreign judgment' means the judgment of a foreign Court:

'foreign judgment:'

This section applies to H. C. and P. S. C. C.

The definition of foreign Court does not include the Privy Council, as it possesses authority in British India. It does include all other Courts in England; but see 13 Geo. III, c. 63, and the observations of their Lordships of the Privy Council in *Madras Ry Co.* vs. *Zemindar of Carvatenagarum*—1 Ind. App., 364, at p. 385.

'public officer' means a person falling under any of the following descriptions (namely):—

'public officer:'

every Judge;

every covenanted servant of Her Majesty;

every commissioned officer in the military or naval forces of Her Majesty while serving under Government;

every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorised by a Court of Justice to perform any of such duties;

every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government, or to make any survey, assessment or contract on behalf of Government, or to execute any revenue process, or to investigate, or to report on, any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government,

or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty.

The Official Trustee of Bengal is a public officer—*Saheb Jadee Shahun Shah Begum* vs. *Fergusson*, I. L. R., 7 Cal., 499; *Abdul Lateef* vs. *Doutre*, I. L. R., 12 Mad., 250.

A supernumerary peon, appointed by the Board of Revenue under section 6, Act V, 1863 (B.C.), is a public officer—*Queen* vs. *Ram Kisto*, 16 W. R., Cr., 27. So are convict warders appointed under the jail rules (403A), whose duty it is to keep prisoners in confinement—*Queen* vs. *Kallachand*, 7 W. R., Cr., 99. A naib nazir is a public officer—*Queen* vs. *Mahmood Hossein*, 2 Alla., 298. So, apparently, is a putwari—*Queen* vs. *Mudsooddeen*, 2 Alla. 148. A Collector appointed to take charge of the estate of a minor—*Bhau Balapa* vs. *Nana*, I. L. R., 13 Bom., 343; *Nursing Rao* vs. *Luxumanrao*, I. L. R., 1 Bom. 318; compare *Mohan Ishwar* vs. *Haku Rupa*, I. L R., 4 Bom., 638, or as agent for the Court of Wards under section 204, Act XIX of 1873—*Collector* of *Bijnor* vs. *Munuvar*, I. L. R., 3 Alla., 20, is a public officer, but a person appointed under section 69 of the Bengal Rent Act is not—*Chatter Lal* vs. *Thacoor Pershad*, I. L. R., 18 Cal., 518.

The definition of public officer given in this Code follows closely the definition of public servant in the Penal Code. The following clauses have been omitted.

Tenth.—"Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, or to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district.

"*Illustration.*

"A Municipal Commissioner is a public servant.

"*Explanation* 1. Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

"*Explanation* 2. Wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation."

It would, therefore, appear that neither a Municipal Commissioner, nor an Engineer, who receives and pays away municipal moneys, is a public officer, although they are both public servants—*R.* vs. *Naritamram Uttaram*, 6 Bom. R., Cr. Ca., 64.

Court of Justice.—No definition is given in this Code. In the Penal Code it is defined as follows:—

"The words 'Court of Justice' denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body when such Judge or body of Judges is acting judicially.

"*Illustration.*

"Punchayet acting under Regulation VII of 1816 of the Madras Code having power to try and determine suits, is a Court of Justice."

'Government:' And in any part of British India in which this Code operates, 'Government' includes the Government of India as well as the Local Government.

See "BRITISH INDIA," section 1, *ante*.

By section 2, Act I of 1868, clauses 8, 9, and 10, 'British India' shall mean the territories for the time being vested in Her Majesty by the Statute 21 & 22 Vic., Cap. 116 (*An Act for the better government of India*), other than the Settlement of Prince of Wales' Island, Singapore, and Malacca.

'Government of India' shall denote the Governor-General of India in Council, or, during the absence of the Governor-General of India from his Council, the President in Council, or the Governor-General of India alone, as regards the powers which may be lawfully exercised by him or them respectively.

'Local Government' shall mean the person authorised by law to administer executive Government in the part of British India in which the Act containing such expression shall operate and shall include a Chief Commissioner.

Enactments repealed.

3. The enactments specified in the first schedule hereto annexed are hereby repealed to the extent mentioned in the third column thereof. But all notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed and forms framed under any such enactment, shall, so far as they are consistent with this Code, be deemed to be respectively published, made, appointed, filed, prescribed and framed hereunder.

References in previous Acts.

And when in any Act, Regulation, or Notification passed or issued prior to the day on which this Code comes into force, reference is made to Act No. VIII of 1859, Act No. XXIII of 1861, or the "Code of Civil Procedure," or to Act No. X of 1877, or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof.

See the case of *In re Waller*, I. L. R., 6 Mad., 430.

Saving of procedure in suits instituted before 1st June, 1882.

Save as provided by section 99A nothing herein contained shall affect any proceedings prior to decree in any suit instituted or appeal presented before the first day of June, 1882, or any proceedings after decree that may have been commenced and were still pending at that date.

Appeal pending on 29th July, 1879.

Every appeal pending on the twenty-ninth day of July, 1879, which would have lain if this Code had been in force on the date of its presentation, shall be heard and determined as if this Code had been in force on such date ; and every order passed before the same day, purporting to transfer a case to a Collector under Act No. X of 1877, section 320, and every notification published before the same day, purporting to be issued under Act No. X of 1877, section 360, shall be deemed to have been respectively passed and issued in accordance with law.

This section applies to H. C. and P. S. C. C.

As to the effect of this saving clause, see *Rustomji* vs. *Kersowji*, I. L. R., 3 Bom., 161. The proceedings were held to be governed by this Code in *Elahi Buksh* vs. *Marachow*, I. L. R., 4 Cal., 825; 3 C. L. R., 593; and by Act VIII of 1859 in *Chinto Joshi* vs. *Krishnaji*, I. L. R., 3 Bom., 214; *Narandas* vs. *Bai Mancha*, I. L. R., 3 Bom., 217; *Vidyaram* vs. *Chandra*, I. L. R., 4 Bom., 163. See *Runjit Singh* vs. *Meherban*, I. L. R., 3 Cal., 662; 2 C. L. R., 391; *Thakur Prasad* vs. *Ashan Ali*, I. L. R., 1 Alla., 668; *Obhoy Churn Coondoo* vs. *Golam Ali*, I. L. R., 7 Cal., 410, p. 413; *Uda Begum* vs. *Imamudin*, I. L. R., 2 Alla., 73; *Syud Nadir Hossein* vs. *Bissen Chund Bassarat*, 3 C. L. R., 437.

Enactments Repealed.—This will not affect proceedings commenced before the Code comes into force. See Act I, 1868, section 6, and the following decisions thereon :—*Syud Mahomet* vs. *Hadzi Abdullah*, I. L. R., 3 Cal., 727; *Ratanchand Srichand* vs.

Hanmantrav Shirbakas, 6 Bom., A. C J., 166; *Ashootosh Dutt* vs. *Doorga Churn*, I. L. R., 6 Cal., at 504, p. 508; *Rustomji* vs. *Kessawji*, I. L. R., 8 Bom , 287.

References to previous Acts.—See Act XIX, 1873, sections 176, 216.

Saving of certain Acts affecting Oudh, Punjab, Central Provinces and Burmah.

4. Save as provided in the second paragraph of section 3, nothing herein contained shall be deemed to affect the following enactments (namely) :—

The Central Provinces Courts Act, 1865 :
The Burmah Courts Act, 1857 :
The Punjab Courts Act, 1877 :
The Oudh Civil Courts Act, 1879 :

or any law heretofore or hereafter passed under the Indian Councils Act, 1861, by a Governor or a Lieutenant-Governor in Council, prescribing a special procedure for suits between landholders and their tenants or agents :

or any law heretofore or hereafter passed under the Indian Councils Act, 1861, by a Governor or a Lieutenant-Governor in Council, providing for the partition of immovable property.

And where under any of the said Acts concurrent civil jurisdiction is given to the Commissioner and the Deputy Commissioner, the Local Government may declare which of such officers shall, for the purposes of this Code, be deemed to be the District Court.

Nothing shall affect—That is to say if there is anything in these Acts inconsistent with the Codes, the latter does not prevail—*Aga Mahomed* vs. *Cohen*, I. L. R., 13 Cal., 221.

The Burmah Courts Act, 1875—An appeal under section 49 of this Act, must be made within the time prescribed by Art. 156, Sch. II, of the Limitation Act for an appeal under the Civil Procedure Code—*Aga Mahomed* v. *Cohen*, I. L. R.. 13 Cal., 221.

Madras.—The proceedings of a Deputy Collector under the Rent Recovery Act are not open to revision—*Velli Periya* vs. *Moidin*, I. L. R., 9 Mad., 332.

District Court.—See clause 1, section 2, *ante*.

Power to modify the Code in its application to Revenue Courts.

"**4A.** (1) Where any Revenue Courts are governed by the provisions of the Code of Civil Procedure in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the official Gazette, declare that any portions of those provisions shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government, with the sanction aforesaid, may prescribe.

"(2) 'Revenue Court' in sub-section (1) means a Court having jurisdiction under any local law to entertain suits relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits as being suits of a civil nature of which its cognizance is not barred by any enactment for the time being in force." [Act VII of 1888, section 3.]

Generally speaking Revenue Courts are Civil Courts within the meaning of this Code—*Nilmoney Singh* vs. *Mukerjee*, I. L. R., 9 Cal., 295; *Adhirani* vs. *Raghu*, I. L R., 12 Cal., 50, and its provisions govern the Revenue Courts of the N.-W. Provinces in those matters upon which the Rent Act is silent—*Mahdo Prakash* vs. *Murli*, I. L. R., 5 Alla., 406; *Fahimunnisa* vs. *Ajudhia*, I. L. R., 6 Alla., 170.

Sections extending to Mofussil Small Cause Courts.

5. The chapters and sections of this Code specified in the second schedule hereto annexed extend (so far as they are applicable) to Courts of Small Causes constituted under Act No. XI of 1865, and to all other Courts (other than the Courts of Small Causes in the towns of Calcutta, Madras and Bombay) exercising the jurisdiction of a Court of Small Causes. The other chapters and sections of this Code do not extend to such Courts.

Act XI of 1865 refers to Mofussil Small Cause Courts only. See section 17, Act IX of 1887.

Saving of jurisdiction and procedure—

(a) of Military Courts of Request;

(b) of officers appointed to try small suits in Bombay;

(c) of Village Munsifs and Village Panchayats in Madras.

(d) of Recorder of Rangoon sitting as an Insolvent Court.

6. Nothing in this Code affects the jurisdiction or procedure—

(a) of Military Courts of Request;

(b) of a single officer duly appointed in the Presidency of Bombay to try small suits in military bázárs at cantonments and stations occupied by the troops of that Presidency; or

(c) of Village Munsifs or Village Panchayats under the provisions of the Madras Code; or

(d) of the Recorder of Rangoon sitting as an Insolvent Court in Rangoon, Maulmain, Akyab or Bassein;

or shall operate to give any Court jurisdiction over suits of which the amount or value of the subject-matter exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

Act VIII of 1859, sections 383, 384.

Any Court Jurisdiction.—This section prevents a Court executing a decree passed in a suit beyond its pecuniary jurisdiction—*Gokul Kristo* vs. *Aukhil Chunder*, I. L. R., 16 Cal., 457; *Durga Churn* vs. *Umtara*, *id.*, 465.

7. With respect to—

(*a*) the jurisdiction exercised by certain jágirdars and other authorities invested with powers under the provisions of Bombay Regulation XIII of 1830 and Act No. XV of 1840 in the cases therein mentioned, and

Saving of certain Bombay laws.

(*b*) cases of the nature defined in the enactments specified in the third schedule hereto annexed,

the procedure in such cases and in the appeals to the Civil Courts allowed therein, shall be according to the rules laid down in this Code, except where those rules are inconsistent with any specific provisions contained in the enactments mentioned or referred to in this section.

Act VIII of 1859, section 384.

The Code of Civil Procedure, except so far as its provisions enact rules for appeals from subordinate Courts, does not apply to proceedings under the Military Courts of Requests Act, Act XI of 1841—*Gunsam Doss* vs. *Mooltan Mull*, 2 Alla., 192.

It does not apply to Mamlatdars' Courts in Bombay—*Kasam* vs. *Sha Ahmed*, I. L. R., 13 Bom., 552.

It does apply to the Vice-Admiralty jurisdiction of the High Court. *In the matter of the ship Fanny Skolfield*, I. L. R., 17 Cal., 337.

8. Save as provided in sections 3, 25, 86, 223, 225, 386, and Chapter XXXIX, and by the Presidency Small Cause Courts Act, 1882, this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

Presidency Small Cause Courts.

Act VIII of 1859, section 382.

The power of extending this Code to the Presidency Small Cause Courts given to the Local Government by this section as it originally stood has been taken away—See *In re Waller*, I. L. R., 6 Mad., 431; and Act VII of 1888, section 4.

9. This Code is divided into ten Parts, as follows :—

Division of Code.

The first Part:	Suits in General.
The second Part:	Incidental Proceedings.
The third Part:	Suits in Particular Cases.
The fourth Part:	Provisional Remedies.
The fifth Part:	Special Proceedings.
The sixth Part:	Appeals.
The seventh Part:	Reference to and Revision by the High Court.
The eighth Part:	Review of Judgment.
The ninth Part:	Special Rules relating to the Chartered High Courts
The tenth Part:	Certain Miscellaneous Matters.

PART I.

OF SUITS IN GENERAL.

CHAPTER I.

OF THE JURISDICTION OF THE COURTS AND *Res Judicata.*

No person exempt from jurisdiction by reason of descent or place of birth.

10. No person shall, by reason of his descent or place of birth, be in any civil proceeding exempted from the jurisdiction of any of the Courts.

Act VIII of 1859, section 4. This section applies to H. C. and P. S. C. C.
This section does not affect special legislation, such as that which has been provided for the care of the persons and property of minors—*Re Shannon*, 2 Alla., 79.

Courts to try all civil suits unless especially barred.

11. The Court shall (subject to the provisions herein contained), have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rights or ceremonies.

This section corresponds to Act VIII of 1859, section 1. It applies to H. C.

Government.—See section 416, *post*, and note.

Ministerial and Judicial Acts.—See note under section 422, *post*.

Minors.—See section 440, *post*. See also "Barred by any Enactment," above.

Lunatics.—See section 440, *post*.

Charities.—See section 539, *post*.

Divisions of jurisdiction.—See *Narivahoo* vs. *Turner*, 16 Ind. App., 156, p. 162.

Suit of a Civil Nature.—See *Meenaksha* vs. *Subra Maniya*, 14 Ind. App., 160. The word "suit" has a wider meaning than the word "action."—*In re Wallis*, 23 L. R. Ir., 7; and includes all contentious proceedings of an ordinary civil kind—*Bhopendro* vs. *Baroda*, I. L. R., 18 Cal., 500.

"Barred by any Enactment."—A Munsif is not debarred by Act IX of 1861 from entertaining a regular suit by a Hindu father for possession of his minor son—*Krishna* vs. *Reade*, I. L. R., 9 Mad., 31; nor was an ordinary Civil Court prevented by section 265 of the Contract Act from trying a suit for dissolution of partnership—*Ramjiwan Lal* vs. *Chand*, I. L. R., 7 Alla., 227.

Co-sharers.—"If there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to come upon the same for the purpose of carrying on operations there, inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said parts and A resists and prevents such entry, not in denial of B's title; but simply with the object of protecting himself, such conduct on the part of A would not entitle B to a decree for joint possession; or for an injunction; but

only to damages—*Watson & Co.* vs. *Ramchand*, 17 Ind. App., 110; and where a co-sharer sets up ferry at his own expense on the joint property; but does not dispossess the other co-sharers or restrict their user of the land or ferry, they cannot obtain any relief by way of injunction, damages or accounts of the profits, even though he denies their title—*Luchmeswar Singh* vs. *Manowar Hossein*, 19 Ind. App., 48.

Hereditary Office and Pension.—As to how far a suit will lie for a pension, &c., see *Khando Narayan* vs. *Apaji*, I. L. R., 2 Bom., 370; *Chinto Abaji* vs. *Lakshmibai*, I. L. R., 2 Bom., 375; *Gopal Hanmant* vs. *Sakharam*, I. L. R., 4 Bom., 254; *Vasudeb Vithal* vs. *Ram Chandra*, I. L. R., 6 Bom., 129; and as to what are pensions—*Vasudev Shadasiv* vs. *Collector of Ratnagiri*, 4 Ind. App., 119; *Parulal Rajaji* vs. *Mohram Kalyandas*, I. L. R., 1 Bom., 203, p. 206; *The Secretary of State* vs. *Jamnadas*, I. L. R., 6 Bom., 737, and *Shahzadee Hazara* vs. *Collector of Burdwan*, 23 W. R., 378, overruled by *Maharaval* vs. *The Government of Bombay*, 8 Ind. App., 77. A suit for a share of a vatan will lie—*Moheyodin* vs. *Chotibibi*, I. L. R., 5 Bom., 578; *Syed Mahomed Isaack* vs. *Azeezoonnissa*, I. L. R., 4 Mad., 341; or to be declared a vatandar—*Ramchandra* vs. *Anant Sat*, I. L. R., 8 Bom., 25; see also *Balkrishna* vs. *Balaji*, I. L. R., 9 Bom., 25; *Parsha* vs. *Lagmyashan*, I. L. R., 13 Bom., 83; *Janardanrav* vs. *The Secretary of State*, I. L. R., 13 Bom., 442, but inam-grants, of a personal or political character are within the prohibition—*Panchanadayyan* vs. *Nilakandayyan*, I. L. R., 7 Mad., 191. See also in regard to inam land—*Venkata* vs. *Rama*, I. L. R., 8 Mad., 249; *Srinivasayyar* vs. *Lakshmamma*, I. L. R. 7 Mad., 206; *Venkatanarasimha* vs. *Suryanarayana*, I. L. R., 12 Mad., 188; *Venkatanarayana* vs. *Subbarayudu*, I. L. R., 9 Mad., 241.

Sanction.—Suits under the Pensions Act require sanction; but if the requisite sanction is obtained before decree, the original defect is cured—*Mahammad Azmat* vs. *Lalli*, I. L. R., 8 Cal., 422.

Assignee.—The assignee of a pension, under the Pension Act, cannot sue—*Imtiaz Begum* vs. *Liakatunnissa*, I. L. R., 6 Alla., 630; unless the assignment took place before the Pensions Act—*Imtiaz Begum* vs. *Liakatunnissa*, I. L. R., 7 Alla., 886.

Costs—A suit will not lie for the costs of defending a possessory action under Act V, 1864 (Bom.)—*Jalam Panja* vs. *Khoda*, 8 Bom., 29; nor for costs incurred in resisting a claim under sections 278, 280, 281 of this Code—Ref. Case, 3 Mad., 341; nor for costs incurred in prosecuting a person for a criminal offence—*Fazal Imam* vs. *Fazul*, I. L. R., 12 Alla., 166; or in defending a criminal prosecution—*Mahomedali* vs. *Bayama*, I. L. R., 14 Bom., 100; and where a Court of competent jurisdiction orders or refuses costs, no separate action will lie—*Kadir Bakhsh* vs. *Salig Ram*, I. L. R., 9 Alla., 474. See note on section 2, "pleader," *ante*.

SEIZURE OF CATTLE.—A suit will lie for compensation on account of wrongful seizure of cattle—*Shuttrughon* vs. *Hokna*, I. L. R., 16 Cal., 159.

Agreement—No action will lie to recover the rent of lodgings knowingly let to a prostitute to carry on her vocation there—*Gaurinath Mookerjee* vs. *Madhumani*, 9 B. L. R., App., 37; 18 W. R., 445, though prostitution is recognized and legalized by the Hindu law—*Chalakonda* vs. *Chalakonda*, 2 Mad., 56; but see *Khubchand* vs. *Beram*, I. L. R., 13 Bom., 150; nor for money lent on an agreement to get a divorce and marry the lender—*Bai Vijli* vs. *Nansa*, I. L. R., 10 Bom., 152; nor for future cohabitation—*In re Vallance*, 26 C. D., 353; nor to recover money lent by a Judge to a native officer on his establishment in contravention of Regulation XXXVIII of 1793—*Ooduy Chund* vs. *Palmer & Co.*, 3 S. D. A., Sel., 18. Nor on an agreement by which a person is partially restrained from exercising a lawful profession, trade or buisness of any kind—*Madhub Chander* vs. *Rajcoomar*, 14 B. L. R., 76; *Oakes* vs. *Jackson*, I. L. R., 1 Mad., 134; but see illustration (*b*), section 74, Act IX, 1872; *Mackenzie* vs. *Striramiah*, I. L. R., 13 Mad., 472; 15 Mad., 79. Nor on an agreement not to carry on a trade with the assistance of others than the defendant's own caste—*Vaithelinga* vs. *Sâminada*, I. L. R., 2 Mad., 44.

Money paid under an illegal contract cannot to be recovered—*Kearley* vs. *Thomson*, 24 Q. B. D., 742.

Unconscionable agreement.—See *Chunni Kuar* vs. *Rup Singh*, I. L. R., 11 Alla., 57; *Kamini Soondari* vs. *Kali Prosunno*, 12 Ind. App., 215; *Fry* vs. *Lane*, 40 C. D., 312; *Nevill* vs. *Snelling*, 15 C. D., 679; the Rialto, 1 P. D. (1891), 175; *Loke Indar* vs. *Rup Singh*, I. L. R., 11 Alla., 118.

Marriage.—A suit will lie for the consideration of a marriage among Hindus—*Visvanathan* vs. *Saminathan*, I. L. R., 13 Mad., 83; but no suit will lie on a contract entered into by Hindus by which it is agreed that, on the happening of a certain event, a marriage is to become null and void—*Sitaram* vs. *Mussamut Aheeree*, 11 B. L. R., 129. But a contract by a Muhammadan with his first wife not to marry a second is not illegal —*Hurron* vs. *Khyroollah*, Fulton, 361. Nor is authority granted to divorce him if he either marries again or he violates any condition of the marriage contract—*Hamidoollah*

vs. *Faizunnessa*, I. L. R., 8 Cal., 327. See, however, Futawa Alimgiri, vol. 1, p. 384; Fatawa Kazikhan, vol. 1, p. 278. Nor will a suit for specific performance of an agreement to marry lie—*Umed Kika* vs. *Nagindas*, 7 Bom., 122; *Shaikh Bhugun* vs. *Shaikh Rumjan*, 24 W. R., 380; though one for damages against a guardian for breach will—*Mulji* vs. *Gomti*, I. L. R., 11 Bom., 412; but a contract to marry a minor on payment of a consideration is void—*Dulari* vs. *Vallabdas*, I. L. R., 13 Bom., 126; *Ram Chand* vs. *Atulaito*, 1. L. R., 10 Cal., 1054; but see *Visvanathan* v. *Saminathan*, I. L. R., 13 Mad., 83. As to a suit to declare a marriage void among Parsees, see *Pershotam* vs. *Maherbai*, I. L. R., 13 Bom., 302. See "RESTITUTION OF CONJUGAL RIGHTS" and *infra*.

Subscription.—See *Kedar Nath* vs. *Gorie*, I. L. R., 14 Cal., 64.

Criminal Proceedings.—A suit will not lie on a contract affecting the course of justice, such as to obtain the release of a *badmash* by killing the Police-officer in whose charge he is—*Protima Aurdl* vs. *Dukhiâ Sircar*, 9 B. L R., App., 38; nor to hush up a case and suppress a criminal prosecution for a consideration—*Jeetoo Mahato* vs. *Monseram*, 17 W. R., 84; *Kandan Chetti* vs. *Coorjee*, 2 Mad., 187; *In re Campbell*, 14 Q. B. D., 32; otherwise, if the contract be to forego a prosecution in a case in which, though a compromise could not be legally effected, it had been allowed by the Magistrate—*Sheikh Nubbee* vs. *Bibee Hingon*, 8 W. R., 412, or it is to compound criminal proceedings in a foreign country for an offence committed there, and the law of the country permits the transaction—*Subraya Pillai* vs. *Subraya*, 4 Mad., 14.

Cesses.—Nor can a contract be enforced for or about any matter prohibited or made unlawful by statute; thus, where certain farmers agreed to pay over and above the jummas such sums as would be realized under the head of *zabita-batta*, and were sued for these sums by the zemindar, it was held that the stipulation was illegal and opposed to section 3, Regulation V of 1812, and the suit was dismissed—*Radha Mohun* vs. *Ganga Pershad* 7 S. D. A., Sel., 166. So an agreement to pay the *Purabi* collected from the village has been declared illegal under section 10, Act X of 1859—*Kamala Kant* vs. *Kalu Mahomed*, 3 B. L. R., 44; 11 W. R., 395; *Sonnum Sookul* vs. *Shaikh Elahee Buksh*, 7 W. R., 453. Nor will a suit lie against a tahsildar to account for money "exacted" in excess of the rent; otherwise, if the payment had been made voluntarily—*Nobin Chunder* vs. *Gooroo Gobind*, 14 W. R., 447; 25 W. R., 8. But where the *talab beshi* has been paid voluntarily for several years, and has been incorporated in the rent, and the two payments form the subject of one receipt, the cess is not illegal and the ryot must pay it—*Serajgunge Jute Co.* vs. *Torabdee*, 25 W. R., 252; not so—*Tilukdhari* vs. *Chulhan*, I. L. R., 17 Cal., 131; 16 Ind. App., 152; *Radha Prosad* vs. *Bal Kowar*, I. L. R., 17 Cal., 726. In the North-West it has been held that a suit to collect cesses not authorized by Regulation VII, 1822, is not maintainable—*Khyrat Ali* vs. *Mahomed Yaseen Khan*, 1 Agra, 207; *Sheikh Bisharut* vs. *Seetul Misser*, 1 Alla., 37; though a suit lies by a zemindar to establish his right to a cess and to question the validity of a Settlement-officer's refusal to record it—*Mahomed Ali Khan* vs. *Oomrao Singh*, 2 Alla., 425; *Akbar Khan* vs. *Sheoratan*, I. L. R., 1 Alla., 373.

A suit will lie to recover a sum alleged to have been illegally levied as tax under the Abkari Act—*Narain* vs. *Salharam*, I. L. R., 9 Bom., 462.

Champerty and Maintenance.—No suit will lie on a contract having the qualities attributed to champerty or maintenance in English law, something against good policy and justice, tending to promote unnecessary litigation and in a legal sense immoral, and to the constitution of which a bad motive is in the same sense necessary —*Fischer* vs. *Kamala Naicker*, 8 Moore, 170; *Ramrav Khanderao* v. *Govind*, 6 Bom., 63, and not *bonâ fide* entered into merely to obtain an interest in the litigation, but an unfair, illegitimate transaction got up for the purpose merely of spoil or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive —*Chellambara Chetty* vs. *Ranga Krisna Muthu*, 1 Ind. App., 241; 22 W. R., 148; *Mallajaffaarje* vs. *Yarali*, 7 Mad., 128; *Gurusami* vs. *Subaraya*, I. L. R., 12 Mad., 118; *Ram Coomar Coondoo* vs. *Chunder Canto*, 4 Ind. App., 23. R., the owner of certain property, having died, and his immediate heirs having subsequently died without issue, A, as the next-of-kin, attempted to take the property of the deceased, and, being opposed, brought a suit under Act XIX of 1841, and subsequently alienated a moiety of his right, title, and interest, valued at Rs. 75,000, to B, in consideration of Rs. 50 in cash, his trouble and assistance in managing and conducting the suit and defraying the expenses of it. The suit was dismissed. Afterwards B sold the interest he had acquired to T for Rs. 1,700 advanced by the latter, and expended in the proceedings, valuing the interest sold at Rs. 2,18,000. T brought a suit against the person in possession and A. *Held*, the contract was void as against public policy—*Tara Soondoree Chowdrain* vs. *Court of Wards*, 20 W. R., 446; see also *Sheikh Abed* vs. *Lalla Ram*, 13 W. R., 426. So a contract made to assist another in carrying on litigation against a third party out of a spite and ill-feeling to such third party is against public policy—*Bamun Dass* vs. *Huro Lall*, 10 W. R., 140; but not a fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered—*Ram Coomar Coondoo* vs. *Chunder Kanto Mookerjee*,

4 Ind. App., 23; I. L. R., 2 Cal., 233; 13 B. L. R., 530; *Munirakhan Singh* vs. *Bhodoy*, 12 W. R., 133; *Jugmohun Lall* vs. *Buddun Koer*, 9 W. R., 243; *Damodhar* vs. *Kahandass*, 8 Bom., 1; or, where the consideration is not a share but a lease of the property—*Pitchakutti Chetti* vs. *Kamala Nayakkan*, 1 Mad., 153.

But where a Hindu widow assigned to a person, as her attorney, an 8-anna share in the subject-matter of the litigation for the advances and expenses which the assignee or his assigns might reasonably make for her maintenance and for carrying on the suit, and the other 8-anna to the assignee or his assigns as remuneration for their trouble and labour to be bestowed in the conduct and management of the suits, it was held that the assignment of the first 8-anna was binding upon the widow's reversionary heirs to the extent of the advances and expenses, but that that of the second was not binding, if not on the ground of champerty, upon the ground that it was an unconscionable bargain and speculation if not a gambling contract—*Grose* vs. *Amiramayi Dassi*, 4 B. L. R. (O.C.), 1. And see *Ibke Indar* vs. *Rup Singh*, I. L. R., 11 Alla., 118; *Husain* vs. *Rahmat*, I. L. R., 11 Alla., 128.

Where an ignorant suitor was under an apprehension of losing his suit from the false colour given to it by his attorney, who represented the necessity of making a bargain with a more favoured client; and this bargain was of a most oppressive kind for a division of a fund which must have been recovered, and in which the plaintiff really risked and the attorney knew he really risked nothing: *Held*, the contract could not stand for more than *bonâ fide* advances—*Mulla Juffarji Tyabuli* vs. *Yacali Kadar*, 7 Mad., 128.

In *Param Singh* vs. *Lalji Mal*, I. L. R., 1 Alla., 403, plaintiff had alienated certain property to defendant for the purpose of defrauding his son. The alienation was successful in defeating an attachment made by one of plaintiff's creditors yet he was held entitled to recover, on showing the real nature of the transaction.

Legal Representative—A plaintiff is entitled to sue the legal representative of his deceased debtor without proving that assets have come into his hands. It is sufficient if there are assets of which he may become possessed—*Girdharlal* vs. *Bhal Shiv*, I. L. R., 8 Bom., 309. See notes under sections 50, 206, 244, and 252, *post*.

Bottomry Bond.—No suit can be brought against the owner of a ship on a bottomry bond given by the master, as the master has no authority to pledge the owner's credit by the instrument hypothecating the ship by way of bottomry, nor can any suit be brought on a bottomry bond in a Court which has no Admiralty jurisdiction—*Gladstone* vs. *Harrison*, 24 W. R., 50.

Voluntary Payments.—Voluntary payments give no cause of action. Thus where A paid money in his own name to stay a decree against others, he could not get it back—*Abdool Wahab* vs. *Drummond*, 2 W. R., Act X, 1848. And where A, a purchaser of B's title, and B were afterwards sued for arrears due by B, and A paid to save the tenure from sale, it was held he could not sue B for it—*Ram Buksh* vs. *Hridoymones*, 10 W. R., 446; but see section 69 of the Contract Act, and *Ajudhia Prasad* vs. *Bakar*, I. L. R., 5 Alla., 400. So also a shareholder voluntarily paying an arrear of revenue for a defaulting co-sharer who has a separate account under section 13, Act XI, 1859, cannot claim to be reimbursed by the defaulter—*Kishen Chunder* vs. *Muddun Mohun*, 7 W. R., 365. A having obtained the right, title, and interest of B in execution, paid in a sum of money in another execution against C, in which the interest of B and the sons of C was attached: It was held, as there was nothing to show how B could be liable for C's debt, the payment of A was voluntary, and he could not recover from B—*Collector of Shahabad* vs. *Ram Buddan*, 10 W. R., 400. A obtained a decree against C and D. C had, as guardian of a minor, got a decree against A for a certain sum, and A deposited the amount; but withdrew it in execution of his suit against C and D. Subsequently C sued D for contribution, on the ground that she had repaid her minor son the sum taken by A: *Held*, it was a voluntary payment—*Rajlakhi Debi* vs. *Taramani*, 2 B. L. R. (A. C.), 281.

In both the cases just cited, the Privy Council decision in the case of *Fatima Khatoon* vs. *Mahomed Jan Chowdhry*, 1 B. L. R., 21; 10 W. R., P. C., 29; 12 Moore, 65, was discussed and held not to apply. In that case a family estate was about to be sold under a decree against A's husband. A had a lien for dower on the estate, and, after vainly opposing the order to sell, deposited the amount decreed in Court under protest and with a declaration of bringing a regular suit to set aside the sale-order; but she agreed that the sum should be handed over to the decree-holder: *Held*, that the deposit into Court was to prevent a sale that would be injurious to A's rights, and the only voluntary act was the consent given that, instead of the money remaining in Court, it should be paid over until the rights of the parties could be determined, and was not a voluntary payment. This case was not followed in *Mussamut Asbibun* vs. *Ram Persad Das*, 1 Shome, 25; but the authority of the latter case is very doubtful, and it is opposed to the late case in the Privy Council of *Dooli Chand* vs. *Ram Kishen*, 8 Ind. App., 93. Payment of the putni rent by the mortgagee of the taluk in order to avoid a sale for

arrears of rent is not a voluntary payment, even though the mortgagee has inserted in the mortgage-deed a stipulation for his protection in case such a sale should take place—*Mohesh Chunder* vs. *Ram Persaud*, I. L. R., 4 Cal., 539. As to what amounts to a voluntary payment, see *Sreenarain Bagchee* vs. *Smith*, I. L. R., 4 Cal., 807; *Luckhee Kant Doss* vs. *Shib Chunder Chuckerbutty*, 12 W. R., 462; *Smith* vs. *Denonath*, I. L. R., 12 Cal., 213, *Gadgeppa* vs. *Apaji*, I. L. R., 3 Bom., 237; *Maharana* vs. *The Secretary of State*, I. L. R., 14 Bom., 299. See, however, *Nathuram* vs. *Shoma*, I. L. R., 14 Bom., 562. A made a voluntary payment to B on account of C. B subsequently sued C and realized the debt: *Held*, that A could not sue B: but that C could have pleaded A's payment in the action, and could sue to set the decree aside and recover the money—*Joytara Dassee* vs. *Hurry Kissen Dey*, S. D. A., 1st February 1860.

Foreign State.—Courts have no jurisdiction to interfere with the public property of a foreign sovereign, though he may have submitted to the jurisdiction of the Court for the purpose of enabling the Court to order the property to be delivered over to him—*Vavasseur* vs. *Krupp*, 9 C. D., 351.

Embankments.—As to the liability of zemindars to keep up embankments, see *Nuffur Chunder Bhutto* vs. *Jotendro Mohun*, I. L. R., 7 Cal., 505.

Possession.—A suit for recovery of possession on title will not lie on *mere* previous possession—*Wise* vs. *Imeerunissa Khatoon*, 7 Ind. App., 73; see, however, *Krishnarao* vs. *Vasudeo*, I. L. R., 8 Bom., 371; though it and proof of dispossession by force or fraud are sufficient—*Arumugane* vs. *Perryannan*, 25 W. R., 81; *Sundar* vs. *Parbati*, 16 Ind. App., 186, p. 194; and possession for a long series of years, in the absence of evidence to the contrary *presumitur retro*—*Anangamanjari* vs. *Tripura Soondari*, 14 Ind. App., 101; and see *Wali Ahmad* vs. *Ajudhia*, I. L. R., 13 Alla., 537, p. 563. But such a suit will lie under section 9 of the Specific Relief Act—*Purmeshur* vs. *Brijo Lall*, I. L. R., 17 Cal., 256, unless the possession sought is that of a trespasser—*Amiruddin* vs. *Mahamed*, I. L. R., 15 Bom., 685.

Caste.—A suit will lie for restoration to caste, and damages or compensation for cost of restoration to caste lost in consequence of the defendant having accused plaintiff of adultery—*Gopal Gurain* vs. *Gurain*, 7 W. R., 299. So also a suit lies to gain re-admission to caste only—*Sonaram Gazor* vs. *Obhyram Gazor*, 7 S. D. A., Sel., 344; and expulsion without a hearing is illegal—*Krishnasami* vs. *Virasami*, I. L. R., 10 Mad., 133; but though suits may be instituted for restoration to caste or to membership of religious associations, a suit will not lie to compel Hindus against their will to ask others to their houses and entertainments—*Joychunder Sirdar* vs. *Ramchurn*, 6 W. R., 325; nor to obtain a declaration of a right to membership of a *Somaj* (Society) upon the allegation that the other members have excluded him from it, if the exclusion neither deprived him of caste nor affected any right to property—*Sudharam Patar* vs. *Sudharam*, 3 B. L. R. (A.C.), 91; 11 W. R., 437; and the cases collected there; and see *Hopkinson* vs. *Marquis of Exeter*, L. R., 5 Eq., 63; *Raghunath* vs. *Janardhan*, I. L R., 15 Bom., 599; nor to enforce the performance of certain services by barbers on the ground of custom or established usage—*Rajkisto Majee* vs. *Nobaee Seal*, 1 W. R., 351; and a claim to be *Chalvadi* of the *Lingayet* caste of Bagalkot in Bombay will not be entertained by the Civil Courts—*Shankara* vs. *Hanma*, I. L. R., 2 Bom., 470. So a right to receive fees as head of a caste cannot be decided in Bombay Civil Courts—*Murar Daya* vs. *Nagria*, 6 Bom., 17; nor, on the other hand, will a suit lie for damages because the plaintiff has not received a share in funeral gifts—*Maya Shankar* vs. *Harishankar*, I. L. R., 10 Bom., 661. But the Civil Courts are not ousted of jurisdiction to try a suit for breach of contract or for possession of caste property because it may be incidentally necessary to determine the usages of the caste—*Mehta* vs. *Jamiatram*, I. L. R., 12 Bom., 225; *Pragji* vs. *Gobind*, I. L. R., 11 Bom., 534.

As to defamation by a caste judgment see *Vallabha* vs. *Madusudanan*, I. L. R., 12 Mad., 495.

Voluntary Associations.—See *The Advocate-General* vs. *David*, I. L. R., 11 Bom., 185; *Dawkins* vs. *Antrobus*, 17 C. D., 615.

Religious Ceremonies.—It is doubtful if the Courts have any jurisdiction to entertain a suit not involving any civil rights, but to declare the right to perform or have performed religious ceremonies—*Namboory Seetapatty* vs *Kanoocolanoo*, 3 Moore, 359; *ex. gr.*, the right to have an adoption performed—*Raj Coomari* vs. *Nobo Coomar*, 1 Boulnois, 137; or to compel *pujaris* to adorn an idol at certain seasons —*Vasudev* vs. *Vamnaji*, I. L. R., 5 Bom., 80; or to have certain religious observances due to his rank—*Striman Sadagopa* vs. *Kristna*, 1 Mad., 301; *Karuppa* vs. *Kolanthayan*, I. L. R., 7 Mad., 91, but a suit will lie for an office even although there are no fees attached—*Sayad Hashim* vs. *Huseinsha*, I. L. R., 13 Bom., 429; *Mamat Ram* vs. *Bapee*, I. L. R., 15 Cal., 159; or to declare an exclusive right to perform certain portion of the religious worship in a Hindu temple and to recover dues, not voluntary

offerings, for certain religious services performed; and if to determine the right thereto it becomes necessary to determine incidentally the right to perform certain religious services, the Court has jurisdiction to do so—*Tiru Krishnama* vs. *Krishnasawmi*, 6 Ind. App., 120; I. L. R., 2 Mad., 62; I. L. R., 5 Mad., 313; *Kali Kant* vs. *Gouri Prosad*, I. L. R., 17 Cal., 906; *Limba* vs. *Rama*, I. L. R., 13 Bom., 548; and an injunction will be given against a person interfering with a right to give a crown and water at a religious festival—*Srinivasa* vs. *Tiruvengada*, I. L. R., 11 Mad., 450; and a suit for a share in the management of an endowment and to obtain an office will lie—*The Advocate-General* vs. *David Haim*, I. L. R., 11 Bom., 185, and see *Tara Naikin* vs. *Nana Lakshman*, I. L. R., 14 Bom., 90; but a suit to declare a right to parade a bullock on certain days will not lie—*Rama* vs. *Shivram*, I. L. R., 6 Bom., 116; see also *Dhadphale* vs. *Gurav*, I. L. R., 6 Bom., 122; though if a person is prevented from taking part in the public worship of his sect, he can obtain damages—*Venkatachalapati* vs. *Subbarayadu*, I. L. R., 13 Mad., 293.

Marriage.—A suit by a Hindu mother, as the guardian of her infant daughter, for declaration that the alleged marriage of the daughter with the defendant was full and void, is a suit of a civil nature, which may be entertained in a Civil Court—*Anjon Dossee* vs. *Proladh Chunder Ghose*, 14 W. R., 132, *id.*, 403; see *Gasper* vs. *Gonsalves*, 1 B. L. R., 109.

Fees.—The titular Kazi of a pergunnah cannot recover fees voluntarily paid to another party for the performance of ceremonies which he might have been, but had not been called on to perform—*Bhoolwa* vs. *Syad Omur Ali*, S. D., N. W., 1859, p. 127; and where no fees are of right appurtenant to the office of *Chalvadi*, but gratuities may be given to him, no action for these as money had and received will lie against an intruder in the office—*Shankara* vs. *Hanma*, I. L. R., 2 Bom., 470; nor even if there are fees, if the decision of the question by the Courts would interfere with the autonomy of the caste—*Murari* vs. *Suba*, I. L. R., 6 Bom., 725. But in Bombay a suit for damages by a village priest against, an intruder who deprives him of his fees will lie—*Vithal Krishna Jorki* vs. *Anani*, 11 Bom., 63; or against a *jajman* who has employed and paid another to perform certain ceremonies, to recover the amount of the fee which would be payable to plaintiff had he been called in—*Dinanath Abaji* vs. *Sadashib Hari Madhave*, I. L. R., 3 Bom., 9; *Waman* vs. *Balaji*, I. L. R., 14 Bom., 167; otherwise in Madras—*Ramakrishna* vs. *Rauga*, I. L. R., 7 Mad., 424; and the *Valandar Joshi* of a village has an action for damages against an intruder in the office who has received fees properly payable to the former, but an injunction will not be granted to restrain the intruder from acting—*Rajavalad Shivapa* vs. *Krishnabhat*, I. L. R., 3 Bom., 232.

A suit will not lie to compel *jajmans* to employ a particular *purohit*, though if certain *purohits* are employed, a suit by one of them or his representative will lie against the others for declaration of his right to enjoy the profits—*Behares Lall* vs. *Baboo*, 2 Agra, 80; *Becharam Banerjee* vs. *Thakoorones Debia*, 10 W. R., 114; *Khedro Ojha* vs. *Mussamut Deo*, 5 W. R., 222; *Magju* vs. *Ramdyal*, 8 B. L. R., 50; if based on contract or prescription by long and uninterrupted usage—*Krishna Aiyan* vs. *Anantarama Aiyan*, 2 Mad., 330; *Ramasamy Aiyan* vs. *Venkata Achari*, 9 Moore, 354; see also *Hur Lall* vs. *Jeorakhan Lall*, S. D., N. W., 1862, p. 314; *Chones Lall* vs. *Gouree Sunker*, *id.*, 1866, p. 8; and a suit will lie to declare the right to break a curd pot in a certain part of a temple on a fixed day—*Narayan Sudanand Bava* vs. *Balkrishna*, 9 Bom., 413; or to receive holy cakes in virtue of an hereditary office to chant hymns—*Narasimma Chariar* vs. *Chariar*, 6 Mad., 449.

A suit will not lie to declare a person entitled to certain fees voluntarily paid to the plaintiff *as chowdhreses* for the use of a market-place—*Poorun Mul* vs. *Khedoo Sahoo*, 7 S. D. A., Sel., 366; *Bhinak Chowdhree* vs. *Collector of Jounpore*, 2 Agra, 71; nor for procuring boats—*Ram Deehul* vs. *Chukhoo*, 1 Alla., 291.

Office Dignity.—And no suit is maintainable to vindicate plaintiff's right, not to an office, but to a mere dignity unconnected with any fees, profits, or emoluments—*Sangapa* vs. *Gangapa*, I. L. R., 2 Bom., 476; and trifling gifts will not be looked upon as emoluments, but as symbols of recognition—*Narayan* vs. *Krishnaji*, I. L. R., 10 Bom., 233; but see *Mamat Ram* vs. *Bapu*, I. L. R., 15 Cal., 159; *Srinivasa* vs. *Tiruvengada*, I. L. R., 11 Mad., 450. An action will lie to declare a person's right to perform the duties of *Pujari* and receive the profits of a Mandir—*Pranshankar* vs. *Prannath*, 1 Bom., 12; for the offerings of certain temples on the ground of "*Mourosee Milkeut*" or hereditary property—*Sheo Suhaye* vs. *Bhooree*, 3 W. R., 33; for a share in a *Brit Mahabrahmines* consisting of fees received by plaintiff and defendant for the performance of certain religious ceremonies in certain villages in Behar—*Nundram* vs. *Kashe Pande*, 4 S. D. A., Sel., 89. In short there is no doubt that the Civil Courts will recognize and enforce the rights of persons holding office connected with the management and regulation of pagodas, and if the holder of such office be entitled to remuneration for his services in the way of salary or otherwise, he would have a civil right entitling him to maintain a suit if that remuneration has been improperly withheld. So, too, suits are commonly entertained for the purpose of trying and deciding who are fit and proper persons of right to be entitled *Dharmakartas* of a

pagoda. In such cases it will be found that the offices have a secular character and are so dealt with, though religious duties are attached to them; the occupants being employed to exercise business functions either as trustees and managers of the property and funds of the pagoda, or as overseers in the regulation of its affairs generally, and having necessarily civil rights and liabilities which may properly be made the subject of a civil suit; but nothing of this kind can be said of a plaintiff in his purely religious office of *guru*. The duty of individuals to submit to and perform certain religious observances in accordance with the ritual or conventional practice of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral, and not a civil, nature. Of such obligations, the present Civil Courts cannot take cognizance—*Striman Sadagopa* vs. *Kristna*, 1 Mad., 301. Where a *swami*, or chief priest, of the *smartava* sect claimed an exclusive right of being carried crosswise in a palki on ceremonial occasions in virtue of a grant from the ruling power to a predecessor in office, their Lordships of the Privy Council had some doubt whether he could maintain an action against a party who had assumed the like privileges—*Sri Sunkur Bharti* vs. *Sidha Lingayah*, 6 W. R. (P. C.), 39. Nor can a servant of a temple who takes food offered to the idol sue for damages the inamdar for not making the usual offerings—*Dhadphale* vs. *Gurav*, I. L. R., 6 Bom., 122.

Restitution of Conjugal Rights.—In the case of a Hindu—*Paigi* vs. *Sheo Narayan*, I. L. R., 8 Alla., 78; *Yamunabai* vs. *Narayan*, I. L. R., 1 Bom., 164; *Jogendronundenee* vs. *Hurrydoss*, 5 C. L. R., 65; *Binda* vs. *Kaunsilia*, I. L. R., 13 Alla., 126; *Dadaji* vs. *Rukmabai*, I. L. R., 10 Bom., 301; *Matangini* vs. *Jogendra*, I. L. R., 19 Cal., 84; of a Mahomedan—*Buzloor Ruheem* vs. *Shumsoonneisa Begum*, 11 Moore, 551; of a Parsee—*Ardaseer Cursetji* vs. *Perosebaye*, 6 Moore, 348.

Specific Remedy.—If the Legislature imposes a duty, the non-performance of it is actionable—*Ponnusamy Tevar* vs. *Collector of Madura*, 3 Mad., 35; but if it creates an obligation to be enforced in a specific manner, it cannot, as a general rule, be enforced in any other way (see *Wolverhampton Water Works Co.* vs. *Hawkesford*, 82 J. L. C. P., 242, cited in the notes to *Asby* vs. *White*, Smith's L. Ca., 156, and *Milnes* vs. *Mayor of Huddersfield*, 11 App. Cas., 511, p. 518).

Ferry: Forest.—And on this principle no suit will lie in the Civil Courts, on account of compensation for loss sustained by Government declaring a private ferry public—*Collector of Patna* vs. *Romanath*, 7 W. R., 191; nor for the ferry itself—*Govt.* vs. *Brijosoondry*, 7 S. D. A., Sel., 583; nor to cancel the decision of a forest officer confirmed under section 10 of the Madras Forest Act, 1882—*Ramachandra* vs. *The Secretary of State*, I. L. R., 12 Mad., 105.

Public Road.—In the same way, special procedure has been provided in the Code of Criminal Procedure in regard to public roads, and it has been held that a suit will not lie for obstructing a public road, even if the plaintiff had dedicated the road to the public, unless he has sustained special inconvenience—*Karim Buksh* vs. *Budha*, I. L. R., 1 Alla., 249; *Bhageeruth Rishee* vs. *Gokul Chunder Mundul*, 18 W. R., 58; *Abdool Hye* vs. *Ram Churn Singh*, 11 W. R., 445; *Sathu* vs. *Ibrahim Aga*, I. L. R., 2 Bom., 457; but see *Joggamoni Dasi* vs. *Nilmoni*, I. L. R., 9 Cal., 75; 11 C. L. R., 502; otherwise where the plaintiff has suffered special damages—*Rajcoomar Singh* vs. *Sahebzada Roy*, I. L. R., 3 Cal., 20; or is the representative of the dedicator—*Jaggamoni* vs. *Nilmoni*, I. L. R., 9 Cal., 75; *Tota* vs. *Sardul*, I. L. R., 10 Alla., 553.

As to what is meant by a "public place," see *Fatheyab Khan* vs. *Mahammed Yusuf*, I. L. R., 9 Alla., 434. And as to "public right," see *Venkatachala* vs. *Kuppusami*, I. L. R., 11 Mad., 42.

Ferry.—The owner of a ferry granted under a Government settlement will have an action against any person running a ferry over the same spot, when the latter does not use the ferry for his own conveyance, and that of his servants merely—*Luchmessur Singh* vs. *Leelanund Singh*, I. L. R., 4 Cal., 599; 3 C. L. R., 427; and though a man may set up a ferry on his own land and take tolls—*Luchmeswar Singh* vs. *Menowar*, 19 Ind., App., 48, it is doubtful if he can claim a monopoly without a grant from the Crown—see *Nityahari* vs. *Dunne*, I. L. R., 18 Cal., 652.

Haut.—When a plaint alleged that plaintiff held a haut on his land for many years, that the defendant had set up a rival haut on the same days, and tried to prevent persons from attending plaintiff's haut; that this led to the Magistrate's passing an order prohibiting the plaintiff from holding his haut, in consequence of which he suffered loss and damage: *Held*, a good cause of action—*Gopi Mohun* vs. *Taramoni*, 4 C. L. R., 309; I. L. R., 5 Cal., 7; compare *Kadarnath* vs. *Rughonath*, 6 Alla., 104. As to the evidence necessary to prove a monopoly, see *Rakhal Das* vs. *Durga Sunduri*, I. L. R., 17 Cal., 458.

Penalty.—Where a penalty given by statute is enforceable in a particular way, it cannot be enforced by action—*London and Brighton Ry. Co.* vs. *Watson*, 4 C. P. D. 118. But where by statute a new mode of procedure is given, where an action had been previously allowed, the right of action is not taken away, though it may affect the

question as to costs—*Anglo-Italian Bank* vs. *Davies*, 9 C. D., 275; *Clutton* vs. *Lee*, 7 C. D., 541. See also *Branson* vs. *Municipal Comr. of Madras*, I. L. R., 2 Mad., p. 389.

A suit did not lie to set aside a sale of property legally carried out under section 185, Act XXV of 1861—*Bukhoree Singh* vs. *Government*, 8 W. R., 207.

Decree—Provisions have been made in regard to execution of decrees, and when a decree-holder can proceed under them, he cannot bring a regular suit. Thus, a suit will not lie for the costs of a receiver appointed during execution—*Kosee Mahomed* vs. *Lalla Jussodalal*, W. R., 1864, p. 247. So where, having obtained a decree for money, A sued to recover the unsatisfied balance thereof from B, alleging that the property of the deceased judgment-debtor was in his possession. *Held*, that he should have enforced his decree by execution and sale, or by execution and attachment, and appointment of a receiver, and no regular suit would lie—*Mirza Mahomed* vs. *The Widow of Balmakund*, 3 Ind. App., 241; *Fakirapa* vs. *Pandurangapa*, I. L. R., 6 Bom. 7; and if a plaintiff neglects to execute until execution is barred by limitation, he cannot revert to a regular suit—*Anrudh Singh* vs. *Sheo Pershad*, 1 I. L. R., 4 Alla., 481; *Hari Ranji* vs. *Shapurji*, 13 Ind. App., 66; but see *Muhammad Samiuddin* vs. *Maunu Lal*, I. L. R., 11 Alla., 386; *Jaiwitri* vs. *Emile*, I. L. R., 13 Alla., 98; and after a foreclosure decree no second suit to redeem will lie in Bombay even if there is no foreclosure clause in the decree, otherwise in Madras—*Chudasama* vs. *Mahant Ishwargar*, I. L. R., 16 Bom., 243. p. 248. And a second suit will lie if the decree is one for partition, and the second suit is for a declaration of a right to partition—*Nasratullah* vs. *Mujibullah*, I. L. R., 13 Alla., 313; or the first suit is for money against A, and the second is to establish a right to execute against property in the hands of a third person on equitable grounds—*Gooroo Das Pyne* vs. *Ram Narain*, 11 Ind. App., 59; or the decree is such as is not capable of being executed, such as a final foreign decree—*Nouvion* vs. *Freeman*, 37 C. D., 244, if defendant has been served in the original suit; or a decree merely declaratory—*Edulji* vs. *Manekji*, I. L. R., 11 Bom., 241; *Nunn* vs. *Nunn*, 8 I. L. R., 298; *Vinayak* vs. *Abaji*, I. L. R., 12 Bom., 416; *Srikrishna* vs. *Singara*, I. L. R., 4 Mad., 218; or if it is partly declaratory, a suit will lie on that part—*Sabhanatha*, vs. *Subba*, I. L. R., 7 Mad., 80; but if a decree is not merely declaratory a second suit will not lie, even though it is so vague as to be incapable of execution—*Venkanna* vs. *Aitamma*, I. L. R., 12 Mad., 183; and see *Ashutosh Bannerjee* vs. *Lukhimoni*, I. L. R., 19 Cal., 139.

Plaintiff brought a suit for possession on a contract of sale, and obtained a decree against his vendor, a mortgagor, who had sold to him his right, title, and interest. Plaintiff never took out execution, and, after the lapse of more than three years, he sued to redeem the mortgage. It was held that plaintiff's title under the purchase-deed and decree existed, although it could not be enforced by execution, and the suit would lie—*Jugur Nath* vs. *Balgobind*, 1 Alla., 154; and where the purchaser—*Kishori Mohun* vs. *Chunder Nath*, I. L. R., 14 Cal., 644, and the assignee of a purchaser at a sale in execution were not put in possession in the execution-proceedings, they were allowed to allowed to sue for the property—*Seru Mohun* vs. *Bhagoban*, I. L. R., 9 Cal., 602; and the same rule applies if the decree-holder or his assignee only gets symbolical possession instead of khas—*Joggobundhu* vs. *Purnanund*, I. L. R., 16 Cal., 530; *Sevu* vs. *Muttusami*, I. L. R., 10 Mad., 53; otherwise if the suit is not brought against a party to the original decree: but his lessee having a permanent interest in the soil—*Gossain Dalmar* vs. *Bepin*, I. L. R., 18 Cal., 520. Moneys realized as due under a decree, or realized improperly from a party to the suit are recoverable by application to the Court executing the decree, and not by regular suit—*Partab Singh* vs. *Bani Ram*, I. L. R., 2 Alla., 61; *Jaswant Singh* vs. *Dip Singh*, I. L. R., 7 Alla., 433; only by suit—*Ramghulam* vs. *Dwarka Rai*, I. L. R., 7 All., 171; either in execution or by regular suit—*Kalianasundram* vs. *Egnavedeswara*, I. L. R., 11 Mad., 261, and see *Narayana* vs. *Narayana*, I. L. R., 13 Mad., 437; *Mookoond* vs. *Mahomed*, I. L. R., 14 Cal., 484.

Suit on Decree.—In Calcutta, a suit may be brought in the High Court on a decree of the High Court—*Attermoney Dosses* vs. *Hurry Doss*, I. L. R., 7 Cal., 74. In Madras a suit will lie on the decree of a Native Court—*Kaliegam* vs. *Chokalinga*, I. L. R., 7 Mad., 105; *Sama Rayar* vs. *Annamalai*, I. L. R., 7 Mad., 164; otherwise in Bombay—*Himmatlal* vs. *Shivajirav*, I. L. R., 8 Bom., 593. But a suit was held to lie in the Civil Court on a decree obtained in the Court of the Agent for Sirdars against defendant's father, the decree which was for payment of a sum of money by instalments having become incapable of execution on the death of defendant's father, defendant himself not being a sirdar—*Sakharam Dikshit* vs. *Ganesh*, I. L. R., 3 Bom., 193. See section 14, *infra*.

It is doubtful if a new suit will lie upon a decree pending appeal—*Imamum* vs. *Hurdyal*, 5 W. R., 276; or barred by limitation—*Fakirapa* vs. *Pandurangapa*, I. L. R., 6 Bom., 7; see, however, *Attermoney Dosses* vs. *Hurry Doss*, I. L. R., 7 Cal., 74.

A suit will not lie in a Small Cause Court on a Civil Court decree—*Manchharam* vs. *Bakshee Saheb*, 6 Bom., 231; *Merwanji* vs. *Ashabai*, I. L. R., 8 Bom., 1; nor will a regular suit lie on a rent decree of the Revenue Court—*Ananda Moyi* vs. *Patit*, B. L. R. (F. B.) 18; but a suit will lie in the Bombay High Court on a Small Cause Court decree—*Merwanji* vs. *Ashabai*, I. L. R., 8 Bom., 1, p. 12; Act XV of 1882, section 94; otherwise in Calcutta—*Golam Arab* vs. *Curreem Bux*, I. L. R., 5 Cal., 294.

Mortgages.—When the mortgagee of a house has obtained a decree against the mortgagor and a purchaser from him subsequent to the mortgage, a suit will lie against the latter, but not in a Small Cause Court for diminishing the security by taking away the materials of the house—*Moulvi Omer Kurim* vs. *Lala Shewan*, 4 C. L. R., 291.

Probate, &c.—A suit did not lie to set aside a certificate granted under Act XXVII, 1860—*Roghoobur Dyal* vs. *Ram Narain*, 22 W. R., 312; though one for declaration of title to be used as a reason for asking the certificate to be withdrawn was admissible—*Russick Chunder* vs. *Ram Lall*, 22 W. R., 301. So a regular suit will not lie to set aside an order granting probate of a will, the grant must be contested by an application to revoke in the Court of Probate—*Mayho* vs. *Williams*, 2 Alla., 268; unless possibly for fraud or want of jurisdiction—*Komollochun Dutt* vs. *Nilruttun*, I. L. R., 4 Cal., 360; 4 C. L. R., 175; but a judgment-creditor who has attached if the will is set up in fraud of creditors—*Umanath Mookhopadhya* vs. *Nilmoney Singh*, I. L. R., 6 Cal., 429; I. L. R., 10 Cal., 19; 10 Ind. App., 80, or a mortgagee of the nearest-of-kin—*Nobeen Chunder Sil* vs. *Bhobo Soondari Dabee*, I. L. R., 6 Cal., 460; *Surbomongala* vs. *Shashibhooshun*, I. L. R., 10 Cal., 413, or in Bengal the widow of a Hindu leaving sons—*Brinda Chowdhrean* vs. *Radhica*, I. L. R., 11 Cal., 492, may apply for revocation; but no person can do so who has taken part in the probate proceedings; his remedy is, possibly, by review of judgment—*Soorji Jivandas*, petitioner, I. L. R., 5 Bom., 638; see as to citation *Hormusji* vs. *Bai*, I. L. R., 12 Bom., 164; *Nistariny* vs. *Brahomoyi*, I. L. R., 18 Cal., 45.

Existing Decree, see "*Subsisting Decree*," section 244, *infra*.—A decree or judgment must be considered valid until reversed or superseded. Hence, money recovered under a decree or judgment, cannot be recovered back in a regular suit so long as the judgment or decree under which it was recovered remains in force—*Shama Purshad* vs. *Hurro Purshad*, 10 Moore, 203; and see *Nilmoney Sing* vs. *Sharoda*, 18 W. R., 434; *Jogesh Chunder* vs. *Kalichurn*, I. L. R., 3 Cal., 30; *Mohamed Elahee* vs. *Kally Mohun*, I. L. R., 5 Cal., 589; though there is no bar to a suit for restitution when the decree is reversed—*Narayana* vs. *Narayana*, I. L. R., 13 Mad., 437, and where money is deposited in an action under an order of Court, a separate suit will not lie for its recovery—*Vaughan* vs. *Demetrius Elias*, 7 S. D. A., Sel., 175. A suit to recover money paid to a zemindar under a Revenue Court's decree after the same amount had been paid to his *gomashta* will not lie—*Soudamini Dassi* vs. *Thakomani Debi*, 3 B. L. R., App., 114.

But a suit will lie for the recovery of damages for cutting and carrying crops from certain land, of which the defendant had obtained possession under a decree, which was set aside on appeal—*Shurnomoyee* vs. *Sirkar*, I. L. R., 4 Cal., 625. And when successive decrees for rent have been obtained, each depending on the first, which is afterwards reversed on appeal, a suit will lie to recover the excess money paid under the other decrees—*Jogesh Chunder* vs. *Kali Churn*, I. L. R., 3 Cal., 30, though in a somewhat similar case, relief was given by review—*Waghela* vs. *Masludin*, I. L. R., 13 Bom., 330.

Other Judicial Orders.—A suit will not lie for right of way over land taken up for public purposes—*In the matter of H. B. Fenwick*, 6 B. L. R., App., 47; 14 W. R., Cr., 72. But a suit did lie to declare that the order of a Magistrate passed under section 518, Act X, 1872, was without jurisdiction and giving relief by declaring plaintiff's right—*Kedarnath* vs. *Rughonath*, 6 Alla., 104; *Gopi Mohun* vs. *Taramoni*, I. L. R., 5 Cal., 7; and see *Bradley* vs. *Jameson*, 11 C. L. R., 414; but not to set aside an order declaring a road public—*Ujulmayi Dasi* vs. *Neogi*, 4 B. L. R. (F. B.), 24. But such orders would not prevent the persons against whom the order has been given to show in a suit that it is his own property—*Lalji Ukheda* vs. *Jowba*, 8 Bom., 94; *Queen* vs. *Hutchins*, 6 Q. B. D., 300

Fraud.—A suit will lie to set aside a decree on the ground of fraud—*Golab Chand* vs. *Prosunno Coomaree*, 20 W. R., 86; Lim. Act, sch. 11, cl. 95; *Flower* vs. *Lloyd*, 6 C. D., 297; *Nilmoni* vs. *Aimunissa*, I. L. R., 12 Cal., 156; actual not constructive fraud—*Patch* vs. *Ward*, L. R., 3 Ch., 203, but not if the plaintiff urged fraud in the first Court after the decree had been passed and failing did not appeal, though an appeal was allowed—*Raj Kishen* vs. *Modhoo Soodun*, 17 W. R., 413; but in England the judgment of a foreign Court on fraud is not conclusive—*Abouloff* vs. *Oppenheimer*, 10 Q. B. D., 295; and before passing of the *Judicature Act* at home, if A obtained a decree in a Common Law action against B for money, this decree did not prevent B obtaining relief in Equity on the ground of fraud, although he knew and might have pleaded it in the Common Law action—*Nouvion* vs. *Freeman*, 35 C. D., 704, p. 720; and generally a suit will lie unless the question of fraud has been decided—*Widgery* vs. *Tepper*, 7 C. D., 423, or it has been committed by one party in execution-proceedings—*Paranjpe* vs. *Kanade*, I. L. R., 6 Bom., 148; *Mohendro Narain* vs. *Gopal Mondul*, I. L. R., 17 Cal., 769, under this Code—*Brojo Gopal* vs. *Busirunxiba* I. L. R., 14 cal., 179; but unless the parties sue to set aside the decree directly, it cannot be impugned indirectly, and must be given effect to—*Huro Chunder Biswas* vs. *Nobo Kissen Mookerjee*, W. R., 1864, p. 139. *Quære* if the point arose in the case of *Mohendro Narain*, *supra*, as the decision was that section, 244, *post* did not apply. But see the argument in *Vadala* vs. *Lawes*, 25 C. D., p. 312. In *Mewa Lall* vs. *Bhujhun*, 22 W. R., 213, it was held that no such suit would lie; and see *Ram Sarup* vs. *Rukinnee Kuar*, I. L. R., 7 Alla., 884; but a suit for relief by injunction did lie—*Nouvion* vs. *Freeman*, 35 C. D. 704, p. 720. Fraud may be also raised as a defence—

Ahmedbhoy vs. *Vullebhoy*, I. L. R., 6 Bom., 703; *Bandon* vs. *Becher*, 3 Cl., 1 F. 1 & 479. But in the execution of a decree ordering the sale of immovable property, it is not competent for the Court to refuse to sell it, because a stranger to the suit who is in possession of the property impeaches the decree on the ground of fraud, he must file a suit and get an injunction—*Purshottum* vs. *Purshottum*, I. L. R., 8 Bom., 532.

Pleading.—In all cases of fraud, the plaint must set forth the particular acts alleged to constitute the fraud—*Mir Azimuddin* vs. *Ziaulnissa*, I. L. R., 6 Bom., 309; *Gunga Narain* vs. *Tiluckram*, 15 Ind. App., 119, and plaintiff cannot succeed on any other—*Abdul Hossein* vs. *Turner*, I. L. R., 11 Bom., 620. See also "FRAUD," section 50, *post*.

As to the difference between a suit brought by a party to the fraud and an innocent third party, see *Chenvirappa* vs. *Puttappa*, I. L. R., 11 Bom., 708; *Venkatramanna* vs. *Viramma*, I. L. R , 10 Mad., 17. See "FRAUD," section 244, *post*.

Interest.—As to advances and interest on advances when a deed is set aside for fraud, see the case of *Ajit Singh* vs. *Bijai*, 11 Ind. App., 211; *Pertab Bahadur* vs. *Chitpal*, 19 Ind. App., 174; I. L. R., 19 Cal., 211.

Effect of Suit.—Where a decree is set aside for fraud, the parties are not remitted to the position they held before the decree—*Bhimaji* vs. *Rakmabai*, I. L. R., 10 Bom., 338.

Mortgage.—The owner of a share in the equity of redemption can redeem the whole mortgage even though the mortgagor has obtained some interest in the equity of redemption—*Mora Joshi* vs. *Ramchandra*, I. L. R., 15 Bom., 24; he cannot—*Marakar* vs. *Punjapatath*, I. L. R., 6 Mad., 61.

Privilege.—A Judge is not liable for words spoken in office—*Seaman* vs. *Netherclift*, 1 C. P. D., 540; 2 C. P. D., 53, and cases there cited; and the same privilege extends to letters which a Judge in this country is bound to forward to the High Court—*Ally Kurem* vs. *Sands*, Boulnois, 1. So a counsel is absolutely privileged for words spoken—*Seaman* vs. *Netherclift*, 1 C. P. D., 540; *Sullivan* vs. *Norton*, I. L. R., 10 Mad., 28. In the *Queen* vs. *Chrestien*, 2 Alla., 473, it was held that a pleader or mooktear is not liable if, relying on the statement of his client, he in good faith introduced defamatory matter in the pleadings; and see sections 148—50 of the Evidence Act.

Defamatory and libellous expressions, when used by a party in the course of a judicial proceedings, either in the pleadings or the conduct of the suit are not actionable—*Nathji* vs. *Lalbhai*, I. L. R., 14 Bom., 97. And the rule in England is that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office—*Jex* vs. *Skinner*, 1 Lofft., 55; thus where a witness said a will was a rank forgery: *Held*, that the statement was privileged, and no action for slander would lie, although the jury found that the words were not spoken by the defendant in good faith as a witness, and that he spoke them as a volunteer, and for his own purposes and maliciously—*Seaman* vs. *Netherclift*, 1 C. P. D., 540; 2 C. P. D., 53, and cases there cited; but it has been held that though a witness may be privileged as regards words and statements having direct reference to or bearing on the case, yet when he goes far beyond it and does not act on good faith, he is liable for defamation—*Queen* vs. *Parsoram Dass*, 2 W. R., Cr. R., 36; 3 W. R., Cr. R., 45; *contra*—*Gunnesh Dutt* vs. *Magnuram*, 11 B. L. R., 321; *Chidambara* vs. *Thirumani*, I. L. L., 10 Mad., 87; *Bhikumber* vs. *Becharam*, I. L. R., 15 Cal., 264; *Manjaya* vs. *Sesha*, I. L. R., 11 Mad., 477; and a party who pleads libellous matter irrelevant to the points in dispute, and the pleading is improper, may be liable for defamation—*Constantine* vs. *McConnel*, S. D., N. W., 1864, p. 486; *contra*—*Nathji* vs. *Lalbhai*, I. L. R., 14 Bom., 97, and where a party applying to a Judge to transfer a case from a Moonsiff on the ground of ill-feeling, went further and accused him of borrowing money from his adversary and falsifying evidence in another case, it was held a suit would lie—*Shibnath Tulaputtra* vs. *Sat Cowree*, 3 W. R., 198. In any case the privilege only extends to statements made in judicial proceedings—*Chowdhry Goor Dutt Sing* vs. *Gopal Dass*, 1 Agra, 33.

Privileged Communication.—See *Jenouse* vs. *Delmege*, App. Cas., 1891, p. 73.

Defamation.—A suit will lie for damages for exhibiting an effigy—*Pitumber Doss* vs. *Dwarka Pershad*, 2 Alla., 435; or for mere abuse—*Sreenath Mookerjee* vs. *Komul Kurmokar*, 16 W. R., 83; app , 99; *Kashiram* vs. *Bahadur*; 7 Bom., 17; *Srikant Roy* vs. *Satcori*, 3 C. L. R., 181. for the civil law follows the criminal law, in India—*Ibin Hosein* vs. *Haidar*, I. L. R., 12 Cal., 109; *Trailokya Nath* vs. *Chandra Nath* (id.), 424. As to decision of caste people, see *Vallabha* vs. *Madusudanan*, I. L. R., 12 Mad., 495. The surviving members of a joint family cannot sue for defamation of a deceased member—*Luckumsey* vs. *Hurbun* I. L R., 5 Bom., 580; nor a father for defamation of his daughter—*Dya* vs. *Param*, I. L. R., 11 Alla., 104.

Malice—See *Jenouse* vs. *Delmege*, App. Cas., 1891, p. 73; *Hicks* vs. *Faulkner*, 8 Q. B. D., 167, p. 174.

Contribution.—The right to contribution, in the absence of contract, rests on the equitable doctrine that *in equali jure*, the law requires equality; one shall not bear the burden of the rest—*Rambux Chittangeo* vs. *Modhoosoodun*, 7 W. R., 377; when these

is a common demand—*Johnson* vs. *Wild*, 44 C. D., 146; and a suit will lie by one co-sharer, who pays the revenue of the whole estate against the others—*Rambux, supra;* or against the mortgagee of any of them who has foreclosed—*Gunga Gobind* vs. *Ashootosh Dhur*, 21 W. R., 255; or by one judgment-debtor paying the amount of a joint and several decree passed against him and the defendant—*Sappanachari* vs. *Chakkara Pattan*, 1 Mad., 411; and a person found in possession of one-half the mortgaged land is charged with one-half the debt—*Syud Mobaruck* vs. *Sheo Gobind*, 18 W. R., 61; but no such suit lies against a member of a Hindu family for a joint debt when the plaintiff has not accounted for his management—*Bissonath* vs. *Goburdhun*, 17 W. R., 336; though it will by one member against another for his share of joint debt—*Bose* vs. *Bose*, Fulton, 40.

The mere existence of a decree without payment is not sufficient to support the case—*Ram Pershad Singh* vs. *Singh*, 11 B. L. R., 76. No suit lies for money paid under a joint decree if the defendant can show he had no substantial interest in the suit—*Serajool Haq* vs. *Roy Luchmeput*, 20 W. R., 242; nor by one wrong-doer against another if the plaintiff knew he was doing an unlawful act; but the mere fact that the act was illegal is not sufficient—*Sreeputty Roy* vs. *Loharam* 7 W. R., 384; *Nowab Sidhee Nuzar Ally Khan* vs. *Ojoodhyram Khan*, 10 Moore, 562; *Suput Singh* vs. *Imrit Tewari*, I. L. R., 5 Cal., 720; *Vayangara* vs. *Pariyangot*, I. L. R., 7 Mad., 89; *Kishna Ram* vs. *Rakmini*, I. L. R, 9 Alla., 221; *Brojendro Kumar* vs. *Rash Behari*, I. L. R., 13 Cal., 300.

The Courts trying the case can go into the facts of the previous litigation—*Thangammal* vs. *Thyyamuthu*, I. L. R., 10 Mad., 518. The decree of the Appellate Court did not award mesne profits, but in execution the first Court realized them from plaintiff: *Held*, he could not sue his co-defendants for contribution, as mesne profits were not authorized by the decree—*Bunwaree Lall* vs. *Sudhist*, 25 W. R., 269.

Parties.—In a suit for contribution all the parties interested should be made partie *Khema Debia* vs. *Kumolakant*, 10 W. R., 10; and the plaint must set out the amount due by each party sued, otherwise it should be rejected—*Bholanath* vs. *Indar Chand*, 14 W. R., 373; but see *Ibn Husain* vs. *Ramdai*, I. L. R., 12 Alla., 110.

False Imprisonment.—To constitute false imprisonment, the restraint must be total, and not partial in any particular direction—*Bird* vs. *Jones*, 7 Q. B., 742, section 340, Penal Code; but the restraint need not be the result of actual force, and if an officer tells a person that he must go with him, it is sufficient—*Pocock* vs. *Morse*, Ry. Mo., 321; *Grainger* vs. *Hill*, 4 Bing., N. S., 180.

By Police.—See note under section 342 of the Indian Penal Code.

By Jailor.—See *Migotty* vs. *Colville*, 4 C. P. D., 833.

Under Warrant of Civil Courts.—See *Fisher* vs. *Pearse*, I. L. R., 9 Bom., 1; and the cases under section 423, *post*.

False Charge.—As to the distinction between a false charge and illegal imprisonment, see *Auston* vs. *Dowling*, L. R., 5 C. P., 534; *Imperatrix* vs. *Lakshman*, I. L. R., 2 Bom., 487; *Hicks* vs. *Faulkner*, 8 Q. B. D., 167, p. 170.

Before a suit can lie, the result of the charge must show there has been no ground for bringing it—*Basebé* vs. *Matthews*, L. R., 2 C. P., 684. Thus, where a person has been adjudicated a bankrupt, then, so long as the adjudication stands, he cannot sue on the ground that the petitioner had falsely and maliciously made him a bankrupt—*Metropolitan Bank* vs. *Pooley*, 10 App. Cas., 210.

The charge must have been made without any reasonable or probable cause—See as to the words, *Burns* vs. *Nowell*, 5 Q. B. D., 444; *Hicks* vs. *Faulkner*, *supra*; *Thompson* vs. *Farrer*, 9 Q. B. D., 372; *Hicks* vs. *Faulkner*, 8 Q. B. D., 167; and this must be proved by the plaintiff—*Hall* vs. *Venkatakrishna*, I. L. R., 13. Mad., 394; *Abrath* vs. *North-Eastern Ry.*, 11 Q. B D., 448. And if the first Court supports the charge, this strongly negatives this proposition, even though its decision may have been set aside on appeal—*Parimi* vs. *Bellamkonda*, 3 Mad., 239; *Viranna* vs. *Nagayyah*, I. L. R., 3 Mad., 6.

The plaintiff must also prove injury to his person, reputation, or property—*Abrath* vs. *North Eastern Ry.*, 11 Q. B. D., 448; *Hicks* vs. *Faulkner*, 18 Q. B. D., 167.

Land Revenue.—A suit will lie against the Secretary of State to have it declared that certain lands lie within the ambit of a permanently settled estate and are not liable to be again assessed—*The Secretary of State* vs. *Fahamidunnissa*, 17 Ind. App., 40; *The Secretary of State* vs. *Ranaugrah*, I. L. R., 7 Alla., 140.

Partition.—A joint estate of any kind is partible, and possession not obtained by force or fraud is sufficient to support a partition—*Sundar* vs. *Parbati*, 16 Ind. App. 186, but a partial partition cannot be enforced if objected to—*Haridas* vs. *Pran Nath*, I. L. R., 12 Cal., 566; *Parbati Churn* vs. *Ain-ud-deen*, I. L. R., 7 Cal., 577; 9 C. L. R. 170; *Ramjoy Ghose* vs. *Ram Ranjun*, 8 C. L. R., 367; *Venkataram* vs. *Meera*, I. L. R., 13 Mad., 275; but see *Chandu* vs. *Kunhamed*, I. L. R., 14 Mad., 324, unless perhaps a portion of the property is outside jurisdiction—*Panchanun* vs. *Shib Chunder*, I. L. R.,

14 Cal., 835; *Padamani* vs. *Jagadamba*, 6 B. L. R., 134; *Hari Narayan* vs. *Ganpatrav*, I.L.R., 7 Bom., 275; and also is not held by the plaintiff—*Hari Narayan* vs. *Ganpatrav*, I. L R., 7 Bom., 272; *Janardan* vs. *Anant*, I. L. R., 7 Bom., 373. But if the whole property of the plaintiff is only a portion of the estate—*Chundernath* vs. *Hur Naraian*, I. L. R., 7 Cal., 153; or the estate has been partitioned by the Collector save the portion in dispute which has been left joint—*The Secretary of State* vs. *Nundun Lall*, I. L. R., 10 Cal., 435, or it is an accretion to the parent estate already divided—*Shama Soondures* vs. *Kooer Poresh*, 20 W. R., 182, partition is allowed. And if the property be a revenue-paying estate, the Civil Courts, though they can determine the rights of the parties between themselves to any portion of the estate, cannot affect the right of Government to assess and collect the land revenue in its own way and the partition must be carried out by the Collector—*Zarun* vs. *Gowri Sankar*, I. L. R., 15 Cal., 199; *Ramjoy* vs. *Ram Runjun*; 8 C. L R., 367; *Debi Singh* vs. *Sheo Lall*, I. L. R., 16 Cal., 203; nor can they compel a Collector to divide if the law does not apply as in the case of revenue-paying estates mixed up together—*Adjudia* vs. *The Collector of Durbungha*, 11 C. L. R. 550; but subject to this limitation a partition does not affect the civil right of persons and the Courts can declare that a person not a party to a proceeding before the Collector has a share in property allotted to another—*Sheo Pershad* vs. *Shunkar*, 16 W. R., 190; *Koonj Behares* vs. *Neeroo*, 15 W. R., 291: or that a party has a larger share than has been allowed to him—*Spencer* vs. *Pulul*, 15 W. R., 471; or that a person is by his conduct or has by agreement precluded himself from claiming a partition—*Kishen Singh* vs. *Dabeer*, 2 Agra, 272; *Bhowanee Koonwar* vs. *Thakoor Dass*, 2 Agra, 277; *Ajoodhya* vs. *Kristo*, 15 W. R., 165; not followed in *Joy Noth Roy* vs. *Lall Bahadur*, I. L. R., 8 Cal., 126, p. 129; 10 C. L. R., 149. As to the case of an auction-purchaser, see *Gungadeen* vs. *Kheeroo*, 14 B. L. R., 170.

Partition may be enforced by a shikmee talook-holder—*Mothoor Chunder* vs. *Manick Chunder*, 6 W. R., 192; *Oomesh Chunder* vs. *Manick Chunder Bonick*, 8 W. R., 128; by a ryot—*Gouree Sunker* vs. *Anund Mohun*, 9 W. R., 487; by the purchaser of the share of a member of a joint undivided Hindu family in the joint dwelling house—*Koonwur Bijay Keshub* vs. *Shama Soondures*, 2 W. R., Mis., 30; *Bepin Behari* vs. *Lal Mohun*, I. L. R., 12 Cal., 209; but see *Rajanikanth* vs. *Ram Nath*, I. L. R., 10 Cal., 244; by every member of a joint Hindu family—*Deo Bunsee* vs. *Dwarkanath*, 10 W. R., 273, and see *Kali Pershad* vs. *Ram Charan*, I. L. R., 1 Alla., 159; even though he be a minor, provided his interests would suffer if left in the hands of his co-parceners—*Kamakshi Ammal*, vs. *Chindambara*, 3 Mad., 94; by a grandson against his grandfather—*Nagalinga* vs. *Subira Maniya*, 1 Mad., 77; by one of two co-heiresses, though the partition will not bind the reversioners—*Padmamani Dasi* vs. *Jagadamba*, 6 B. L. R., 134. As to the case of joint Hindu widows, see *Janoki Nath* vs. *Mothura Nath*, I. L. R., 9 Cal., 580; *Sunder* vs. *Parbati*, 16 Ind. App., 186. See "PARTIES TO PARTITION," section 26, *post*.

Maintenance.—

Widow.—A widow who is unchaste has no right of maintenance—*Valu* vs. *Ganga*, I. L. R., 7 Bom., 85; *Roma Nath* vs. *Rajonimoni*, I. L. R., 17 Cal., 674; and even if she is chaste, she has no right of maintenance against her father-in-law who has not ancestral property—*Kalu* vs. *Lakshmibai*, I. L. R., 7 Bom., 127; but generally an heir taking property is bound to support those whom the previous owner was morally bound to support—*Kamini* vs. *Chandra*, I. L. R., 17 Cal., 373; *Janki* vs. *Nand Ram*, I. L. R., 11 Alla., 194; and see *Adhilbai* vs. *Cursadas*, I. L. R., 11 Bom., 199.

Wife.—A wife and daughter must be maintained out of the husband and father's property, and the maintenance may be made a charge on it—*Mansha* vs. *Jiwan*, I. L. R., 6 Alla., 617.

A Hindu woman obtained a decree for maintenance against her husband and subsequently sued him for a declaration that certain land should be charged, saying that he had alienated other property to get rid of her maintenance. It was held she had no cause of action—*Shaminatha* vs. *Ranjathammal*, I. L. R., 12 Mad., 285.

Illegitimate Son.—Compare *Kuppa* vs. *Singaravelee*, I. L. R., 8, Mad., 325; and *Nilmoney Singh* vs. *Baneshur*, I. L. R., 4 Cal., 91.

Tarwad.—A member of a *tarwad* living in the tarwad house cannot sue for maintenance—*Kunhammatha* vs. *Kunhi*, I. L. R., 7 Mad., 233.

Amount of.—See *Baisni* vs. *Rup Singh*, I. L. R., 12 Alla., 558. As to when it can be varied, see *Venkanna* vs. *Aitamma*, I. L. R., 12 Mad., 183; *Vijaya* vs. *Sripathi*, I. L. R., 8 Mad., 94.

Partnerships.—See in regard to section 265 of the Contract Act before it was amended—*Juggat Chunder* vs. *Radha Nath*, I. L. R., 10 Cal., 669; *Adarji* vs. *Erakshah*, I. L. R., 8 Bom., 273; *Ramayya* vs. *Chandra*, I. L. R., 5 Mad., 256; *Kalian Das* vs. *Gunga*, I. L. R., 5 Alla., 500.

As to the practice, pleading, and procedure which should be followed in these suits, see *Ram Chunder Shaha* vs. *Manick Chunder*, I. L. R., 7 Cal., 428; 9 C. L. R., 157.

As to a suit by one partner against another, see *Kassa Mal* vs. *Gopi*, I. L. R. 9, Alla. 120; *Premji* vs. *Dossa*, I. L. R., 10 Bom., 358.

Account.—For the proper procedure to be observed in taking accounts, see *Annada Prosad* vs. *Dwarka Nath*, 8 C. L. R., 321; *Hurronath Roy* vs. *Krishna*, 13 Ind. App., 123; I. L. R. 14 Cal., 147; and the way in which such suits should be framed, see *Gobind Mohun* vs. *Sheriff*, I. L. R., 7 Cal., 169; 8 C. L. R., 357; *Soshi Bhoosun* vs. *Guru Churn*, I. L. R., 7 Cal., 89; *Degamber Mozumdar* vs. *Kallynath*, I. L. R., 7 Cal., 654.

Special Cases.—As to when a suit for accounts will lie against the *kurta* of a Hindu family, see *Krishna* vs. *Subbanna*, I. L. R., 7 Mad., 564; *Soorjeemoney* vs. *Denobundoo* 5 Moore, 526, p. 540; *Venkata* vs. *The Court of Wards*, I. L. R., 5 Mad., 236; *Konerav* vs. *Gurrav*, I. L. R., 5 Bom., 588; and when against a dewan, see *Hurronath Roy* vs. *Krishna*, I. L. R., 14 Cal., 147; 13 Ind. App., 123.

Stamp.—See *Govandas* vs. *Dayabhai*, I. L. R., 9 Bom., 22.

Reversioner: Alienation.—When a Hindu widow having one sonless daughter is in possession of her husband's estate, a suit will lie at the instance of the next heir in reversion at the death of the daughter to prevent the mother and daughter from alienating the property to the prejudice of his reversionary right—*Gauri Dat* vs. *Gur Shahai*, I.L.R., 2 Alla., 41. But not if the reversioner cannot prove collusion between mother and daughter—*Anund Koer* vs. *Court of Wards*, 8 Ind. App., 14; *Madari* vs. *Malki*, I. L.R., 6 Alla., 428, and generally a remote reversioner cannot sue unless the nearest has colluded with the widow, or done something to preclude him, or has refused to sue without sufficient cause—*Jhula* vs. *Kanta Prosad*, I. L. R., 9 Alla., 441; and see *Ramanund Koer*, vs. *Ragunath*, 1 Ind. App., 141.

Settlement.—

Resumed Land.—It has been the invariable practice to allow a person who alleges that he is entitled to a permanent settlement in resumed land to obtain a declaration of that right against his opponent only, and the Government has invariably recognized the right so declared by making or altering the permanent settlement accordingly—*Krishna* vs. *Harish*, 8 B. L. R., 524; but whether any person could compel Government to settle with him is not clear—*Government* vs. *Tekait Pokharun Singh*, 7 W. R., 465.

Permanent Settlement.—It is not competent for a Civil Court to direct that the Collector will enter into engagements with a zemindar after a temporary settlement, though it may declare his prior right to a settlement on agreeing to the assessment and other terms fixed by the revenue authorities—*Government* vs. *Sheikh Fukeerullah*, 6 S. D. A., Sel., 208; *Watson & Co.* vs. *Brojo Soondaree*, 10 W. R., 395; and even in a district not permanently settled, the Civil Courts can decide the rights of parties as having a share in the settlement—*Beejoy Keot* vs. *Goria*, I. L. R., 7 Cal., 437.

Right to Sue.—The assignee of a mere right to sue for damages has no cause of action—*Pragi Lal* vs. *Fateh Chund*, I. L. R., 5 Alla., 207. Thus the purchaser of a right to sue for mesne profits cannot sue for them—*Shyam* vs. *Land Mortgage Bank*, I. L. R., 9 Cal., 695, p. 697; see also note under section 266, clause (*e*), *post*.

Mahammaden Law.—A creditor is only entitled to sue one heir when the whole estate is in his possession—*Hamir Singh* vs. *Zakai*, I. L. R., 1 Alla., 57; and if the heirs have divided the property, he can only recover against each according to his share—*Pirthi Pal* vs. *Husainijam*, I. L. R., 4 Alla., 361; *Jafri* vs. *Amir*, I. L. R., 7 Alla., 822; *Bussunteram* vs. *Kamaluddin*, I. L. R., 11 Cal., 421. But see *Muttyjan* vs. *Ahmed Ally*, I. L. R., 8 Cal., 370; *Muleeka* vs. *Jumeela*, Ind. App. (Sup. Vol.), p. 145.

Municipality.—No suit will lie to compel a mofussil municipality to grant a license under section 339, Act III of 1884—*Moran* vs. *Motihari Municipality*, I. L. R., 17 Cal., 329.

User.—Mere user will not support a claim to exclusive possession—*Husain Ali* vs. *Matukman*, I. L. R., 6 Alla., 39.

Pre-emption.—A suit for pre-emption must embrace the whole property—*Durga Prasad* vs. *Mansi*, I. L. R., 6 Alla., 423; *Arjun* vs. *Sarfaraz*, I. L. R., 10 Alla., 182, and compare—*Kuar Dat* vs. *Nahar Singh*, I. L. R., 11 Alla., 257, and the cases on it.

A purchaser takes subject to all the equities of his vendor—*Durga Prasad* vs. *Shambunath*, I. L. R., 8 Alla., 86.

As to special conditions in regard to price, see *Karim Baksh* vs. *Phula Bibi*, I. L. R., 8 Alla., 102. As to a suit for a portion of the purchase-money paid into Court where the decree has fallen through, see *Koji Ram* vs. *Ishar*, I. L. R., 8 Alla., 273. See note under section 214, *post*.

Shias.—See *Abbas Ali* vs. *Maya Ram*, I. L. R., 12 Alla., 229.

Registration.—A suit will not lie in Bengal to have a document registered —*Edun* vs. *Mahomed*, 11 C. L. R , 440; *Lukhimoni* vs. *Akurmoni*, 12 C. L. R , 527; nor in Madras—*Kunhimmu* vs. *Viyyathamma*, I. L. R., 7 Mad., 535; nor in the North-West—*Bhugwan Singh* vs. *Rhuda Buksh*, I. L. R., 3 Alla., 397, unless in virtue of some undertaking express or implied—*Hurjivan* vs. *Jamsetji*, I. L. R., 9 Bom , 63; *In re Shaik Abdul*, I. L. R., 11 Bom., 681.

Pending suits.

12. Except where a suit has been stayed under section 20, the Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, pending in the same or any other Court, whether superior or inferior, in British India having jurisdiction to grant such relief, or in any Court beyond the limits of British India established by the Governor-General in Council and having like jurisdiction, or before Her Majesty in Council.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

This section applies to H. C. and P. S. C. C.

The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree—*Fakuruddeen* vs. *The Official Trustee*, I. L. R., 7 Cal., 82.

Pending the final hearing in appeal of a suit for confirmation of possession of certain land, and for the recovery of the produce of such land alleged to have been carried away by the defendants, the plaintiff brought a suit again asking for confirmation of possession, but also for the recovery of other produce which had been taken away by the defendants since the institution of the first suit: *Held*, that the second suit so far as it sought for the recovery of the produce was not barred—*Bissessur Singh* vs. *Gunput*, 8 C. L. R , 113.

Previously Instituted.—Where two suits are pending in different Courts regarding the same subject-matter, priority of time is the proper guide in determining which suit should be allowed to proceed—*Mekjee Khetsee* vs. *Devachund*, 4 C. L. R., 282. There A, who was employed as B's agent, instituted a suit in Calicut against B for the balance of an account in July 1878. In December 1878, B sued A in Calcutta for an account, and for damages caused by his alleged negligence. It was held that the latter suit must be stayed; but a suit for rent or *malikhana* for one year does not *bar* a suit for another—*Balkishan* vs. *Kishan Lal*, I. L. R., 11 Alla., 148.

Res judicata.

13. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and

has been heard and finally decided by such Court.

Explanation I.—The matter above referred to must, in the former suit, have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation IV.—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V.—Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI.—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.

This section applies to H. C. and P. S. C. C.

Proof.—Evidence of the decree or order on which reliance is placed must be produced and put on the record—*Bishambar* vs. *Imdadali*, 17 Ind. App., 173, p. 186.

"**Directly and Substantially in Issue.**—These words are to be read with Explanation II. In *Doorga Persad Singh* vs. *Doorga Konwari*, I. L. R., 4 Cal., 190; 5 Ind. App., 149, A (claiming as heiress of her deceased son), sued B for possession of an estate. Defence, that B was the heir according to the Mitakshara law, and that he had been installed on the *guddee* according to ancient usage. The plaintiff got a decree in execution of which she entered into possession. Then B, claiming, *under a family custom*, to be the next heir in succession to A's son, sued A for possession of the same property, and also for a declaration that on A's death he (B) would become entitled to the property under the family custom. In the second case, the plaintiff (B) denied that he had set up the family custom in his defence in the previous suit: the Judicial Committee of the Privy Council found that he had set up the family custom in the previous suit, but assuming that he had not done so, he ought to have done so, and his suit for possession was barred. In support of their decision, the Judicial Committee cited Lord Westbury's dictum in *Srimut Raja* vs. *Kajama Nachiar*, 11 Moore at p. 73:—"When a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward," and relied on the principle laid down in *Gregory* vs. *Molesworth*, 3 Atkyns, 626, namely, that "where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form." So far, the question before the Judicial Committee was the right to the possession of a family estate, the settlement of this right having been the end and aim of the first suit, as well as of the second. But the Judicial Committee went on to say that B might set up the family custom in the second suit for the purpose of showing that

he was presumptively entitled to succeed to the family estate on A's death, relying on the Vice-Chancellor's decision in *Barrs* vs. *Jackson*, 1 Y. & C., Ch., 586.

In *Krishna Behari Roy* vs. *Bunwari Lall Roy*, 2 Ind. App., 283; I. L. R., 1 Cal., 144; A sued B (a putnidar) to set aside a putni granted by the adoptive mother of A (before the adoption of A), on the ground that she had only a widow's estate. Defence, that A had not been adopted. C intervened, and was made a defendant to contest the adoption. It was held that the adoption was good, but that the putni had been properly granted. C appealed on the question of adoption, but the decision of the lower Court was affirmed. *Held*, that a subsequent suit by C to set aside the adoption was barred. Similarly, *Gobind Chunder* vs. *Taruck*, I. L. R., 3 Cal., 145; *Bemola Soondury* vs. *Punchanun*, I. L. R., 3 Cal., 705; *Ram Krishna* vs. *Vithal*, I. L. R., 15 Bom., 89, and *Toponidhee Dhirj* vs. *Sreeputty*, I. L. R., 5 Cal., 832.

In *Soorjeemonee Dayee* vs. *Suddanund Mohapatter*, 12 B. L. R., 304; 20 W. R., 377; the first suit was by a son against his father and an intended devisee under his father's will to have it declared (in substance) that the father had no power to devise the property, as it was all ancestral, or had been acquired with the income of the ancestral property. The declaration was granted as to the ancestral property, but the suit was dismissed as to the acquired property. A second suit against the devisee after the father's death to recover possession of the acquired property was barred. Similarly, *Gopinath Chobey* vs. *Bhugwat Pershad*, I. L. R., 10 Cal., 697; where the first suit was for possession and the second for malikhana.

In *Srimut Rajah* vs. *Katama Nachiar*, 11 Moore 50, A's widow sued B for possession of A's estate, alleging that the property was the self-acquired property of A, and that a will relied on by B was a forgery. B alleged that the property was undivided family property, and that he did not rely upon the will (of A) as a testamentary disposition. The Courts decreed the widow's claim on the ground that the property was self-acquired. *Held*, that a suit by B against A to recover back possession as devisee under A's will was barred. Similarly, *Wafeah* vs. *Saheeba*, 8 W. R., 307; *Asgur* vs. *Nuzeema*, 14 W. R., 272; *Wilaiti* vs. *Nur Khan*, I. L. R., 5 Alla., 514; *Man Singh* vs. *Narayan*, I. L. R., 1 Alla., 480.

In *Woomatara Debia* vs. *Unnopoorna Dossee*, 11 B. L. R., 158, Woomatara had brought a suit for 1,500 bighas of land, alleging that they were situated outside the boundaries of her talook, but that she was entitled to them by virtue of having taken possession of the lands and brought them into cultivation. The suit was dismissed. A second suit by her, claiming 770 of the 1,500 bighas as lands actually lying within the boundaries of her talook, was held to be barred. Similarly, *Nirman Singh* vs. *Phulman Singh*, I. L. R., 4 Alla., 65; *Dudsar Bibee* vs. *Shakir*, 15 W. R., 168; *Brojo Lall* vs. *Khetter Nath*, 12 W. R., 55; *Shib Shunker* vs. *Huro*, 13 W. R., 209; *Kashee* vs. *Kristo*, 22 W. R., 464; and *Sundhya Mala* vs. *Dabi Churn*, I. L. R., 6 Cal., 715. In *Denobundhoo Chowdhry* vs. *Kristomonee*, I. L. R., 2 Cal., 152; the first suit was brought by a Hindu widow against the husband of her deceased daughter for possession of certain property which had admittedly at one time belonged to the plaintiff's husband. She said that the defendant claimed to hold the land under an alleged deed of gift from the plaintiff's husband to his daughter (the defendant's wife), and she charged that the deed of gift was a forgery. That suit was dismissed on the ground that the deed was genuine, and the widow brought a second suit claiming the property as the heir of her deceased daughter. *Held*, that the suit was barred. Similarly, *Sultan Ahmad* vs. *Maula Baksh*, I. L. R., 4 Alla., 21; *Kamini Debi* vs. *Asutosh*, 15 Ind. App., 159; and *Haji* vs. *Mancharam*, I. L. R., 3 Bom., 137; *Ananta* vs. *Damodhar*, I. L. R., 13 Bom., 25. A suit to have land declared *ijmalee* was dismissed; a second suit for partition was held to be barred—*Besharutoollah* vs. *Ajoo*, 14 W. R., 195. The same principle has been extended to money demands—*Bheeka* vs. *Bhuggoo*, I. L. R., 3 Cal., 23. See *Naro Hari* vs. *Anpurnabai*, I. L. R., 11 Bom., 160.

In *T. K. Ummatha* vs. *T. K. Cheria*, I. L. R., 4 Mad., 308, the cases of *Bheeka* vs. *Bhuggoo*, I. L. R., 3 Cal., 23, and *Denobundhoo* vs. *Kristomonee*, I. L. R., 2 Cal., 152, were dissented from. In *Girdhar* vs. *Dayabhai*, I. L. R., 8 Bom., 174, A sued B for possession of certain land, alleging that he had let B into possession under a written lease, which lease had been determined. Defence, a permanent tenancy at a fixed rent. The letting relied on by the plaintiff was not proved, and the suit was dismissed. A was allowed to bring a second suit, claiming possession of the land as the owner thereof. For similar decisions, see *Nonsha* vs. *Umrao* (first claim under a will, second as heir, allowed), 7 Alla., 60; *Sadaya Pillai* vs. *Chinni*, I. L. R., 2 Mad., 352; *Muttu Chetti* vs. *Muttan Chetti*, I. L. R., 4 Mad., 296; *Sridhar* vs. *Narayan*, 11 Bom. 224; *Sheo Ratan Singh* vs. *Sheosahai*, I. L. R., 6 Alla., 358; *Allunni* vs. *Kunjusha*, I. L. R., 7 Mad., 264; *Nursem* vs. *Borandy*, 25 W. R., 208; *Nilo* vs. *Govind*, I. L. R., 10 Bom., 24; *Kandunni* vs. *Katiamma*, I.L.R., 9 Mad., 251; *Amanut Bibi* vs. *Imdad Hossein*, 15 Ind., App., 106; I. L. R., 15 Cal. 800; *Naro Balvant* vs. *Ramchandra*, I. L. R., 13 Bom., 326. In *Radhanath Kundu* vs. *Land Mortgage Bank*, I. L. R., 6 Cal., 550, the Bank held two mortgage-decrees against A. In execution of one decree, the Bank attached certain property as belonging to A, but the property was released from attachment on a claim being made by B. Then the Bank attached the same property in execution

of its other decree, and the property was again released from attachment on B's claim. Afterwards the Bank brought a suit (see section 283 of the Code of Civil Procedure) to establish its right to execute the first decree against the property. It was held that the Bank were entitled to bring a subsequent suit to establish its right to execute its second decree against the property.

In the *Rajah of Pittapur* vs. *Sittaya Garu*, I. L. R., 8 Mad., 219; 12 Ind. App., 16, the first suit had been brought by Sittaya's husband against the Rajah's father Venkata, claiming possession of the zemindary of Pittapur as the elder (adopted) brother of Venkata. The adoption was denied, and the suit was dismissed on failure to prove the adoption. Sittaya's husband appealed, but the case was compromised, and he withdrew his appeal; some years afterwards he died, leaving one son who died leaving his mother Sittaya. The second suit was brought by the Rajah, claiming a declaration that he was entitled to succeed to Sittaya's son's estate on her death. He based his claim on the fact that Sittaya's husband was the adopted brother of his (the Rajah's) father. *Held*, that the suit was barred. Similarly, *Tekait Ram* vs. *Srimati Modha*, 12 Ind. App., 188; *Venkatadri* vs. *Peda*, I. L. R., 10 Mad., 16; and *Belchambers* vs. *Aushotosh Dhur*, 7 C. L. R., 308. See also *Balkishan* vs. *Kishan Lal*, I. L. R., 11 Alla., 148, p. 157; *Kamini Debi* vs. *Asutosh Mookerjee*, 15 Ind. App., 159; *Dinkar* vs. *Hari*, I. L. R., 14 Bom., 206.

In *Nobo Doorga* vs. *Foyz Bux*, I. L. R., 1 Cal., 202, A sued B for the rent of a putni talook for the year 1871. Defence, abatement of Rs. 165 on account of eviction from a portion in 1865. Decree for amount claimed by the plaintiff less Rs. 42 abatement. Then B sued A for a permanent abatement at the rate of Rs. 155 per bigha. *Held*, barred. Similarly, *Bussun Lall* vs. *Chunder*, I. L. R., 4 Cal., 686, where the question was as to the amount of land held by the tenant and *Jeo Lal* vs. *Surfun*, 11 C. L. R., 483, where in the first suit (for enhancement) the plaintiff's evidence was disbelieved: and *Venkatachalapati* vs. *Krishna*, I. L. R., 13 Mad., 287, where in the first suit the relationship of landlord and tenant was held to exist. But had the Court refused to decide the matters raised by B in the first suit, the second suit would not have been barred—*Kanai* vs. *Soshi*, I. L. R., 6 Cal., 777; *Rughoonath* vs. *Juggut*, I. L. R., 7 Cal., 214; *Mobaruck* vs. *Gobind*, 18 W. R., 61, where the questioni n dispute was reserved; and *Girdhar* vs. *Dayabhar*, I. L. R., 8 Bom., 174; *Becharji* vs. *Pujaji*, I. L. R. 14 Bom., 31.

In *Pahlwan Singh* vs. *Risal*, I. L. R., 4 Alla., 55, the first suit was for four instalments due on a bond with interest from the date of the bond. Defence, interest only ran from date of default. Decree for plaintiff. Second suit for other instalments and interest from date of bond. *Held*, defendant was not at liberty to raise the contention that interest only ran from date of default; and see *Ananta* vs. *Damodhar*, I. L. R., 13 Bom., 25. For a similar decision on the construction of an order in a suit, see *Peareth* vs. *Marriott*, 22 C. D., 182. As to public statutes, see *Commissioners of Revenue* vs. *Harrison*, L. R., 7 H. L., 1.

The verdict of a jury on issues out of Chancery must be read with the pleadings and decree in the Chancery suit in order to see if there is a bar of *res judicata*—*Robinson* vs. *Dhuleep Singh*, 11 C. D., 798. The pleadings in the former suit must be looked at for the same purpose—*Houston* vs. *Marquis of Sligo*, 29 C. D., 448; *Kali Krishna* vs. *The Secretary of State*, I. L. R., 16 Cal., 173; 15 Ind. App., 186; *Ramireddi* vs. *Subareddi*, I. L R., 11 Mad, 500.

In *Niamut Khan* vs. *Phadu Baldia*, I. L. R., 6 Cal., 319, the first suit was Landlord *vs.* Tenant, for enhancement of rent. The defence was (*a*) no notice; (*b*) the tenure is not enhanceable. The finding of the Court was for the defendant on (*a*) and for the plaintiff on (*b*), and the suit was dismissed on the question of notice. The landlord brought another suit for enhancement of rent after notice, and the defendant was held to be precluded by the finding in the former suit from raising the defence that his tenure was not enhanceable. The decision deserves examination, for, though the question of enhancement was put directly in issue and was heard and determined in the former suit, it is difficult to see how it could have been directly *and substantially* in issue, inasmuch as the decree was not based on the finding as to enhancement, but was made in spite of it —*Contra*, *Thakur Magundeo* vs. *Thakur Mahadeo*, I. L. R., 18 Cal., 647. (See the observations of the Judicial Committee in *Run Bahadur Singh* vs. *Lucho Koer*, I. L. R., 11 Cal., at p. 306; *Concha* vs. *Concha*, 11 App. Cas., 541, p. 552; and see *Muttu Kumarappa* vs. *Arumuga*, I. L. R., 7 Mad., 145; *Anusugatai* vs. *Sakharam*, I. L. R., 7 Bom., 464; *Jardine* vs. *Dwarkanath*, 14 W. R., 412.) *Mohan Lall* vs. *Ram Dial*, I. L. R., 2 Alla., 843, is a case of the same kind as that of Niamut Khan. See the judgment of Petheram, C. J., in *Jamailunnissa* vs. *Lutfunnissa*, I. L. R., 7 Alla., 606; and see *Nundoo Lall* vs. *Bidhoomukhy*, I. L. R. 13 Cal., 17; *Magundeo* vs. *Mahadeo*, I. L. R., 18 Cal., 647; and *Gursobhit* vs. *Ramdut*, I. L. R., 5 Cal., 923.

One Cause of Action.—In *Kendall* vs. *Hamilton*, 4 App. Cas., 504, A obtained judgment against B and C for money due to him on a joint contract; but the judgment remained unsatisfied. A then sued B, C and D for the same money, alleging B and C had entered into the contract as agents on behalf of B, C and D. *Held*, that the suit was barred. See also *Nuthoo Lall* vs. *Shanker*, 18 W. R., 458; *Hemendro* vs. *Rajendro-lall*, I. L. R., 3 Cal., 353; *Ramubhoy* vs. *Turner*, I. L. R. 14 Bom., 408. This decision does

not govern the case where the relation between the plaintiff and the defendant is that of surety and principal—*Badeley* vs. *Consolidated Bank*, 34 C. D., 536; nor where the obligation is not joint merely but joint and several—*Dhunput Singh* vs. *Sham Somder*, I. L. R., 5 Cal., 291; *Lawless* vs. *The Calcutta Landing and Shipping Co.*, I. L. R., 7 Cal., 627. See *Becharji* vs. *Putaji*, I. L. R., 14 Bom., 31; *Govinda* vs. *Mana Vikraman*, I. L. R., 14 Mad., 284.

In a suit to reduce an usufructuary mortgage the Court directed possession be given on payment of sum a of money. The money was not paid, and the suit was dismissed. *Held*, it did not bar a subsequent suit for possession, on the ground that the money had been all realized—*Muhammad Samiuddin* vs. *Mannu Lal*, I. L R., 11 Alla., 391. And a suit for possession of property as sub-proprietor or on a statutory right does not prevent a subsequent suit to redeem the same property—*Amanat Bibi* vs. *Imdad Husain*, 15 Ind. App., 106. And see *Luchmiput* vs. *The Land Mortgage Coy.*, I. L. R., 14 Cal., 464.

Not in Issue.—It is the matter in issue not the subject matter of the suit tha forms the essential test of *res judicata*.—*Ananta* vs. *Damodhar*, I. L. R., 13 Bom., 25; if the matter in issue in the second suit was not put in issue in the previous suit, and essential to the decision, the second suit will not be barred—*Concha* vs. *Concha*, 11 App. Cas., 541, p. 552. In *Zemindar of Pittapuram's* case, I. L. R., 2 Mad., 23, the first suit was by a Hindu reversioner against a Hindu widow and the widow's alienee, to set aside the alienation of certain property, and to prevent her from committing waste of that property as well as of another property X, both of which the plaintiff claimed to be entitled to on the death of the widow as the heir of the last full owner. The alienation was set aside, but no issue was raised with regard to X, nor was any evidence offered by the plaintiff, and his suit with regard to it was dismissed. *Held*, that after the death of the widow the plaintiff in the former suit was not debarred from su ng the alienee for possession of X. See *Ram Tunoo Acharjee* vs. *Radha Gobind*, 11 W. R., 407, where the second suit was against a surety who had been a *pro formâ* defendant in a suit by the same plaintiff against the principal debtor. In *Shivram* vs. *Narayan*, I. L. R., 5 Bom., 27, the first suit proceeded on a previous partition which was admitted by the defendants, the only dispute being as to whether the portion claimed by the plaintiff had been allotted to him. The Court found that no partition had taken place, and dismissed the suit. *Held*, a subsequent suit for partition was not barred; and see *Konerrav* vs. *Gurrav*, I. L. R., 5 Bom., 589. In *Sheoraj Rai* vs. *Kashi Nath*, I. L. R., 7 Alla., 247, the matter in issue in the second suit was raised by the defendant (who was also defendant in the first suit), in his written statement in the first suit, but had no bearing on the claim made by the plaintiff therein. See also *Gooroo Churn* vs. *Brija Nath*, 24 W. R., 111; *Becharji* vs. *Pujaji*, I. L. R., 15 Bom., 31.

Incidentally in Issue.—If the matter in issue in the second suit has been only incidentally or collaterally in issue in the first suit, the second suit will not be barred—see *Run Bahadur Singh* vs. *Luch Koer*, I. L. R., 11 Cal., 301. Note the second point decided in *Doorga Prosad Singh* vs. *Doorga Koonwari*, I. L. R, 4 Cal., 190; and see *Mohun Lall* vs. *Luchmun Lall*, 14 W. R., 73. The leading case on this branch of the subject is *Barrs* vs. *Jackson*, L Y. and C., Ch. Cas., 586, the report of which will be found in Appendix II. In *Ram Chunder* vs. *Kashee Mohun*, 21 W. R., 57, A sued B and C (B's judgment-debtor) for a declaration that property attached by B was part of a turuf which A had purchased from C. Dismissed on the ground that A held benamee for C. Then B bought the *rest* of the turuf from C, and sued A and C for possession thereof. *Held*, A not barred on the question of title. In *Moni Roy* vs. *Rajbunsee*, 25 W. R., 393, A sued B for possession of land. Decree for plaintiff on the ground that the boundary line of the village showed the land to be in A's village and not in B's. A sued B for possession of other land, and it was held that the determination of the boundary line in the former suit was only conclusive as to the land then in dispute. In *Moro* vs. *Narayan*, I. L. R., 11 Bom., 355, A sued B for possession of waste lands claiming under a grant in general terms of all the lands of the village, and obtained a decree. In a subsequent suit of A *vs.* B for possession of the cultivated lands of the village, *held* that B was not debarred from disputing A's title. See also *Booa Russoolee* vs. *Nawab Nazim*, 11 W. R., 382; *Hurrehur Mookerjee* vs. *Ooma Moyee*, 12 W. R., 525; *Jardine* vs. *Dwarkanath*, 14 W. R., 412; and *Goopee Mohun* vs. *Hills*, I. L. R., 3 Cal., 789. As to the effect of decisions under the Land Acquisition Act in suits regarding property held under the same title as that acquired by the Government, see *Nobodeep Chunder* vs. *Brojendro Lall*, I. L. R., 7 Cal., 406. As to the effect of a decree for rent on the question of rate of rent, see *Modhosudun* vs. *Brae*, I. L. R., 13 Cal., 300; but see as to the effect of a decision in a rent suit on a suit to redeem—*Radhamadhub* vs. *Monohur*, 15 Ind. App., 756.

In a former Suit.—Plaintiff and defendant appealed separately. The defendant's appeal was first heard, an issue as to title in the land was decided adversely to the defendant, and this decision was treated in the plaintiff's appeal as operating as *res judicata*. *Held*, that although this section did not apply, it was not exhaustive and the principle of *res judicata* applied—*Ram Lal* vs. *Chhab Nath*, I. L. R., 12 Alla., 578; *contra*—

Abdul Majid vs. *Dev Narain*, I. L. R., 16 Cal., 233, and see *Bal Kishan* vs. *Kishan Lal*, I. L. R., 11 Alla., 148.

Where the previous Suit is the basis of the second Suit—In some instances the first suit was dismissed, the Court finding a state of facts which would entitle the plaintiff to relief had he properly framed his suit. In that case a second suit claiming such relief will not be barred. See *Varathayyangar* vs. *Krishnasami*, I. L. R., 10 Mad., 102; where the first suit was for possession, the second for redemption, and a similar decision in *Ramkisto* vs. *Nemy*, W. R., 1864, p. 110. In *Watson* vs. *Dhonendra*, I. L. R., 3 Cal., 6, the first suit was for use and occupation, the second for rent under a lease. In *Shivram* vs. *Narayan*, I. L. R., 5 Bom., 27, and *Konerrav* vs. *Gurrav*, I. L. R., 5 Bom., 589, the first suit was for possession, the second for partition. In *Chooneelal* vs. *Munnoo*, 13 W. R., 343, the first suit was for possession, the second to set aside a sale in execution. In *Naro* vs. *Ramchandra*, I. L. R, 13 All., 326, the first suit was to redeem, the second to eject. See also *Rajah Sheoraj* vs. *Rajcoomar*, 24 W. R., 23; and *Amir* vs. *Nathu*, I. L. R., 8 Alla., 306. And in the second suit, the defendant will not be allowed to contest the propriety of the grounds upon which the first suit was dismissed, he having had the advantage of such dismissal—*Lakshman* vs. *Ram Chandra*, I. L. R., 5 Bom., 48; *Ali Moidin* vs. *Kombi*, I. L. R., 5 Mad., 239; but see *Kudrat* vs. *Dinu*, I. L. R., 9 Alla., 155. See this decision explained in *Sukh Lal* vs. *Bhiki*, I. L. R., 11 Alla., 187. As to the effect of previous decrees not reversed, see *Naranjee Bhikabai* vs. *Dipanmed*, I. L. R., 3 Bom., 3. As to when a decree will be considered to have been superseded and no longer binding, see *Shama Pershad* vs. *Hurro Pershad*, 10 Moore, 203; *Jogesh Chunder* vs. *Kally Churn*, I. L R., 3 Cal., 30; *Mahomed* vs. *Kally Mohun*, I. L. R., 5 Cal., 589; *Narayana* vs. *Narayana*, I. L. R., 13 Mad., 437; *Waghela* vs. *Masludin*, I. L. R., 13 Bom., 330.

"Between the same parties, or between parties under whom they or any of them Claim."—A decree against a Hindu widow will bind the reversionary heirs—*Nand Kuar* vs. *Radha Kuari*, I. L. R., 1 Alla., 283; *Pertabnarain* vs. *Triloknath*, I. L. R., 11 Cal., 186; 11 Ind. App., 207; and *Katama Nachiar* vs. *Shiragunga*, 9 Moore, 543; and a decree against the Kurta of a Mitakshara joint family may bind the whole family—*Narayun* vs. *Pandurang*, I. L. R., 5 Bom., 685; distinguished in *Ram Narain* vs. *Bisheshar*, I. L. R., 10 Alla., 411. A decree against a tenant for life may bind the estate—*Pertabnarain* vs. *Trilokinath*, I. L. R., 11 Cal., 186. A decree against a *vatan* holder—*Radhabai* vs. *Anantrav*, I. L. R., 9 Bom., 198; or against a *Shebait*—*Golab Chand* vs. *Prosono Coomaree*, 20. W. R., 86, or against a Karnem—*Venkayya* vs. *Suramma*, I. L. R., 12 Mad., 235, is binding on his successor. A decree against a Benameedar will bind the real owner — *Khub Chand* vs. *Narain Singh*, I. L. R., 3 Alla., 812; *Gopi Nath Chobey* vs. *Bhugwat*, I. L. R., 10 Cal., 697. As to the effect of a decree against the Karnavan of a tarwad, see *Thenju* vs. *Chimmon*, I. L. R., 7 Mad., 413; *Ittiachan* vs. *Velappan*, I. L. R., 8 Mad., 484. See, however, *Sankaran* vs. *Parvathi*, I. L. R., 12 Mad., p. 437.

A revenue-auction purchaser is not bound by a decree obtained against his predecessor—*Radha* vs. *Rakhal*, I. L. R., 12 Cal., 82, p. 84. The dismissal of a suit brought by a decree-holder under section 283 of the Code of Civil Procedure against the successful claimant will not bar a subsequent suit by the judgment-debtor against the claimant—*Shivappa* vs. *Dod Nagaya*, I. L. R., 11 Bom., 114, p. 82; see also *Guruva* vs. *Subbarayudu*, I. L. R., 13 Mad., 366. A decree against a mortgagor will not bar a mortgagee whose title arose prior to suit—*Sita Ram* vs. *Amir Begam*, I. L. R., 8 Alla., 324; *Rambrohmo* vs. *Bungsi*, 11 C. L. R., 122. A decree against a registered tenant will not bind the real owner unless he claims through the registered tenant—*Ram Narain* vs. *Ram Coomar*, I. L. R., 11 Cal., 562. After obtaining a decree for redemption, the mortgagor sold his interest in the mortgaged property. *Held*, the assignee could bring another suit for redemption—*Karuthasami* vs. *Jaganatha*, I. L. R., 8 Mad., 478; *Roy Dinken* vs. *Shee Golam*, 22 W. R., 172; but see in Bombay, *Chudasama* vs. *Mahani*, I. L. R. 16 Bom., 243. A decree in favour of a ryot against a lessee will not bar a suit by the lessor against the ryot—*Shaikh Wahid Ali* vs. *Naseeb Toorako*, 24 W. R., 128. A previous decision against one member of family suing to recover his own share of certain property will not bar a suit by the receiver in the name of the whole family to recover the whole property—*Juggonath* vs. *Hogg*, 12 W. R. 117; nor a subsequent suit by another member of the family—*Jogendro* vs. *Furindro*, 14 Moore, 367; nor does a suit for maintenance against a father bar a second suit for maintenance against an elder brother after the father's death, where the maintenance is claimed in a different right—*Ahmad Hossein* vs. *Nihaluddin*, I. L. R., 9 Cal., 945. In *Ananda* vs. *Paliyll*, I. L. R., 5 Mad., 9, the plaintiff sued his tenant (B) and B's alleged under-tenant (C) for possession. C's defence was that he was in possession as tenant of D and not of B, and the suit was dismissed as against him. *Held*, that a second suit for possession against C and D was not barred. But see *Gopal Dass* vs. *Gopee Nath*, 12 C. L. R., 38.

As to judgments *in rem*, see *Kanhya* vs. *Radha*, 7 W. R., 338; *Jogendro* vs. *Funindro*, 14 Moore, 367. A decree of the Probate Court establishing a will is only conclusive *in rem*

as to those findings which are necessary for the decree—*Concha* vs. *Concha*, 11 App. Cas., 541, and to that extent only is a decree against an executor binding on the legatees under a will—*Concha* vs. *Concha*, 11 App. Cas., 541; and the latter are entitled to show that the decree has been fraudulently obtained—*Ahmedbhoy* vs. *Vallubhoy*, I. L. R., 6 Bom., 603.

"In a Court of Jurisdiction competent to try such subsequent Suit or the Suit in which such issue has been subsequently Raised."—This clause did not appear in Act X of 1877. It was inserted to counteract the effect of the decision of the High Court of Bengal in *Run Bahadur Sing* vs. *Lucho Koer*, I. L. R., 6 Cal., 406, but was unnecessary. See S. C. on appeal, 12 Ind. App., 23; I. L. R., 11 Cal., 301. *Edun* vs. *Bechun*, 8 W. R., 175, is still the leading case. There Edun sued Bechun for rent in arrear, Rs. 3,500, in the Collector's Court, under section 23, Act X of 1859. Defence, that only Rs. 756 were due, the remainder of the Rs 3,500, having been applied in reduction of a bond-debt due from Edun to Bechun. The Collector found the bond to be a genuine bond, and gave Edun a decree for Rs. 756 only, which decree was upheld by the High Court on special appeal. Bechun then sued Edun in the Civil Court to recover the amount remaining due on the bond; Edun denied that the bond was genuine, and it was held that she was entitled to raise that defence notwithstanding the finding of the Collector in the previous suit. The grounds of the decision are—(1) the two Courts were not Courts of concurrent jurisdiction; and (2) the genuineness of the bond was only incidentally or collaterally in issue in the suit for rent. The same point was decided in *Tekaitnee Goura Coomaree* vs. *The Bengal Coal Co.*, 13 W. R., 129. Similar decisions were given in *Poholi* vs. *Fukeer Chunder*, 12 W. R., 290; and in *Inayat Khan* vs. *Rahmat Bibi*, I. L. R., 2 Alla., 97, where the first suits were cognizable by a Small Cause Court, and the second were not. (See also *Manappa* vs. *McCarthy*, I. L. R., 3 Mad., 192.) And in *Run Bahadur Singh* vs. *Lucho Koer*, I. L. R., 11 Cal., 301, where the first suit was brought in the Moonsiff's Court. Where A sued B and C on a joint and several promissory note, and the claim was decreed against C, but dismissed against B on the ground of want of jurisdiction; a subsequent suit on the note against B was not barred—*Sreeram Mitter* vs. *Nobin Kisto*, 22 W. R., 290. A sued B in the Moonsiff's Court for possession of a house. C who intervened and was made a defendant claimed the house under a deed of gift of that and other property. The suit was dismissed in the Court of first instance, but decreed in appeal. C then sued A in the Subordinate Judge's Court (the Moonsiff's Court not having jurisdiction) to recover all the property included in the deed of gift; *held*, that the claim to the house but not to the other property was *res judicata*—*Pathuma* vs. *Solimamma*, I. L. R., 8 Mad., 83.

On an application for execution of a decree, the Court is not competent to try finally whether the applicant is the legitimate son of the deceased decree-holder, and a decision of the question on such application will not prevent its being raised in a subsequent suit—*Abedooninna* vs. *Ameeronnissa*, 4 I. A., 75.

The two Courts must have concurrent jurisdiction as regards the pecuniary limit as well as the subject-matter—*Misir* vs. *Sheo Baksh*, I. L. R., 9 Cal., 43; 9 Ind. App., 197;—*Run Bahadoor* vs. *Lucho*, I. L. R., 11 Cal., 301; 12 Ind. App., 27; *Pathuma* vs. *Salimamma*, I. L. R., 8 Mad., 83; and the extent of the jurisdiction depends on that of the Court in which the first suit was instituted—*Mahomed* vs. *Beer Chunder*, I. L. R., 8 Cal., 470; *Bholabhai* vs. *Adesang*, I. L. R., 9 Bom., 75; *Govind* vs. *Dhondbarav*, I. L. R., 15 Bom., 104, at the time the first suit was brought—*Gopi Nath* vs. *Bhugwat*, I. L. R., 10 Cal., 697; *Rughunath* vs. *Issur Chunder*, I. L. R., 11 Cal., 153. Where A sued B in the Assistant Judge's Court to recover Rs. 120, money wrongfully exacted from the plaintiff as enhanced rent, and the suit was dismissed on the ground that the plaintiff was bound to pay the enhanced rent; that decision did not bar A from bringing a subsequent suit in the District Judge's Court to recover Rs. 689 on similar allegations—*Bholabhai* vs. *Adesang*, I. L. R., 9 Bom., 75.

Declaratory Decree.—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property—*Ganapati* vs. *Chathu*, I. L. R., 12 Mad., 223.

Revenue Courts.—The Revenue Courts under Act X of 1859 were Courts of limited jurisdiction, and could not make binding declarations of right or finally determine questions of title—*Hurri Sunker* vs. *Muktaram*, 15 B. L. R., 238; 24 W. R., 154; but the Courts trying rent suits under Act VIII (B. C.) of 1869 had full power to do so within the limits of their jurisdiction as Civil Courts—*Mohima Chunder* vs. *Asradha*, 15 B. L. R., 251, note; *Bemolasoondury* vs. *Punchanun*, I. L. R., 3 Cal., 705; *Govind Chunder Koondoo* vs. *Taruck Chunder*, I. L. R., 3 Cal., 145; *Hussun Lal* vs. *Chundee Dass*, I. L. R., 4 Cal., 686; see also *Dinomoyi* vs. *Anungo*, 4 C. L. R., 599.

A decision of the Revenue Courts, if on a matter within their jurisdiction, will bar a suit in the Civil Court in respect of the same matter. See *Amir Singh* vs. *Naimati*, I. L. R., 9 Alla., 388; *Ragava* vs. *Rajah Gopal*, I. L. R., 9 Mad., 39; *Lodhi* vs. *Ishri*, I. L. R., 6 Alla., 295; *Amrit* vs. *Balbir*, I. L. R., 6 Alla., 68; *Mahip* vs. *Cholu*, I. L. R., 5 Alla., 429; *Radha* vs. *Rai*, I. L R., 5 Alla., 245; *Wazir* vs. *Gauri*, I. L. R., 4 Alla., 412; *Har Sahai* vs. *Maharaj*, I L. R., 2 Alla., 294; *Shimbhu* vs. *Bachcha*, I. L. R., 2 Alla., 200; *Gunga* vs. *Beni*, I. L. R., 7 Alla., 148; *Tika* vs. *Khuda*, I. L. R., 7 Alla., 191;

Venkatachalapati vs. *Krishna*, I. L. R., 13 Mad., 287; and see *Gokhul Sahu* vs. *Gobind Sahu*, I. L. R., 17 Cal., 721. Otherwise not—*Ajudhia* vs. *Sheodin*, I. L. R., 6 Alla., 403; *Waris* vs. *Muhammad*, I. L. R., 8 Alla., 552; *Ashgar* vs. *Ihanda*, I. L. R., 2 Alla., 839; *Harika* vs. *Sri Vidya*, I. L. R., 7 Mad., 61.

Civil Court's Jurisdiction under Special Acts.—An award as to the apportionment of compensation under Act X of 1870, section 40, is final and binding on the parties in whose presence it is passed—*Nilmoney* vs. *Rambundhoo*, I. L. R., 4 Cal., 757; but a decision under section 39 of Act X of 1870, is not *res judicata* in respect of the title to portions of the property not taken up under the Act?—*Nobodip* vs. *Brojendro*, I. L. R., 7 Cal., 406 (compare *Ram Chunder* vs. *Madho*, I. L. R., 12 Cal., 484, 12 Ind. App., 188; where the first decision was passed in the ordinary jurisdiction of a Civil Court). The dismissal of an application under section 63 of the Administrator-General's Act II of 1874, for an order for the payment of money—*Smith* vs. *Secretary of State*, I. L. R., 3 Cal., 340; and the dismissal of an application under section 55 of the National Debt Act, 1870, for the transfer of stock—*In re May*, 28 C. D., 516, will bar a subsequent application. Otherwise where an application for the guardianship of a minor is made under Act IX of 1860—*Nehalo* vs. *Nawal*, I. L. R., 1 Alla., 428, the decision would not prevent a regular suit for recovery of possession of the minor—*Krishna* vs. *Reade*, I. L. R., 9 Mad., 31.

Criminal Courts.—The finding of a Criminal Court, that A had abducted B is not *res judicata* in an action for damages brought against A by B's father—*Ram La* vs. *Tula Ram*, I. L. R., 4 Alla., 97. The adjudication by a Magistrate that a street is a highway does not bar a regular suit to declare it is private property. See the *Q.* vs. *Hutchins*, 6 Q. B. D., 300; but his decision as to possession under section 530 of the Code of Criminal Procedure is final—*Lillu* vs. *Annaji*, I. L. R., 5 Bom., 387.

Foreign Court—The word "Court" includes a foreign Court—*Balabhat* vs. *Narhabhat*, I. L. R., 13 Bom., 224.

Heard and Decided.—If the matter in issue in the first suit has been heard and decided it is a bar although the subject matter is different—*Radhamadhub* vs. *Monshur* 15 Ind. App., 97; *Ananta* vs. *Damodhar*, I. L. R., 13 Bom., 25; but if it has not been heard and decided, the previous suit will not be a bar—*Becharji* vs. *Pujaji*, I. L. R., 14 Bom., 31; *Radha Prasadh* vs. *Lal Sahab*, I. L. R., 13 Alla., 53, p. 62; 17 Ind. App., 150; *Shaik Saheb* vs. *Mahomed*, I. L. R., 13 Mad., 510. Thus, where a regular suit under section 283 of this Code has been dismissed on the ground that the attachment complained of had been removed, a second suit on title under section 283, after and in consequence of a second attachment will not be barred—*Kasinath* vs. *Ramchandra*, I. L. R., 7 Bom., 408, and see *Ibrahembhai* vs. *Kabulabhai*, I. L. R., 13 Bom., 72. Where, on remand, none of the parties appeared on the day fixed for hearing—*Roghonath* vs. *Ram Coomar*, 14 W. R., 81; or where the first suit was dismissed under section 27, Act VIII (B. C.) of 1869—*Brindabun* vs. *Dhununjoy*, I. L. R., 5 Cal., 246 (as to the present law see *Ramdhan* vs. *Ram Kumar*, I. L. R., 17 Cal., 926) or under section 10, cl. (iii) of the Court Fees Act—*Muhammed* vs. *Nabian*, I. L. R., 8 Alla., 282; or for default in paying fees; but not under section 158, *infra*—*Shaikh Saheb* vs. *Mahomed*, I. L. R., 13 Mad., 510; or under section 102, *post*—*Chand Koer* vs. *Partab Singh*, 15 Ind. App., 156; or under section 381 of this Code—*Rungrav* vs. *Sedhi Mahomed*, I. L. R., 6 Bom. 482; or for non-joinder of parties—*Pursun* vs. *Pornanund*, 21 W. R., 272; or for multifariousness—*Futteh Singh* vs. *Luchmee Kooar*, 21 W. R. 105; or because the property sued for was wrongly described in the plaint—*Shokhee* vs. *Mehdee*, 9 W. R., 327; or for want of notice under section 132, Act VI of 1882—*Ramireddi* vs. *Subbareddi*, I. L. R., 12 Mad., 500, the subsequent suit was not barred. See also *Nanda*, vs. *Bonomali*, I. L. R., 11 Cal., 544. See the cases collected under *Watson* vs. *The Collector of Rajshaye*, *infra*.

But in *Kudrat* vs. *Dinu*, I. L. R., 9 Alla., 155, A sued B for exclusive possession of certain lands or (in the alternative) for joint-possession. Issues were framed, and the case was tried. The third issue was whether the plaintiff could claim alternative relief. On this issue alone judgment was given, and the suit dismissed. *Held*, a subsequent suit for joint-possession was barred as *res judicata*. See this decision explained in *Sukh Lal* vs. *Bhikhi*, I. L. R., 11 Alla., 187; *Ganesh* vs. *Kalka*, I. L. R., 5 Alla., 59b. And when a suit was wholly dismissed, but the decree contained a clause giving liberty to sue again for one-third of the subject-matter: *Held*, the lease was void and the decision operated as a *res judicata*—*Sukh Lal* vs. *Bhikhi*, I. L. R., 11 Alla., 187; but see *Avala* vs. *Kappes*, I. L. R., 8 Mad. 77.

In *Jenkins* vs. *Robertson*, L. R., 1 H. L.; S. C., 117, the first suit was brought on behalf of the public for a declaration that the public had a right of way over the defendant's land, and a consent decree was passed to the effect that the public had not a right of way. A second suit identical with the first *held* not barred. See also *Keshava* vs. *Rudran*, I. L. R., 5 Mad., 259, where the first suit was decided on the oath of the plaintiff with defendant's consent; and see *Thenju* vs. *Chimmu*, I. L. R., 7 Mad., 413.

In *Parthasaradi* vs. *Chinna*, I. L. R., 5 Mad., 304, the first suit was brought by members of the Tenkalai sect against the Vadakalai sect, to have the idols of the defendants removed from a particular spot, and to prohibit them from celebrating festivals and erecting any temple in the village for the worship of their idols. Decree, that the

defendants be prohibited from erecting a temple or instituting public worship on the piece of ground objected to by the plaintiffs, and which lay within the range of their temple, that is to say, within the usual range of the processions conducted in connection with the temple worship. In a subsequent suit for the removal of a temple which the defendants had built on another piece of ground (their own property), within "range" of plaintiffs' temple. *Held*, that the former decree was not *res judicata*.

Where a matter has been heard and determined, and a decree obtained by plaintiff which owing to his own fault cannot be executed, a subsequent suit will not lie—*Hossein* vs. *Musund*, 18 W. R., 261. Similarly, where the execution of the decree has become barred by limitation—*Ram Jus* vs. *Ram Narain*, 2 Alla., 382.

In *Watson* vs. *The Collector of Rajshahye*, 13 Moore, 160, the plaintiff sued for possession. After issues were framed, the plaintiff failed to produce evidence in proof of his claim, and the suit was dismissed. *Held*, that a second suit for the same relief was barred as *res judicata*. See also *Sahadeo* vs. *Nokhid*, 15 W. R., 573; *Venkatachatam* vs. *Mahalakshamamma* I. L. R., 10 Mad. 272; *Mofizooddeen* vs. *Amooddeen*, 23 W. R., 58; *Kartick Chunder* vs. *Sridhar*, I. L. R., 12 Cal., 563.

Jurisdiction.—Where the first suit has been dismissed on the ground of jurisdiction, the second suit will not be barred—*Ram Gobind* vs. *Mungur*, 13 C. L. R., 83; *Lakshman* vs. *Chandra*, I. L. R., 5; Bom., 48; even though the plaintiff might have given the Court jurisdiction by obtaining a certificate under the Pensions Act of 1871—*Pirtali* vs. *Tulja*, I. L. R., 3 Bom., 223; or by applying to the High Court—*Subba* vs. *Rama*, 3 Mad., 273; or to the Collector—*Pattaravy* vs. *Andimula*, 5 Mad., 419. But see *Hari*, vs. *Ganpatrao*, I. L. R., 7 Bom., 272.

Nominal Party: no Relief.—And where in a suit for redemption it was held that A was not a necessary party and under no obligation to make a defence, this decision did not bar a plaintiff claiming through A following the property—*Pattappa* vs. *Timmaji*, I. L. R., 14 Bom., 176, and the same rule applies if the party is merely nominal, against whom no relief is asked—*Rahmubhoy* vs. *Turner*, I. L. R., 14 Bom., 408. Where a suit was brought against two defendants, and the liability of one only was determined, and a decree given against him, a second suit against the other defendant was held not to be barred—*Shib Nath* vs. *Nobo Kissen*, 21 W. R., 189. Where the name of the intervenor in a suit was ordered to struck off the record, but by mistake was not, a subsequent suit by the intervenor will not be barred—*Kales Coomar* vs. *Pran Kishor*, 18 W. R., 29; nor will a subsequent suit be barred where the decree in the first suit expressly reserves all questions between the intervenor and the plaintiff in the second suit—*Mobaruck* vs. *Gobind*, 18 W. R., 61. See also *Kanai* vs. *Soshi*, I. L. R., 6 Cal., 777; *Rughoonath* vs. *Juggut*, I. L. R., 7 Cal., 214; *Gridhur* vs. *Dayabhar*, I. L. R., 8 Bom., 174; but see *Sukh Lall* vs. *Bhikhi*, I. L. R., Alla., 187. As to the effect of a decree against the wrong party, see *Webb* vs. *Wright*, 8 App. Cas., 318, p. 321.

"**Interlocutory orders, and orders in Execution-proceedings.**"—These are, if not appealed from binding on the parties to the suit in all subsequent proceedings in that suit, on principles analogous to those of *res judicata* strictly so-called. Thus, a decision declaring (though erroneously) that an application for execution is not barred by limitation is final if not appealed from—*M. igul Pershad* vs. *Grija Kant*, I. L. R., 8 Cal. 51; 8 Ind. App., 123; *Manjunath* vs. *Venkatesh*, I. L. R., 6 Bom., 55; *Sher Singh* vs. *Daya Ram*, I. L. R., 13 Alla., 564,; and a construction put upon a decree in execution-proceedings is binding—*Kali Mundul* vs. *Kader*, 6 C. L. R., 215; *Huro* vs. *Jugobundhoo*, I. L. R., 6 Cal., 203; *Ram Kirpal* vs. *Rup*, I. L. R., 6 Alla., 269: 11 Ind. App., 37; *Pearsh* vs. *Marriott*, 22 C. D., 182; and cannot be set a side at a later stage of the proceedings—*Bani Ram* vs. *Nanhumal*, I. L. R., 7 Alla., 102; 11 Ind. App., 181; but the effect of the previous order will be confined to the point actually contested—*Sheik Budan* vs. *Ramchandra*, I. L. R., 11 Bom., 537; *Dinkes* vs. *Hari*, I. L. R., 14 Bom., 206. If a judgment-debtor allows joint decree-holders to issue out separate execution, he cannot subsequently object that the application was not in accordance with law—*Nanda Rai* vs. *Raghunandn*, I. L. R., 7 Alla., 282; and where a Judge has issued a sale certificate, his successor should not decide that the order was illegal—*Vithal* vs. *Vithojirav*, I. L. R., 6 Bom., 586.

Where an interlocutory order or order in execution properly so-called has not been made, and the Court merely declined to entertain the application, a subsequent application will not be barred—*Delhi Bank* vs. *Orchard*, I. L. R., 3 Cal., 47; and see *Gour Moni* vs. *Jugut Chandra*, I. L. R., 17 Cal., 57; *Hurosoondarry* vs. *Jugobundhoo*, I. L. R., 6 Cal., 203, and although a Judge cannot return an order for discovery made by his predecessor, he can issue new orders according to circumstances—*Presney* vs. *Mayor*, W. N., 1883, p. 114; and see *Birmingham Land Coy.*, vs. *North Western Ry.*, 34 C. D., 261, p. 277.

Co-Defendants.—"Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication—*Cottingham* vs. *Earl of Shrewsbury*, 3 Hare, 627; and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiffs and the defendants.

But for this effect to arise there must be a conflict of interests amongst the defendants, and a judgment defining the real rights and obligations of the defendants *inter se*" —West, J., in *Ramchandra* vs. *Narayan*, I. L. R., 11 Bom., 216. No such adjudication can take place where the plaintiff's suit has wholly failed—*Kevan* vs. *Crawford*, 6, C. D., pp. 41, 42. See accordingly—*Brojo Behari* vs. *Kedar Nath*, I. L. R., 12 Cal., 580, and cases there cited; *Bhagwant* vs. *Tej Koar*, I. L. R., 8 Alla., 91 (*Bissorup* vs. *Gorachand*, I. L. R., 9 Cal., 120, is of doubtful authority). In *Surender Nath* vs. *Brojo Nath*, I. L. R., 13 Cal., 352; and *Khelut* vs. *Kishen*, 16 W. R., 128, the first suit, though decreed in favour of the plaintiff, was *held* not to cause a *res judicata* as between the defendants. See, however, *Shadal Khan* vs. *Aminullah Khan*, I. L. R., 4 Alla., 92, (compare *Bhagwant* vs. *Tej Kuar*, I. L. R., 8 Alla., 91). There, A (a Mahommedan widow of B) sued for her share in B's estate, making her son C a defendant. The defendants other than C, (who supported the plaintiff's claim,) denied that the plaintiff had been married to B. The suit was decreed in favour of the plaintiff, the Court finding that she was the widow of B. In a subsequent suit by C against his co-defendants in the former suit, *held* that the question, whether A was the widow of B, was *res judicata*; similarly, *Venkayya* vs. *Narasamma*, I. L. R., 11 Mad., 204. See *Chandu* vs. *Kunhamed*, I. L. R., 14 Mad., 324. As to the effect of a decree for partition, see *Sheikh Koorshed* vs. *Nubbee*, I. L. R., 3 Cal., 551; and *Himat Ali* vs. *Wdli-un-nessa*, I. L. R., 12 Alla., 506. See the "CO-DEFENDANTS," section 147.

Explanation II.—In a suit on a mortgage bond, the mortgagors set up a specific agreement to have the rents due by the mortgagee set off as against the debt. The mortgagors failed, and the mortgagee obtained relief without any deduction of rents. The mortgagors subsequently got decrees for rents. The mortgagee sold the property under their decree and purchased with sanction of the Court. The mortgagors then sued to set aside the sale on the ground that they had an equity to have an account taken for the years to 1871 to 1874 and the rents credited against the debt. It was *held* that their equity should have been raised in the former suit.—*Mahabir Pershad* vs. *Macnaghten*, 16 Ind. App., 107; I. L. R., 16 Cal., 682. See also the remarks of Sir Barnes Peacock in the case of *Thakur Shankar* vs. *Dya Shankar*, 15 Ind. App., 66, p. 71.

A redemption decree simply declared the amount of the debt due under the mortgage; but provided no time within which it should be paid or the mortgage foreclosed. Subsequenty the mortgagee sued to recover his mortgage debt personally from the mortgagors and to sell the mortgaged property. *Held*, the claim to sell was prohibited by this explanation—*Maloji* vs. *Sagaji*, I. L. R., 13 Bom., 567; and see *Chudasama* vs. *Mahani*, I. L. R., 16 Bom., 243.

Explanation III.—In *Lutesfoonissa* vs. *Luckeesmonee*, Marsh, 93, the first suit was for possession of land and wasilat from 1253, the date of plaintiff's dispossession. Decree for possession, and wasilat from the filing of the plaint. Second suit for wasilat from 1253 to filing of plaint, held barred as *res judicata*. A suit for possession of property and his suit was dismissed, though he had proved a title to one-third with leave to bring another suit for the one-third. It was *held* that the leave was inoperative, and the decision was *res judicata* in regard to the one-third—*Sukh Lal* vs. *Bhikhi*, I. L. R., 11 Alla., 187; and see note under section 373, *post*. A suit for possession and mesne profits until recovery of possession was decreed giving plaintiff possession with mesne profits up to the date of the suit only. It was *held* not to bar a subsequent suit for mesne profits accruing after the date of suit—*Mon Mohan* vs. *The Secretary of State*, I. L. R., 17 Cal., 968; and see *Ramabhadra* vs. *Jagannatha*, I. L. R. 14 Mad., 328. A sued for future maintenance, but in the decree founded on a compromise the date of payment was not given, and it could not be executed. It was *held* a second suit would not lie.—*Venkanna* vs. *Aitamma*, I. L. R., 12 Mad., 183. See *Denobundhoo* vs. *Kristomonee*, I. L. R., 2 Cal., 152; *Becharji* vs. *Pujaji*, I. L. R., 14 Bom., 31. See in connection with this last case, *Fatmabai* vs. *Aishabai*, I. L. R., 13 Bom., 242.

Explanation IV.—*Final Decision.*—"When the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata* and becomes *res sub-judice*; and if the Appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment were reversed by the Court of Appeal. This very clearly appears from Explanation 4, section 13 of the Code of Civil Procedure, Act X of 1877"—Melvill, J., in *Nidvaru* vs. *Nilvaru*, I. L. R., 6 Bom., 110; where the first suit, A vs. B, for damages for cutting down trees, was dismissed on the grounds (1) the land did not belong to A, and (2) B did not cut down the trees. A appealed, but his appeal was dismissed on the ground that he had failed to prove that B had cut down the trees. *Held* that a subsequent suit A vs. B, for possession of the land on which the trees had stood was not barred as *res judicata*, and see *Balkishan* vs. *Kishan Lal*, I. L. R., 11 Alla., 148. For similar decisions, see *Gungahbishen* vs. *Roghonath*, I. L. R., 7 Cal., 381; *Emamoodeen* vs. *Futteh Ali*, 3 C. L. R., 447; *Chunder Coomar* vs. *Shibo Sundari*, 11 C. L. R., 22;

Mokoond vs. *Jonardun*, 15 W. R., 208; but see also *Nund Kishore* vs. *Huree Pershad*, 13 W. R., 64; and the cases referred to under *Watson* vs. *Collector of Rajshaye*, *supra*.

Ex-Parte.—An *ex-parte* decree is a final decree—*Modhusudun* vs. *Brae*, I. L. R., 16 Cal., 300.

Explanation V.—*Private right claimed in Common.*—In *Arlett* vs. *Ellis*, 7 B. and C., 346, A sued B for damages for trespassing on a piece of land of the plaintiff's, and B's defence was that he was a tenant of the manor of Cromdall, and that he and every other tenant of the manor was entitled to pasture his and their cattle on the said piece of land, and that this was the trespass complained of. A judgment for the plaintiff in a case of that kind in England would be admissible in evidence in a subsequent action between A and any other tenant of the manor, in respect of the same right of pasturage, but would not be *res judicata*—Taylor on Evidence, 4th ed., 1419. A, therefore, to prevent being harassed by the other tenants of the manor and to prevent being compelled to bring separate actions against each, would file a bill in Equity, called a *bill of peace*, stating the claim of the tenant, that he had judgments in his favour showing the claim was unfounded, that the tenants were too numerous to bring before the Court, and praying that the claim be declared unfounded in equity, and that the defendant and all the other tenants should be restrained from asserting their pretended right. If the original judgment at law had been in favour of the defendant, one or more of the tenants in behalf of themselves and others would take a similar course, and decrees in these equity suits would bind or, as the case might be, be taken advantage of by the absent parties. (Under the modern English practice there would, of course, be no necessity to proceed at law in the first instance.) Other instances of bills seeking relief on behalf of or against parties not before the Court will be found in *Cockburn* vs. *Thomson*, 16 Vesey, 32, and notes to section 30, *post*. In all suits of this kind it clearly appeared that the suit was brought by or against one or more parties personally and on behalf of or as representing a large number of persons not before the Court. If it be held that Explanation V refers to suits of this nature (see *Kalishunkur* vs. *Gopal Chunder*, I. L. R., 6 Cal., 49; *Thanakoti* vs. *Muniappa*, I. L. R., 8 Mad., 496; *Hazir* vs. *Sonamonee*, I. L. R., 6 Cal., 31; and *Devi* vs. *Kelu*, I. L. R., 10 Mad., 79); then as no suit of that kind can be maintained without the leave of the Court first had and obtained, we have an easy test by which to ascertain whether any particular case comes within this Explanation.

It has been held not to apply to a suit for a watercourse—*Kalishunkur* vs. *Gopal Chunder*, I. L. R., 6 Cal., 49; nor to a decree against one of several co-sharers in a property—*Hazir* vs. *Sonamonee*, *supra*. But see *Chandu* vs. *Kunhammed*, I. L. R., 14 Mad., 324. It was applied in *Madhavan* vs. *Keshavan*, I. L. R., 11 Mad., 191; where successive suits were brought by different trustees of certain property. As to the position of the Karnavan of a Malabar tarwad, see *Sri Devi* vs. *Kelu*, I. L. R., 10 Mad., 79; *Thanakati* vs. *Muniappa*, I. L. R., 8 Mad., 496; *Subramanyan* vs. *Gopala*, I. L. R., 10 Mad., 223; *Shan Karan* vs. *Kesavan*, I. L. R., 15 Mad. 6.

When foreign judgment no bar to suit in British India.

14. No foreign judgment shall operate as a bar to a suit in British India—

(*a*) if it has not been given on the merits of the case:

(*b*) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India:

(*c*) if it is in the opinion of the Court before which it is produced contrary to natural justice:

(*d*) if it has been obtained by fraud:

(*e*) if it sustains a claim founded on a breach of any law in force in British India.

"Where a suit is instituted in British India on the judgment of any foreign Court in Asia or Africa except a Court of Record established by Letters Patent of Her Majesty or any predecessor of Her Majesty or a Supreme Consular Court established by an Order of Her Majesty in Council, the Court in which the suit is instituted shall not

be precluded from inquiry into the merits of the case in which the judgment was passed." [Act VII of 1888, section 5.]

This section applies to H. C. and P. S. C. C.

Effect of Foreign Judgment : Parties.—A foreign judgment decreeing a sum of money is in England only evidence of the debt, and if sued on, the plaintiff cannot join the debtors and others on the allegation that the latter were trustees for the former —*Hawkaford* vs. *Giffard*, 12 App. Cas., 122, but in India the judgment creates a *res judicata*—*Bababhat* vs. *Narharbhat*, I. L. R., 13 Bom., 224, and see *Kandasami* vs. *Moidin*, I. L. R., 2 Mad., 337, and compare *Trafford* vs. *Blanc*, 36 C. D., 600.

Bar an Action.—The mere fact that a suit is pending in a foreign Court at the time the suit is instituted in this country is no bar—*The Delta*, 1 P. D., 393; *Seal* vs. *Chatterjee*, 1 Taylor, 418. A foreign judgment on matters of form only will not bar a suit in this country on the merits—*The Delta*, 1 P. D., 393; nor will an *ex-parte* decree against a native of British India, not residing within the jurisdiction of the Court on a cause of action arising in British India—*Hinde* vs. *Ponnath*, I. L. R., 4 Mad., 359: but see *Bangarusami* vs. *Balasubramanian*, I. L. R., 13, Mad., 496. An action cannot be maintained on the decree of a foreign Court against the drawer of a bill neither domiciled, resident, nor possessing property in the foreign State, who is found to have casually resorted thither and drawn the bill for a sum found due to his creditor—*Mathappa* vs. *Chellappa*, I. L. R., 1 Mad., 196.

Execution—The judgment of a foreign Court obtained on a decree in British India, is no bar to execution of the original decree—*Fakuruddeen Mahomed* vs. *The Official Trustee*, I. L. R., 7 Cal., 82.

Suit on Judgment.—In Bombay no suit was maintainable, founded upon the judgment of a Court of a Native State. Such judgment could only be enforced as provided by section 434 of the Code of Civil Procedure—*Bhavanishankar* vs. *Pursadri*, I. L. R., 6 Bom., 292; 4 *Himmatlal* vs. *Shivajirav*, I. L. Rep., 8 Bom., 593; but in Madras the opposite view prevailed—*Sama Rayar* vs. *Annamalai*, I. L. R., 7 Mad., 164. The last paragraph was added to this section to enforce the view of the Madras Court. See section 229B, *post*.

The judgment sued on must be final. That is to say final in the sense of being a binding final decision as to the rights of the parties—*Nouvion* vs. *Freeman*, 37 C. D., 244; and it is not enforceable if the Court had not jurisdiction, or it was obtained by fraud, even if the question of fraud had been investigated by the foreign tribunal—*Abailoff* vs. *Oppenheimer*, 10 Q. B. D., 295, or, it seems, had been known and not raised—*Nouvion* vs. *Freeman*, 35 C. D., p. 720; 37 C. D., 244.

The rule in Story (Conf. of Laws) is, that a foreign judgment, to be binding, must have finally determined the matters in dispute, and must be an adjudication upon the actual merits; they may be impeached on the ground that the foreign Courts had no jurisdiction, whether over the cause, over the subject-matter, or over the parties, or that the defendant never was summoned to answer or had an opportunity of making his defence, or that the judgment was fraudulently obtained. This was adopted by the Calcutta High Court—*Sreshuree* vs. *Gopal Chunder*, 15 W. R., 500; see also *Messina* vs. *Petrocochino*, L. R., 4 P. C., p. 157; and the rules laid down in *Rousillon* vs. *Rousillon*, 14 C. D., 351; *Edulji* v. *Manekji*, I. L. R., 11 Bom., 241; *Bangarusami* vs. *Balasubramanian*, I. L. R., 13 Mad., 496. A suit was brought against the defendants in the French Court at Mahé, and they made no objection to the jurisdiction of the Court, but appeared and defended the suit, which was decreed against them. In a suit upon the decree of the French Court, the defendants pleaded that it had been passed without jurisdiction, as they had always lived in British territory. *Held* by the Madras High Court, that the defendants having taken the chance of a judgment in their favour, which would, if obtained, have relieved them from all liability, they were equitably estopped from afterwards pleading want of jurisdiction—*Kandoth* vs. *Neelancherayil*, 8 Mad., 14; *Fazal* vs. *Gafar*, I. L. R., 15 Mad., 83; *Nallatambi* vs. *Ponnusami*, I. L. R., 2 Mad., 400, p. 404; *Kaliyugam* vs. *Chokalinga*, I. L. R., 7 Mad., 105. See also *Kandasami* vs. *Moidin Sahib*, I. L. R., 2 Mad., 337. But if a party, sued in a foreign Court not having jurisdiction, protest against the jurisdiction, he does not voluntarily submit, although he may have appealed from the decision of the first Court without repeating his objection, and the judgment cannot be sued upon in British India—*Parry & Co.* vs. *Pillai*, I. L. R., 2 Mad., 407. And even if a Court has jurisdiction to try cases between natives and foreigners, arising out of transactions in a foreign country, yet if the cause of action does not arise within the local limits of the Court, nor the defendant reside in it when the action is brought, the judgment is not a bar—*Hinde* vs. *Ponnath*, I. L. R., 4 Mad., 359.

For the effect of contracts for the compounding of criminal offences against the law of a foreign country, see *Subraya Pillai* vs. *Subraya*, 4 Mad., 14. As to irregularity in procedure or limitation in a foreign country, see *Nallatambi Mudaliar* vs. *Pillai*, I. L. R., 2 Mad., 400.

CHAPTER II.

OF THE PLACE OF SUING.

Court in which suit to be instituted.

15. Every suit shall be instituted in the Court of the lowest grade competent to try it.

Act VIII of 1859, section 6. This section applies to H. C. and P. S. C. C.

Court of the Lowest Grade Competent.—This means a Court to which the Civil Procedure Code is applicable—*Mirkhan* vs. *Kadarsa*, I. L. R., 13 Mad., 145. It is the actual value of claim or subject-matter of the claim by the plaintiff that *primâ facie* determines jurisdiction — *Lakshman Bhatkar* vs. *Babaji*, I. L. R., 8 Bom., 31; but formerly the stamp fee was governed by a different principle—*Kirty Churn* vs. *Aunath*, I. L. R., 8 Cal., 757; *Daya Chand* vs. *Hemchand*, I. L. R., 4 Bom., 515. This has been modified by section 8, Act VII of 1887.

How Determined.—By section 12 of the Letters Patent, the High Court of Cal cutta has not jurisdiction where the "debt, damage, or value of the property sued for does not exceed 100 rupees," and it has been held that the *bonâ fide* nature of the claim and not the decree determines the jurisdiction. Thus, where a person sued *bonâ fide* to recover 843 rupees damages in the High Court, and through defective proof failed to obtain a larger amount than 75 rupees, it was held that the High Court had jurisdiction—*Sikhur Chand* vs. *Sooring Mull*, 1 Hyde, 272; compare *Mohabir Singh* vs. *Behari Lal*, I. L. R., 13 Alla., 320; but a person cannot give a Court jurisdiction in such a case by adding on to his claim sums which he could not recover, was not entitled to, and which he added simply to give jurisdiction—*Bonomally Nawn* vs. *Campbell*, 19 W. R., 20; but see *Damodhar* vs. *Trimbak*, I. L R., 10 Bom., 370; *Lakshman* vs. *Babaji*, I. L. R., 8 Bom., 31; or sums which he did not claim in the suit—*Motoo* vs. *Verapah Chetty*, 17 W. R., 243. But the mere fact that a suit has been over-valued does not deprive the Court in which the suit is brought of jurisdiction, if the over-valuation was *bonâ fide* and had not the effect of altering the appellate jurisdiction—*Rajendro Lall* vs. *Shama Churn*, I. L. R., 5 Cal., 188; *Kondaji* vs. *Anau*, I. L. R., 7 Bom., 448.

It is the money-value of the original suit that fixes the jurisdiction of the Courts throughout the subsequent litigation in its several stages, not the value of what has been left in dispute—*Mahabir Singh* vs. *Behari Lall*, I. L. R., 13 Alla., 320; and cases cited; *Boidya Nath* vs. *Makhan Lall*, I. L. R., 17 Cal., 680; *Muthusami Pillai* vs. *Muthu Chidambara*, 7 Mad., 356; *Dooly Chund* vs. *Nirban Singh*, 18 W. R., 262, nor is the jurisdiction lost in execution, because the interest accrued after decree has raised the amount due above the money limit—*Shamrav* vs. *Niloji*, I. L. R., 10 Bom., 200. Thus where a person sought to recover one instalment of a bond conditioned for the payment of Rs. 500 per month, and secured by a penalty of Rs. 50,000, the suit was held to be within the jurisdiction of the Small Cause Court of Calcutta—*Smith* vs. *Sims*, Gasper, 145; and a Munsif has jurisdiction in a suit for money not exceeding Rs. 1,000 charged on land, although the value of the land is greater, such land lying within the local limits of his jurisdiction—*Janki Das* vs. *Badri Nath*, I. L. R., 2 Alla., 698; *Gobind Singh* vs. *Kallu*, I. L. R., 2 Alla., 778; *Bahadur* vs. *Nawab Jan*, I. L. R., 3 Alla., 822; *Modhusudene* vs. *Rakhal*, I. L. R., 15 Cal., 104; see, however, *Krishnama Chariar* vs. *Srinivasa*, I. L. R., 4 Mad., 339. If the plaint is amended so as to increase the original value, jurisdiction may be destroyed — *Chandu* vs. *Komi*, I. L. R., 9 Mad., 208.

District Court.—Competent to Try.—All suits for infringement of copyright brought in the mofussil must be laid in the District Judge's Court—*Sheikh Hamidoolah* vs. *Mahomed*, 7 C. L. 471; *Ledgard* vs. *Bull*, 13 Ind. App., 134. So a suit to dismiss a zemindary Karnam in Madras—*Venkatanarasmha* vs. *Suryanarayanai*, I. L. R., 12 Mad., 188. In Bombay suits against a municipality—*Ahmedabad Municipality* vs. *Jamal*, I. L. R., 3 Bom., 146; and see *Mula* vs. *Sayad*, I. L. R., 7 Bom., 100; or against Government or any officer in his official capacity—*Gopi* vs. *Sheso*, I. L. R., 12 Bom., 358.

Territorial Jurisdiction. — Under Act VI of 1871, a District Judge could assign local limits to the jurisdiction of subordinate officers and beyond than the officers had ordinarily no jurisdiction. This is not the effect of section 13, Act XII of 1887—*Dakhina Churn* vs. *Bilash Chunder*, I. L. R., 18 Cal., 526.

Valuation of Suit.—By chapter 3, Act XII of 1887 the ordinary jurisdiction of District Judges and Subordinate Judges extends, subject to the present section, to *all* original suits; that of Munsifs to all such suits in which the subject-matter in dispute does not exceed one thousand rupees; and an appeal lies to the District Judge where the amount or value of the subject-matter in dispute (in the original suit—does not exceed Rs. 5,000 [compare *Noggendro Chundro Mittro* vs. *Kishen Soondory*, 19 W. R., 133, 137-8]. The valuation of a suit for the purposes of stamp-duty, and the valuation of

the subject-matter of the suit for the purpose of determining the jurisdiction of the Court, may be different. Thus, an appeal to a District Judge against a decree in a suit for property of the value of more than Rs. 5,000 will be set aside in special appeal though the valuation for the purpose of stamp duty may have been less than Rs. 5,000, and though the first appeal may have been heard by consent of the parties—*Aukhil Chunder* vs. *Mohini Mohun*, 4 C. L. R., 491. But now note the effect of the Act VII of 1889, and section 578, *post*.

Redemption Suit.—*Amanat Begam* vs. *Bhajan*, I. L. R., 8 Alla., 438; *Rupchand* vs. *Balvant*, I. L. R., 11 Bom., 591; *Ramchandra* vs. *Janardan*, I. L. R., 14 Bom., 19; *Amrita* vs. *Naru*, I. L. R., 13 Bom., 489; *Sakharam* vs. *Shripati*, I. L. R., 16 Bom., 183.

Alternative Relief.—The larger of the two relief determines the stamp—*Kashinath* vs. *Govinda*, I. L. R., 15 Bom., 82.

To enforce Registration.—See *Ramakrishnanma* vs. *Bhagamma*, I. L. R., 13 Mad., 56.

Partition.—*Boidyanath* vs. *Makhanlal*, I. L. R., 17 Cal., 680; see *Hikmatali* vs. *Wali Unnissa*, I. L. R., 12 Alla., 507; *Krishnasami* vs. *Kanakasabai*, I. L. R., 14 Mad., 183.

Sale.—Suit to set aside by a shareholder—*Unnoda Pershad* vs. *Erskine*, 21 W. R., 68.

To set aside an Instrument.—See *Kanaram* vs. *Komappan*, I. L. R., 14 Mad., 169.

No Value.—Where the subject-matter of the suit has no money-value, as in a suit for possession of a minor son, the amount the stamp fee is governed by s. vi, art. 17, of the Court Fees Act—*Krishna* vs. *Reade*, I. L. R., 9 Mad., 31, but jurisdiction may not depend on that alone, and if the management of property is involved its value decides jurisdiction—*Kristna* vs. *Ramas*, I. L. R., 11 Mad., 267. A suit for the removal of a Karnavan—*Nambiar* vs. *Nambiar*, I. L. R., 4 Mad., 146; or for restitution of conjugal rights—*Golam Rahman* vs. *Fatima*, I. L. R., 13 Cal., 232; *Mowla Newaz* vs. *Sajidunnissa*, I. L. R., 18 Cal., 378, is incapable of valuation; see also *Mulla Adjim*, I. L. R., 14 Cal., 351. See section 9, Act VII of 1887.

Shall be Instituted.—This section refers to procedure only, and regulates the practice of the Courts, but does not deprive any Court of jurisdiction which it may otherwise possess. Thus, where a Subordinate Judge entertained a suit contrary to this section, the High Court held that it was a mere irregulaity which did not prejudice the appellant, and refused to enter on the question of valuation with a view to determine in what Court the suit should have been brought—*Matra Mondal* vs. *Hari Mohun*, I. L. R., 17 Cal., 155; *Krishnasami* vs. *Kanakesahai*, I. L. R., 14 Mad., 183. So, where the first Appellate Court dismissed a suit on the ground that the subject-matter of the suit being less than a thousand rupees, the suit should have been brought in the Munsif's Court, and that the Subordinate Judge had acted without jurisdiction in trying it; the High Court decided that, under Act VI, 1871, section 19, the Subordinate Judge was empowered to try *causes of any value*, and although he should, if he had found the value of the subject of the suit to be under a thousand rupees, have sent it to the Munsif, still the fact that he tried it himself was no ground for error in special appeal—*Sufeeoollah Sircar* vs. *Begum Bibee*, 25 W. R., 219. So it has been held the fact of a suit decreed by a Subordinate Judge for less than a thousand rupees being cognizable by a Munsif's Court is no ground for dismissing it; but the plaintiff should not be allowed more cost than if he had sued in the lower Court—*Joy Kishen* vs. *Turnbull*, 24 W. R., 137; and see *Mawaoolah Khan* vs. *Ram Lall*, I. L. R., 6. Cal., 6; *Nidhi Lal* vs. *Mazhar Husain*, I. L. R., 7 Alla., 230; *Krishnasami* vs. *Kanakasabai*, *supra*; see, however, *Ramayya*, vs. *Subbarayudu*, I. L. R., 13 Mad., 24; *Velayudam* vs. *Arunachala*, I. L. R., 13 Mad., 273, and compare section 11, Act VIII of 1887.

Subordinate Judge—As to the case of a Subordinate Judge appointed in Bombay under sections, 23 & 24 Act XIV of 1869, see *Shri Sidheshwar* vs. *Harihar*, I. L. R., 12 Bom., 155.

Under-Value.—But if a suit was under valued, and taken into the wrong Court, it was otherwise — *Russick Chunder* vs. *Ram Lall*, 22 W. R., 301, unless the objector was equitably estopped, or had delayed in raising the objection. Plaintiff applied before a Subordinate Judge to sue *in forma pauperis*, and was met by the plea of over-valuation, and the Subordinate Judge, holding that the suit was over-valued, declined to entertain it. Subsequently, he obtained a decree before the Munsif, and defendant appealing, raised the objection of valuation, and the suit was dismissed as beyond the Munsif's competency to try. *Held*, this decision was wrong, that the defendant could not turn round and object to the jurisdiction of the Munsif, since it was on his opposition that the original application had been rejected—*Bromo Moyee* vs. *Anund Chunder*, 22 W. R., 120; but see *Aukhil Chunder* vs. *Mohesnee Mohun*, 4 C. L. R., 491; *Shri Sidneshwar* vs. *Harihar*, I. L. R., 12 Bom., 155. Plaintiff's suit was dismissed by a Munsif as above his jurisdiction. He appealed; the Court of Appeal, reversing the Munsif's decision, directed him to try the suit; he did so and dismissed it, but on appeal, plaintiff obtained a decree. In special appeal defendant again raised the question, but it was ruled that he was not entitled to do so. The Court held "the objection as to jurisdiction cannot be taken at this stage of

the case; the appellant had a right to come up here in special appeal from the order passed on the 14th of June, 1872. .....This question of jurisdiction has no bearing upon the merits, and simply refers to the form in which a suit should be brought—*Koylash Chunder* vs. *Shaih Ashruf*, 22 W. R., 101; and see *Dattu* vs. *Kasat*, I. L. R., 8 Bom., 535. See 'JURISDICTION,' *infra*, and the change introduced by section 11," Act VII of 1887, and note to section 578, *post*.

Costs.—When a suit is dismissed, or the plaint returned, for want of jurisdiction, the defendant is entitled to his costs—*Moshingan* vs. *Mozari*, I. L. R., 12 Cal., 271.

Small Cause Court; *Munsif's Court.*—When a Munsif was vested with powers up to fifty rupees under Act VI of 1871, and there was a Court of Small Causes, under Act XI, 1865, with jurisdiction extending to five hundred rupees, at the same place, a suit of the nature cognizable by Small Cause Courts, if not above fifty rupees in value, must have been brought in the Munsif's Court—*Dwarkanath Dutt* vs. *Bhathu*, 22 W. R., 457. So where two Courts with different money limits possess jurisdiction to try the cause, it should be instituted in the Court of the lower limit—*Mohanlal* vs. *Vira*, I. L. R., 12 Bom., 169. This rule does not apply to village Munsifs established in Madras under Regulation IV, 1816, section 5, to try suits not exceeding ten rupees, and in such cases the Munsifs and Small Cause Courts possess *concurrent* jurisdiction, and one does not exclude the other—*Parasoorama Pillay* vs. *Ramasawmy*, 5 Mad., 45. As to the present law, see sections 16 and 23, Act IX of 1887.

Jurisdiction of Small Cause Courts.—*General.*—A person claiming damages for personal injury where actual pecuniary damage has resulted, has a right to join in the suit another part of the claim to damages which is not cognizable by a Small Cause Court—*Mansing Lalung* vs. *Theram*, 22 W. R., 395; but see as to the present law, section 15, Act IX of 1887, and compare *Jiwa Ram* vs. *Bhola*, I. L. R., 10 Alla., 49.

Small Cause Court, Provincial.—Under Act IX of 1887, a Small Cause Court has power to try all suits of a civil nature not excluded by the second schedule to the Act; and it is the nature of the suit as described in the plaint and not the nature of the defence that determines the question of jurisdiction—*Bapuji* vs. *Kuvarji*, I. L. R., 15 Bom., 400. A suit for compensation on account of injury to an oil mill will lie in a Provincial Small Cause Court—*Banwari Lall* vs. *The Secretary of State*, I. L. R., 17 Cal., 290, so will a suit for damages on account of the use and occupation of land—*Makhan Lall* vs. *Goribullah*, I. L. R., 17 Cal., 541, or on account of the forcible cutting and carrying away of grass—*Krishna Prosad* vs. *Maizuddin*, I. L. R., 17 Cal., 707; but not a suit for mesne profits—*Sriram* vs. *Kalidas*, I. L. R., 18 Cal., 316; or to recover a legacy when there is no allegation that the executors are in possession of sufficient assets to pay or that they had ever assented to the payment—*Okhoy Coomar* vs. *Koylash Chunder*, I. L. R., 17 Cal., 387.

Presidency Small Cause Court.—The jurisdiction given to this Court under section 18 of Act XV of 1882 is not affected by 51 Vic., c. 4., section 7.—*Watts* vs. *Blacksett*, I. L. R., 18 Cal, 144; *Wallis* vs. *Bailey*, I. L. R., 18 Cal., 372. It is the nature of the case as laid and not the defence that determines jurisdiction—*Bapuji* vs. *Kuvarji*, I. L. R., 15 Bom., 400. As to stating a case, see *Ralli Brothers* vs. *Goculbhai*, I. L. R., 15 Bom., 376.

Court of Cantonment Magistrate.—See *Sundardas* vs. *Mohandas*, I. L. R., 9 Bom., 454.

Court of Requests—*Shere Ali* vs. *Prendergast*, I. L. R., 13 Cal., 143.

Revenue Courts—*North-West.*—Under Act XVIII, 1873, a suit for possession of a holding by a tenant against his landlord should be instituted in the Revenue Courts—*Muazzim Ali* vs. *Sheo Parshad*, 7 Alla., 259; *Chhiddu* vs. *Narpat*, I. L. R., 8 Alla., 62; and in a suit to eject a tenant holding over, the Civil Courts will not have jurisdiction even if the suit for ejectment is combined with a claim for mesne profits—*Ram Autar* vs. *Talimundi*, 7 Alla., 49; but this Act does not preclude the Civil Courts from taking cognizance of a suit to recover possession, on the averment that the plaintiffs are occupancy-ryots, with mesne profits against third persons setting up an adverse title—*Mata Pershad* vs. *Janki*, 7 Alla., 226; *Raghobar Misser* vs. *Sital*, *id.*, 228; nor of a suit to recover possession of *sir* land on the ground that defendants have taken possession without any right—*Ghisa* vs. *Didari*, 7 Alla., 257; nor a claim of one joint owner against another—*Birbal* vs. *Tika Ram*, I. L. R., 4 Alla., 11; though a mere declaration that a tenant is only a tenant-at-will cannot be obtained in any Court—*Maharaja of Benares* vs. *Angan*, I. L. R., 7 All., 112; nor will a suit lie to determine the status of persons admittedly tenants—*Mahesh Rai* vs. *Chandar*, I. L. R., 13 Alla., 17.

Revenue Courts cannot hear a suit concerning profits of land, arising between the heirs of a lumbardar and his co-sharers—*Ahmaduddin* vs. *Majlis*, I. L. R., 5 Alla., 438; nor a suit for rent by assignee of the landlord—*Ganga Prasad* vs. *Chandrawati*, I. L. R., 7 Alla., 256; and see *Autu Singh* vs. *Ajudhia*, I. L. R., 9 Alla., 249; nor a suit for declaration of right in land as *sir* land—*Kauleshar Panday* vs. *Girdhari*, I. L. R., 7 Alla., 338; and see *Sheodisht* vs. *Rameshar*, I. L. R., 7 Alla., 188; *Madho Singh*

vs. *Ajudhia*, 15 Ind. App., 77; *Mahadeo Singh* vs. *Bachu Singh*, I. L. R., 11 Alla., 224, nor to determine a right to rent against a person claiming as landlord—*Gobind Ram* vs. *Narain Das*, I. L. R., 9 Alla., 394; and see *Mirza Anand* vs. *Mausuma*, I. L. R., 13 Alla., 634; nor a suit to restrain a tenant from changing the nature of his holding—*Gangadhar* vs. *Zahurriya*, I. L. R., 8 Alla., 446, see *Musharaf Ali* vs. *Iftkhar*, I. L. R., 10 Alla., 634; nor to remove trees—*Prosonno Mai* vs. *Mansa*, I. L. R. 9 Alla., 35.

Settlement officers cannot determine the rights of contending parties in the soil—*Tota Ram* vs. *Har Kishan*, I. L. R., 7 Alla., 224.

Bengal.—By Act VIII (B.C.) of 1869, Revenue Courts were abolished, over the greater part of Bengal, and the trial of rent suits was made over to the ordinary Civil Courts. The question of jurisdiction can but seldom arise. It has been held that a Court was not justified in dismissing a suit wrongly instituted under Act VIII (B.C.) of 1869, if it could give relief under the ordinary procedure—*Jallalooddeen* vs. *Burne*, 18 W. R., 99; *Gobind Mahtoon* vs. *Ram Khelawun*, 22 W. R., 478; if necessary, it should allow the plaint to be amended—*Gobind Chunder* vs. *Bykuntnath*, 19 W. R., 61. A suit for enhancement not cognizable under the rent law may be brought under the ordinary procedure—*Coomar Poresh Narain* vs. *Watson*, 3 C. L. R., 543.

Objections to Jurisdiction how raised.—A Court cannot try a cause where there is no jurisdiction, if it did, it would be nothing more than a private arbitrator—*Sreemutty Lalmoney Dossee* vs. *Juddoonauth Shaw*, 1 Ind. J. (N.S.), 319; and submission by the defendant cannot oust the jurisdiction of the Appellate Court to set the decision aside—*Ledgard* vs. *Bull*, 13 Ind. App., 134, p. 145; *Roy Bhopendro Nath* vs. *Kalee Prosunno*, 24 W. R., 205; *Government* vs. *Ramnalsinghji*, 9 Bom., 242; *Aukil Chunder* vs. *Moheenee Mohun*, 4 C. L. R., 491; and see *Foster* vs. *Underwood*, 3 Ex. D., 1; but it has been held in England that where a Judge acts *ultra vires* by consent no appeal lies—*White* vs. *Buccleuch*, L. R., I. H. L., S. C., 70; though if the person who is cast by the decision succeeds in first appeal, he cannot object to a second appeal—*Bickett* vs. *Morris*, L. R., I. H. L., S. C., 47. In India where an appeal lies, appeals have been always allowed on the question of jurisdiction—*Naro Hari* vs. *Aupurnabai*, I. L. R., 11 Bom., 160; *Ledgard* vs. *Bull*, 13 Ind. App., 134; *Meenakashi* vs. *Subramaniya*, 14 Ind. App., 160; *Bishenmun* vs. *The Land Mortgage Bank*, I. L. R., 11 Cal., 244, at p. 248.

If the objection is not raised till a late stage, and the jurisdiction is doubtful, the proper course is to proceed and determine the suit—*Bagram* vs. *Moses and Gaspar*, 1 Hyde, 284.

Regular Appeal.—When no objection to the jurisdiction of the first Court was raised in the grounds of appeal, and the first Appellate Court declined to hear the question argued, it was held that the objection should have been considered and decided—*Motilal Ramdass* vs. *Jumnadas*, 2 Bom., 40: otherwise if it were only an irregularity—*Ram Kishen* vs. *Dipa*, I. L. R., 13 Alla., 580; and when a Judge acted without jurisdiction, their Lordships of the Privy Council set aside the decree, although the point was not raised either in the first Court, or the Court of Appeal in India—*Har Narain* vs. *Bhagwant Kuar*, I. L. R., 13 Alla., 300.

Waiver.—There cannot be a waiver of jurisdiction—*Meenakshi* vs. *Subramaniya*, 14 Ind. App., 160; *Sankumani* vs. *Ikoran*, I. L. R., 13 Mad., 211. As to what amounts to waiver of an irregularity, see *Ledgard* vs. *Bull*, 13 Ind. App., 134.

Special Appeal.—Generally, the plea of want of jurisdiction will not be listened to in special appeal if not raised in the Courts below, unless it arises clearly upon the pleadings or from the admissions of the parties—*Nymooddee Joardar* vs. *Moncrieff*, 12 W. R., 140; 3 B. L. R., 283.; and see the remarks of Bovill, C. J., in *Revell* vs. *Blake*, L. R., 7 C. P., 300; 8 C. P., 533; but if it appears on the face of the proceedings the Court must take notice of it—*Bibi Ladli* vs. *Bibi Raje*, I. L. R., 13 Bom., 650; *Meenakshi* vs. *Subramaniya*, 14 Ind. App., 160; see also *Chundee Churn* vs. *Eduljee*. I. L. R., 8 Cal., 678. If a party protest against jurisdiction, he is not bound to retire · he can go through the case subject to the protest—*Hamly* vs. *Bellemy*, 6 Q. B. D., 63; *Ledgard* vs. *Bull*, 13 Ind. App., 134.

After years of litigation in execution-proceedings, the Court of first instance was held to be justified in refusing, in a suit brought to have errors in those proceedings corrected, to raise an issue as to the jurisdiction of the Court to entertain those proceedings—*Nehora Roy* vs. *Radha Pershad*, 4 C. L. R., 353.

Costs.—As to costs when the plea of no jurisdiction is allowed in special appeal, see *Aftabooddeen* vs. *Mohin Mohunee Doss*, 15 W. R., 48.

Form of Order.—When an objection to jurisdiction is raised and allowed at an early stage of the case, the plaint should be returned to be presented in the proper Court—*Khooshal Chund* vs. *Palmer*, 1 Agra, 280; and this is the rule in Bombay at any stage—*Prabhakarbhat* vs. *Vishwambhar*, I. L. R., 8 Bom., 313, even in special appeal—*Babaji* vs. *Lakshmibai*, I. L. R., 9 Bom., 266. In Bengal there is no uniform practice—*Joynath Roy* vs. *Lall Bahadoor Sing*, I. L R., 8 Cal., 126. In Madras the Court either dismisses the suit or appeal, or returns the plaint—*Yacoob* vs. *Mohan Singh*, I. L. R., 1 Mad., 482; *Sonachala* vs. *Mantika*, I. L. R., 8 Mad., 516; but see *Muttirulando* vs.

Kottayan, I. L. R., 10 Mad., 211. In *Ledgard* vs. *Bull*, 13 Ind. App., 134, p. 142, their Lordships of the Privy Council stated "that the Court should have given the plaintiff the alternative of having his suit dismissed or of withdrawing it with leave to bring a new action."

Jurisdiction.—The leading case on jurisdiction is *Ledgard* vs. *Bull*, L. R., 13 Ind. App., 134; I. L. R., 9 Alla., 191. This was a case under the Patent Act, and should have been instituted in the District Court. It was instituted in the Court of the Subordinate Judge, and defendant pleaded that the Court had no jurisdiction, and though subsequently he consented to have the case removed into the District Court, he did not withdraw the objection to jurisdiction. Their Lordships said:

"The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit, if it were competently brought, and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When a Judge *has no inherent jurisdiction over the subject-matter of a suit*, the parties cannot by their mutual consent, convert it into a judicial process, although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, *in a cause which the Judge is competent to try*, the parties without objection join issue and go trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. *The present case does not come* strictly within those authorities, because the defendant's plea was stated before issue was joined on the merits, and in reliance on that plea, he objected to the case being tried, and *withheld his objections to the validity of the patent.*" Their Lordships then found that defendant had not consented to the case being tried by the District Judge, and dismissed the suit. This case was followed and approved in the case of *Meenakshi* vs. *Subramaniya*, 14 Ind. App., 160. See also *Vishnu Sakharam* vs. *Krishnarao*, L. R., 11 Bom., 153; *Naro Hari* vs. *Aupurnabai*, I. L. R., 11 Bom., 160; *Bibi Ladli* vs. *Bibi Raje*, I. L. R., 13 Bom., 650.

Jurisdiction in Part.—As to where is jurisdiction in part, see *In the matter of Leslie*, 9 B. L. R., 171, p. 175; *Sree Nath* vs. *Cally Doss*, I. L. R., 5 Cal., 82, but see *Holkar* vs. *Dadabhai*, I. L. R., 14 Bom., 353; *Punchanun* vs. *Shib Chunder*, I. L. R., 14 Cal., 835. See "THE PROPERTY IS SITUATE," section 16, *post*; and as to when a second suit can be brought when the first is partly infractuous for want of jurisdiction, see the cases under "Act VIII," section 19, *post*.

Alternative Relief.—Where plaintiff claims different relief to some of which he is not entitled, jurisdiction depends on the other reliefs—*Nanda Kumar* vs. *Ishan*, 1 B. L. R., 91; *Lakshman* vs. *Babaji*, I. L. R., 8 Bom., 31.

Irregularity.—The distinction between entire absence of jurisdiction and an irregular exercise of jurisdiction seem to have been lost sight of in several cases. In *Ekouri Sing* vs. *Bijaynath Chattapadya*, 4 B. L. R., A. C., 114, Markby, J., said:—"The only point upon which I have felt the smallest doubt is as to whether or no the conduct of the defendant in the subsequent suit in having, as I think it is pretty clear he had, concluded that mesne profits were given in the first suit could in any way affect the position of the parties. But upon consideration, I think it clear that it could not. I think it is a clear principle of law that parties cannot, either by special agreement or by any conduct of their own, invoke the process of the Court in execution. Process in execution must always be granted by the direct act of the Court itself. And it appears to me that precisely upon the same principle that parties are prohibited from invoking the process of the Court *de novo*, either by agreement or by their conduct, they are also prohibited from extending in like manner the relief which the Court has chosen to award. Therefore all questions as to the conduct of parties, where they are seeking to execute a decree of the Court, are, in my opinion, immaterial in considering what is the effect of the decree."

In *Sadasiva Pillai* vs. *Ramalinga Pillai*, 15 B. L. R., 383, their Lordships of the Privy Council, referring to a question of *mesne* profits under a decree, held as follows:—"Upon the whole, their Lordships are of opinion that the respondent did come under an obligation to account in this suit for the subsequent mesne profits of the appellant's land which was capable of being enforced by proceedings in execution, notwithstanding the construction of the 11th section of the Act of 1861, which now prevails in Madras. They conceive that this liability made the accounting 'a question relating to the execution of the decree within the meaning of the latter clause of the section. But even if it did not, they think, that, upon the ordinary principles of estoppel, the respondent cannot now be heard to say that the *mesne* profits in question are not payable under the decree, nor do they feel pressed by the observations made by Mr. Justice Markby in the case reported in the 4 B. L. R., A. C. J., p. 113. *The Court here had general jurisdiction over the subject-matter*, though the exercise of that jurisdiction by the particular proceeding

may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani* vs. *Attorney-General of Gibraltar*, in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiae*." See also *Pisani* vs. *Attorney-General for Gibraltar*, L. R., 5 P. C., 516, referred to above; *Brooks* vs. *Wigg*, 8 C. D., 510; *Fakhruddin Mohamed* vs. *The Officiating Trustee*, 8 Ind. App., 197; *Khemna Gawala* vs. *Budoloo Khan*, I. L. R., 6 Cal., 251; *Dinonath* vs. *Guruchurn*, 14 B. L. R., 287. See also the case of *Vishnu* vs. *Krishnarao*, I. L. R., 11 Bom., 153. Again, in the case of *Rewa Mahton* vs. *Ram Kishen*, 13 Ind. App., 106, the High Court held that execution-proceedings not carried on as required by section 246 of this Code were null and void. Their Lordships in setting aside that decision said:

"Their Lordships are of opinion that the High Court came to an erroneous decision with regard to the construction of section 246, and that the judgment of the High Court must in that respect be set aside. A purchaser under a sale in execution is not bound to inquire whether a judgment-debtor had a cross-judgment of a higher amount, any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issues, has been satisfied or not. These are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. *If the Court has jurisdiction*, a purchaser is no more bound to inquire into the correctness of an order for execution, than he is as to the correctness of the judgment upon which the execution issues." So it has been held that the omission to record reasons for admitting new evidence as directed in section 566, *post*, is only an irregularity and does not touch jurisdiction—*Gunga Gobind* vs. *Collector of 24-Pargannahs*, 11 Moore, 345; so where the Judicial Commissioner of Mysore struck a pleader off the rolls without hearing him, although the Act declared that "notwithstanding hereinbefore contained, no pleader shall be suspended or dismissed under this Act, unless he has been allowed an opportunity of defending himself," the order was set aside on the ground of irregularity only—*In the matter of Sonthekul Krishna Row*, 14 Ind. App., 154; and where a suit cognizable by a Munsif was brought, contrary to the corresponding section of Act VIII of 1859, in the Court of a Subordinate Judge, it was held that the Court had power to try the cases by virtue of the Civil Courts Act, and this power was not affected by the prohibition in Act VIII which was merely a procedure code—*Russick Chunder* vs. *Ram Lall*, 22 W. R., 301. See also the remarks of James, L. J., in Dale's case, L. R., 6 Q. B. D., 376, p. 451.

In *Revell* vs. *Blake*, L. R., 7 C. P., 300, 8 C. P., 533, which was an interpleader suit to have an adjudication declared a nullity as made without jurisdiction, the Kent County Court adjudicated one Maxwell, a bankrupt. The petition had described him as residing within the jurisdiction of the Court, and "not carrying on business within the jurisdiction of the London Bankruptcy Court;" for otherwise the latter Court alone could, under section 59 of the Bankruptcy Act of 1869, make the adjudication. It turned out afterwards that Maxwell did in reality carry on business in London within the jurisdiction of the London Bankruptcy Court (which was unknown to the petitioning creditor and to the Kent County Court), and the question was, what effect had that fact on the adjudication made by the Kent County Court. The majority of the Court of Common Pleas held that, as on the facts which were before the County Court, the adjudication made was correct, and one which the Court would be bound to make, it was not rendered null by the fact that the Court had come to a wrong conclusion that the Bankrupt had not traded in London; Bovill, C. J., saying—"In ordinary cases where the jurisdiction of an inferior tribunal, as of Magistrates at petty sessions, depends on some fact into which it is their duty to inquire as essential to jurisdiction, the determination of that tribunal after *bonâ fide* investigation as to such fact is conclusive as to the existence of jurisdiction so far as that fact was concerned, see *Reg.* vs. *Bolton*, L. R., 1 Q. B., 66; *Mould* vs. *Williams*, L. R., 5 Q. B., 469." On appeal to the Exchequer Chamber, the whole Court were unanimous that, under the Bankruptcy Act of 1869, each County Court has a general jurisdiction in Bankruptcy as part of one general Court of record, and therefore the adjudication was merely an irregular exercise of jurisdiction, the remedy for which was an appeal, and that the question as to the effect of want of jurisdiction did not really arise. On this latter point Blackburn, J., said:—"It was thought by Brett, J., in the Court below, that the County Court could only have jurisdiction if the debtor resided within the district, and did not reside or carry on business in the London district. And it was argued, that the general rule applied to this case, which is applicable to inferior Courts with a limited jurisdiction, *viz.*, that where such Court exceeds the limits of its jurisdiction, the proceedings are void, and may be shown to be so in any collateral proceedings. If it were so, and the local Courts of Bankruptcy were inferior Courts, these consequences might follow, however inconvenient they might be. I do not, however, think that such is the effect of the Act."

Officer not Appointed.—As to objections to jurisdiction on the ground that the officer whose act is impugned was not properly appointed or was disqualified, see *Glyn*

vs. *Bonnaud*, 2 Taylor and Bell, 205, 224, and cases there cited. Acts done by Justices, in a judicial character, have in no instance been thought invalid—*Margate Pier Co.* vs. *Hannan*, 3 B. and Ald., 271; *Addison on Torts*, p. 691.

Suits to be instituted where subject-matter situate.

16. Subject to the pecuniary or other limitations prescribed by any law, suits—

(*a*) for the recovery of immoveable property,

(*b*) for the partition of immoveable property,

(*c*) for the foreclosure or redemption of a mortgage of immoveable property.

See *Shurnomoyee* vs. *Srinath*, I. L. R., 12 Cal., 614, p. 621.

Service may be made under section 77, *post*—*Michael* vs. *Ameena Bibi*, 13 C. L. R., 166; I. L. R., 9 Cal., 733.

(*d*) for the determination of any other right to or interest in inmoveable property,

(*e*) for compensation for wrong to immoveable property,

(*f*) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, when the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section "property" means property situate in British India.

Act VIII of 1859, section 5; New York Code, section 123; Westlake's Private Inter. Law, p. 58. This section applies to P. S. C. C.

Immoveable Property.—By section 12 of the Charter of 1865, the High Court has jurisdiction of the case of suits for land or other immoveable property, situated within the local limits of its original jurisdiction, and under this section it has been held that suits for foreclosure or redemption of land—*Bebee Jaun* vs. *Meerza Mahommed Hadee*, I. I. J. N. S., 40; *Sreemutty Lalmoney Dassee* vs. *Judoo Nath Shaw*, *id.*, 319; *Ramdhone Mullick* vs. *Blacquire* (*the Englishman*, September 11th, 1865); (see all these cases referred to in *Juggodumba* vs. *Puddomoney*, 15 B. L. R., 318; against a receiver in possession of lands after the mortgagee has foreclosed, asking for an account and to redeem—*Denonath Sreemoney* vs. *C. S. Hogg*, 1 Hyde, 141; against trustees to carry out the terms of a trust deed executed by A for himself and B, and compel the sale of lands outside Calcutta, where B denies A's authority to act for him—*Delhi Bank* vs. *Wordie*, I. L. R., 1 Cal., 249; 25 W. R., 272, explained in *Kellie* vs. *Fraser*, I. L. R., 2 Cal., p. 457; to restrain persons working a mine in the mofussil beyond a certain line—*East Ind. Ry. Coy.* vs. *Bengal Coal Coy.*, I. L. R., 1 Cal., 95; for specific performance to execute a mortgage of lands—*Sreenath* vs. *Cally Doss*, I. L. R., 5 Cal., 82; *contra*—*Holkar* vs. *Dadabhai*, I. L. R., 14 Bom., 353; or for partition—*Jairam* vs. *Atmaram*, I. L. R., 4 Bom., 482, have been considered "suits for land."

As to the High Court's jurisdiction between 1862 and 1865, to sell property outside Madras, see *Sriman Sadagopa* vs. *Jamuna*, I. L. R., 5 Mad., 54; reversed on review—*Jamuna* vs. *Sadagopa*, I. L. R., 7 Mad., 56.

By section 5, Act VIII, 1859, "suits for land or immoveable property" should be instituted in the Court within whose jurisdiction it is situated. *Held*, a suit for the recovery of a mortgage-debt by sale of the mortgaged property is not a suit for land within this section, and that a suit for land is a suit which asks for delivery of the land to the plaintiff—*Yenkoba Balshet* vs. *Rambhaji*, 9 Bom., 12. It seems to be otherwise in Bengal. *In the matter of S. J. Leslie*, 18 W. R., 269; 9 B. L. R., 171, Markby, J., said:—"I think that the plaint, so far as it asks for a sale of the mortgaged property in satisfaction of the mortgage-debt, is a "suit for land" within the meaning of section 5 of the Code of Civil Procedure which regulates the jurisdiction in this case. Mr. Branson contended that these words should be read as signifying these suits alone in which the land itself is sought directly to be recovered. It was admited that a much wider construction had been put by Mr. Justice Macpherson upon the similar words of the Charter of the High Court; that learned Judge holding that a suit for foreclosure by the mortgagee was as such a suit for land (1 Ind. Jur., N. S., 40), and that a suit for redemption was so also (1 Ind. Jur., N. S., 319), but it was contended that these decisions were not correct. We see no reason to suppose this. They have never been questioned so far as we are aware. On the contrary, the uniform practice of the Court on its original side has been in accordance with them." But see the observations of Garth, C. J., in *Delhi and London Bank* vs. *Wordie*, I. L. R., 1 Cal., 249, p. 257. See "Interest in Immoveable Property."

Standing Crops.—Standing crops are immoveable property——*Ched Lal* vs. *Mul Chand*, I. L. R., 16 Mad., 30.

Interest in Immoveable Property.—A suit for possession and for opening a water-course is a suit for an interest in immoveable property—*Oodoyessuree* vs. *Huro Kishore Dutt*, 4 W. R., 107; and so is a suit to have certain lands mortgaged declared liable for the debt—*Ram Lall* vs. *Chittro Coomaree*, 15 W. R., 277. And in regard to limitation it has been held that a suit to enforce a contract of hypothecation pledging certain lands for payment of the amount borrowed, and providing that on non-payment in three years the lands should become the absolute property of the pledgee is for an interest in immoveable property—*Chetti Gaundan* vs. *Sunaram Pillai*, 2 Mad., 51; *Raja Kaundan* vs. *Muttammal*, 3 Mad., 92. So also is a suit brought to enforce payment of principal and interest both as a simple contract, liability and as a debt secured by a collateral mortgage of immoveable property—*Kristna Row* vs. *Hachapa*, 2 Mad., 307; *Juneswar* vs. *Mahabeer*, 3 Ind. App., 1. So is a suit for a declaration that lands are mortgaged or charged with a debt and to have them sold in execution notwithstanding a later disposition—*Surwan Hossein* vs. *Gholam Mahomed*, 9 W. R., 170; or a suit for a sum of money, where plaintiff asked that the decree should been forced against the person of the borrower and the property pledged—*Munoo Lall* vs. *Pigue*, 10 W. R., 379. And so is a suit to enforce in plaintiff's favour an assignment of rent not due, but to become due—*Hall* ex parte, *Whatting, in re*, 10 C. D., 615.

A suit to follow the purchase-money of land taken up under the *Land Acquisition Act*, over which the plaintiff had a mortgage lien, is not a suit under clause (*d*)—*Venkata* vs. *Krishnasami*, L. L. R., 6 Mad., 344.

See as to meaning of somewhat similar words—*Indar Kunwar* vs. *Jaipal Kunwar*, 15 Ind. App., 127, p. 148; *Anund Koer* vs. *The Court of Wards*, 8 Ind. App., 14, p. 22.

Sayer.—Sayer is not an interest in immoveable property—*Surendro* vs. *Kedar*, I. L. R., 19 Cal., p. 8.

The Property is Situate.—And in a suit on a mortgage and money bond in a district other than where the property is situated, the Courts have no jurisdiction to pass any but a money decree, leaving the Court of the district in which the property is situated to execute it against the property mortgaged—*Mahomed Khulleel* vs. *Sona Kooer*, 23 W. R., 123. See also *Buldeo Dass* vs. *Mool*, 2 Alla., 19. So a mortgage decree passed by a Court other than that described in the section can be only looked on as a money decree—*Gudri* vs. *Jagannath*, I. L. R., 8 Alla., 117. and see *Premchand* vs. *Mokhoda*, I. L. R., 17 Cal., 609. See "JURISDICTION IN PART," section 15, p. 44, *ante*.

Mortgage Charge.—A Court has power to give a decree for mortgaged property situate within its jurisdiction, though the mortgage of which redemption is sought includes property without the jurisdiction—*Girdhari* vs. *Sheoraj*, I. L. R., 1 Alla., 431; and see *Bolakee Lall* vs. *Thakoor Pertam*, I. L. R., 5 Cal., 928; but it cannot declare a charge on property wholly outside its jurisdiction, if it does, a purchaser under such a decree would not be in a better position than a purchaser under a money decree—*Gudri Lal* vs. *Jagannath*, I. L. R., 8 Alla., 117.

Not Immoveable Property: Relief by Personal Obedience.—Under the Charter, suits for foreclosure or for redemption of land in the Mofussil are excluded as being suits for land (see cases abovementioned), and only a limited relief can be given against the individual. A suit to declare that a person resident in Calcutta holds certain lands in the Mofussil, subject to certain trusts, is not a suit for land, and may be tried in Calcutta—*Bagram* vs. *Moses*, 1 Hyde, 284; nor is a suit to enforce the right of parties to act as co-sebaits to an idol endowed with lands in the Mofussil where possession of any land is not claimed—*Juggodumba* vs. *Puddomoney*, 15 B. L. R., 318;

nor is a suit for specific performance of a contract to sell lands outside Calcutta—*Ramdhone Shaw* vs. *Sreemutty Nobamoney Dossee*, Bourke, 218; *Holkar* vs. *Dadabhai*, I. L. R., 14 Bom., 353; but see *Sreenath Roy* vs. *Cally Doss*, I. L. R., 5 Cal., 82; nor a suit for an injunction to restrain a nuisance in Howrah—*Rajmohun Bose* vs. *East Indian Railway*, 10 B. L. R., 241; nor is a suit by one shareholder to recover his share of the rents received by another, although the title to the land is in disputo—*Chintaman Narayan* vs. *Madhavrav*, 6 Bom., 29; nor a suit on a bond and asking for a sale of the mortgaged property—*Yenkoba* vs. *Rambhaji*, 9 Bom., 12 p. 13; *Holkar* vs. *Dadabhai*, I. L. R., 14 Bom., 353; nor a suit to file an award arising from a dispute regarding the partnership entered into in Calcutta in regard to lands outside—*Kellie* vs. *Fraser*, I. L. R., 4 Cal., 322; 3 C. L. R., 375, nor is a suit to recover title deeds—*Juggernauth Doss* vs. *Brijnath*, I. L. R., 4 Cal., 322; 3 C. L. R., 375.

The Sudder Dewanny Adawlut declined to take cognizance of a suit for the title deeds of property in Calcutta, by a person claiming as a Hindu widow—*Maha Ranee Bussunt Koomaree* vs. *Maha Ranee Kumul Cumaree*, 7 S. D. A., Sel., 168; but see *Juggernauth Doss* vs. *Brijnath Doss*, I. L. R., 4 Cal., 322; C. L. R., 375.

This section determines the powers of the Courts to act *in personam*, when the person against whom the relief is sought resides within jurisdiction. The jurisdiction is limited to cases in which the relief sought can be entirely obtained through personal obedience, and does not go to the full extent claimed by the English Courts of Equity to take cognizance of any equity between persons residing within jurisdiction respecting lands outside it. Thus, it is doubtful whether our Courts will be able to entertain suits for foreclosure or sale of property beyond their local jurisdiction. See Westlake's Private Internat. Law, p. 58; Burges's Col. Law, 399, 398; 4 Phillimore's Internat. Law, 584; *Paget* vs. *Ede*, L. R., 18 Eq., 118; and in regard to this case, the case of *The East Indian Railway Co.* vs. *The Bengal Coal Co.*, I. L. R., 1 Cal., 95; *The Delhi and London Bank* vs. *Wordie*, I. L. R., 1 Cal., 249; *Longdendale Cotton Spinning Co.* in re, 8 C. D., 150; *Holkar* vs. *Dadabhai*, I. L. R., 14 Bom., 353, and the cases under "IMMOVEABLE PROPERTY" collected above.

Actually and Voluntarily Resides.—The Supreme Courts established at Calcutta, Madras, and Bombay, were empowered to try "all and all manner of actions and suits against all and singular the *inhabitants* of the said Calcutta, Bombay, and Madras." The word "inhabitant" for the purpose of "jurisdiction" meant "resident"—*Ram Narain Tanker* vs. *Chederbule Nurseah*, 2 Str., 289; and did not include a person having daily employment in Calcutta, but residing outside it, and coming in in the morning and returning in the evening — *Goculchund Banerjee* vs. *Camdeb Mookerjee*, Mor., 148; but otherwise, when in addition he often slept at his father's house in Calcutta—*Habberley* vs. *Bason*, 1 Mor., 160 and note (b); or where, though carrying on business all day in Calcutta and earn his livelihood, he slept in Entally at night to *avoid jurisdiction* — *Martindoll* vs. *To Man*, Mor., 161; *Mussamut Bhando Beebee* vs. *Moonshee Hossein Ally*, Mor., 166.

Length of Time.—No length of time was necessary to make a person an inhabitant—*Madoo Wissenath* vs. *Bulloo Gunnasett*, Mor., 149; and a man who had come to Calcutta, with no definite object, but slept there, and the plaint was filed when he was in Calcutta, was held subject to the Court's jurisdiction — *Punchanand Bose* vs. *Davison*, Mor., 149. The Bombay Court held that *residence at the time of the contract* or at the commencement of the suit was sufficient — *Madoo Wissenath* vs. *Balloo Gunnasett*, Mor., 153.

Evidence.—A bond reciting the obligor to be "of Calcutta" was *primâ facie* evidence that he was an inhabitant—*Dutt* vs. *Ramnarain*, Mor., 121.

Voluntary. — But the residence must have been voluntary — *Madoo Wissenath* vs. *Balloo Gunnasett*, Mor., 149. A person confined in jail without just cause having been brought down from the mofussil by process in a suit as to which he had been discharged for want of proceeding, was not considered to be an inhabitant — *Dahan* vs. *Mendes*, Mor., 147. Otherwise, if he had been lawfully confined, as if he had been imprisoned on conviction for a misdemeanour—*Caliprasaud Dutt* vs. *Prankiseen Halder*, Mor., 165, The Sudder Dewanny held, so far back as 1810, that a State prisoner was amenable to the jurisdiction of the Civil Court of the district in which he lived for a debt contracted in a foreign country — *Dwarka Dass* vs. *Raja Jhoolal*, 1 S. D. A., Sel., 410. The Madras Court went further and exempted from jurisdiction persons compelled, by the injurious act of others, to seek justice at the Presidency, and persons visiting it on public business, provided they did not remain there for any other purpose—*Nagapah Chetty* vs. *Rachunmmal*, 1 Str., 152; *Boojung Row* vs. *Chittoo Row*, 1 Str., 210.

High Courts' Charter. — Under their Charters the High Courts possess jurisdiction if the defendant at the time of suit dwells within the limits of their ordinary jurisdiction. A person, having a permanent residence outside Calcutta, who visits Calcutta for the purpose of carrying on a suit, does not dwell in Calcutta. In *Emritlall* vs. *Kidd* (2 Hyde, 117), Levinge, J., said :—"I consider that the word 'dwell' has a more extended signification than the word 'reside,' and means a permanent as opposed to a mere

temporary residence. A traveller, putting up at an hotel, may be said in one sense to reside there, but a man can only be said to dwell in the sense in which that term is used as giving jurisdiction in the place where he ordinarily and permanently resides." So, where "defendant, an officer in the Bombay Staff Corps, holding an appointment in Sind, visited Bombay on leave for ten days, during which a plaint was filed against him, and he was served with a writ, it was held that the temporary residence for a few days did not amount to dwelling within the meaning of the Charter"—*Framji Kawasji* vs. *Wallace*, 1 Bom., 113. *Shri Goswami* vs. *Shri Govardhan*, I. L. R., 14 Bom., 541, p. 547. But see as to the meaning of "dwell" and "reside" in this Code—*Mahomed Shuffli* v. *Laldin*. I. L. R., 3 Bom., 227; *Ramchandra* vs. *Keshav*, I. L. R., 6 Bom., 101; *Ereret* vs. *Frere*, I. L. R., 8 Mad., 204. The result of these decisions seems to be that, if a person has a permanent dwelling he does not "dwell" in the sense used in the Charter at a place where he has lodged for a temporary purpose, but it is otherwise if he has no permanent dwelling. So, where defendant had usually a house at Mussoorie from March to October, where he left his wife and children while he attended race meetings in the plains, and visited Calcutta in March, merely temporarily, and for the purposes of pleasure,—it was held he was liable to answer in a suit filed during his stay in Calcutta; that he could not be said to dwell at Mussoorie, as he never lived there during the winter months, and though he kept an establishment there for his children, yet, at the time the suit was instituted, he had no house of his own—*Monis* vs. *Baumgarten*, Bourke, 128; Coryton, 152. A party spending his time alternately in the mofussil and Calcutta, and resident in the latter for some days previous to and on the day of filing the plaint, is, for the purpose of jurisdiction, said to dwell in Calcutta—*S. M. Nishadiney Dossee* vs. *Kally Kisto Ghose*, Coryton, 24.

The same meaning has been attached to the word "dwell" in other Acts. Thus, where an officer attached to a regiment at Shahjehanpore, who had been gazetted to two years' furlough, was served with process whilst attending a race meeting at Meerut, it was held that if he had not availed himself of furlough, but was only present on leave at Meerut, he was not dwelling within the jurisdiction of the Meerut Small Cause Court. *Semble*, if having availed himself of furlough, he retained his permanent residence at Shahjehanpore and only visited Meerut for a few days. But, if having availed himself of furlough, and having retained no permanent place of residence at Shahjehanpore or elsewhere, he attended the race meeting with the intention of leaving after the races, he was dwelling within jurisdiction—*Mayhew* vs. *Tulloch*, 4 Alla., 25.

In the case of *Orde* vs. *Skinner*, I. L. R., 3 Alla., 91, 7 Ind. App., 197; 7 C. L. R., 295. Skinner at the time of suit was actually residing at Mussoorie in the district of Shaharunpore. He resided there during the hot weather, and during the cold weather he travelled through the joint estate putting up sometimes at Hansi, sometimes at Delhi, and sometimes at Bilaspur in one of the houses kept at the expense of the estate. The question for decision, did Skinner reside at Bilaspur? Their Lordships held he could have more than one residence, that as he was not a mere manager, but a part owner, and had a residence there which his predecessor contemplated to be the principal place of residence of the family and in which Skinner kept the accounts of the estate, he dwelt in it within the meaning of section 5, Act VIII, of 1859. When a person resides at one place, his mere casual presence, or even residence for a temporary purpose within jurisdiction without the intention of remaining is not "dwelling" within the meaning of the Small Cause Court Act—*Saminatha Pillay* vs. *Varisai Mahomed Ravattan*, 2 Mad., 304; *Madho Doss* vs. *Sita Ram*, 3 Alla., 121. Where a servant, whose home was in Nuddea, resided with his master at Monghyr, and had no intention of returning home soon, it was held he dwelt at Monghyr and not at Nuddea—*Porgash Parray* vs. *Hachim Khansamah*, 7 W. R., 417; see also *Gendu* vs. *Gorind*, 10 Bom., 409. Whether persons imprisoned can be said to dwell at their homes or not, depends on whether they have any intention of returning to their previous place of abode on the termination of their imprisonment—*Gopal Chunder Sircar* vs. *Kurnodhar Moochee*, 7 W. R., 349.

The decision on the County Courts Act in England are to the same effect. Thus, a man having his permanent residence at one place and a lodging at another for a temporary purpose only, was held not to dwell in the latter place—*Macdougall* vs. *Peterson*, 21 L. J. (C. P.), 27. A mere visitor acquires no dwelling—*Butler* vs. *Ablewhite*, 28 L. J. (C. P.), 292; see cases collected in *Adam* vs. *South Western Railway Company*, 6 H. & N., 404. A person who has no permanent place of abode "dwells" at the place at which he may be temporarily residing—*Alexander* vs. *Jones*, L. R., 1 Exch., 133.

Evidence.—Where the payee sued the maker of a note which was dated "Madras, 27th September 1860," and delivered to the plaintiff at Madras, it was held that this was *primâ facie* evidence of dwelling within the High Court's jurisdiction—*Winter* vs. *Round*, 1 Mad., 202, explained in *Rajendra Rau* vs. *Sama Rau*, 1 Mad., 436.

In the present Act the word "dwell" has been replaced by "reside." What is meant by residing is a question of fact depending on the circumstances of each case. The words "dwell" and "reside" express the same idea—*Mahomed Shuffli* vs. *Laldin*, I. L. R., 3 Bom., 227; *Shri Gosvami* vs. *Shri Govardhan*, I. L. R., 14 Bom., 541; see also

Everet vs. *Frere*, I. L. R., 8 Mad., 205, and the Explanation shows that reside must be construed more liberally in this section than in section 37, cl. (*a*), *post*—*Ramchandra* vs. *Keshav*, I. L. R., 6 Bom., 101.

A suit to wind up a partnership may be brought in the Court within whose jurisdiction the defendants reside, notwithstanding the provisions of the Contract Act, section 265—*Javati Ramasami* vs. *Theruvengadasami*, I. L. R., 1 Mad., 340.

Insolvency.—By 11 and 12 Vict., c. 21, s. 5, jurisdiction in insolvency is conferred when the person "shall reside within the jurisdiction" of any of the High Courts. A petitioner came down from Cawnpore where he resided for some time and left his wife to file his petition, which he did after living eight days in a hotel. It was held that the petitioner had come to file his petition and not to reside (though he had stated that he intended to remain in Calcutta after his discharge), and that the Court had not jurisdiction—*In the matter of Tietkins*, 1 B. L. R., 84; see also *Manning* vs. *Manning*, L. R., 2 P. & D., 223. And where a person whose family residence in Bhagulpore had been sold in execution of decree, left his family in that district, and coming to Calcutta lived in a hired house from May till September, when he left to obtain funds to carry on a petition of insolvency which he had filed in July, he was held not to reside within jurisdiction, although he returned in November and lived as before—*In re Ram Paul Singh*, 8 C. L. R., 14. *In re Hurruck Chund Golicha*, I. L. R., 5 Cal., 605, an insolvent was held to "*reside*" in Calcutta, who carried on business there by means of a gomashta; and see *Kessowji* vs. *Khimji*, I. L. R., 12 Bom., 507.

Rangoon.—The Court of the Recorder of Rangoon has, under the Burmah Courts Act, no jurisdiction in a suit brought against a defendant dwelling in Surat, though the cause of action arose in Rangoon—*Anonymous*, 18 W. R., 397. See *ante*, section 3. See notes under sections 37, 380 and 648, *post*.

Carry on Business.—In the case of *Chinnammal* vs. *Tulukannuatammal*, 3 Mad., 146, it was decided that a trader in the mofussil, who habitually sent grain to Madras to be sold by a party who was a general agent for the sale of goods sent to him by different persons, did not carry on business within the jurisdiction of the High Court, although he himself had sometimes accompanied the loads. Scotland, C. J., said:—"It could never have been intended (as observed in the judgment of the Court in *Subbaraya Mudali and others* vs. *Government*, 1 Mad., C., 286) that the words 'carry on business' were to be understood in their most general sense. Giving proper effect to the other words of the provision, the section, I think, requires that the defendant should, at the time of the commencement of the suit, carry on, within the local limits of the Court's jurisdiction, some independent regular business in person as in the case of *Mitchell* vs. *Hinder* (23 L. J. Q. B., 273), or at an office or other fixed place of business (see *Rolfe* vs. *Learmouth*, 14 Q. B., 96), either personally or by *clerks or servants employed by the defendant and conducting the business under his control and in his individual or partnership name.* Here the defendant had no place of business in Madras and the sales were effected by Narayana in his independent trade or business of a general broker for a commission received from the purchasers. In *Corbet* vs. *The General Steam Navigation Company* (4 Hurl and Nor., 482; 28 L. J., Ex., 215), and in *Minor* vs. *The London and N. W. R. Company* (1 C. B. N. S., 325), it was held that the defendants in those cases did not carry on business within the meaning of the County Courts Act at a place where they employed *general* agents to act on their behalf, and in the present case I think Narayana is the only person who can be said to have carried on business within the meaning of the section in question with respect to the paddy sent to him for sale. For these reasons I am of opinion that the Court has no jurisdiction to entertain the suit. It should be understood that I do not mean, by any expression in this judgment, to question, in the slightest degree, the decision in *Shiel* vs. *The Great Southern Railway Company* (referred to as an authority by the Court in *Subbaraya Mudali and others* vs. *Government*, and in the late case, *Re Brown* vs. *The London and N. W. Ry. Company*, (32 L. J., Q. B., 318), as to the meaning of the words "carry on business" in their application to Railway Companies and other corporate bodies having numerous stations and officers throughout the country." Followed in *Chundee Churn* vs. *Eduljee*, I. L. R., 8 Cal., 678.

It has been held that the test of carrying on business as a retail dealer is "sale," and that a retail dealer in European goods, residing and carrying on business at an up-country station, is not within the jurisdiction of the High Court of Bombay, merely, from the fact that he has an agent in Bombay for the purpose of purchasing and forwarding goods to be used in his trade—*Framji Kavasji* vs. *Harmasji*, 1 Bom., 220; and that an English firm does not carry on business within local limits by employing a firm as commission agents in Bombay—*Khimji Chaturbhuj* vs. *Forbes*, 8 Bom., 102; and see *Kessowji* vs. *Khimji*, I. L. R., 12 Bom., 507. So also, that a person who carries on business at a place by a commission agent to whom he only consigns goods does not carry on business within the local limits of a Court where the commission agent resides—*Goopee Mohun* vs. *Protab Chunder*, 11 W. R., 530; and generally, that it could not be intended that a person residing at a distant place, and there carrying on his business in person, might, because of his carrying on business within local limits

by a gomashta, clerk or agent, or because of occasional visits only, be sued in the High Court at the discretion of the plaintiff, without any regard to the place where the cause of action arose—*Subbaraya Mudali* vs. *Government*, 1 Mad., 286. It will be seen, however, on comparing this case with that of *Chinnammal* cited above, that Scotland, C. J., somewhat modified his opinion; and it is settled in Madras that it is not necessary for jurisdiction that a person should *personally* carry on business—*Muthaya* vs. *Harrison*, I. L. R., 4 Mad., 209; compare *Chundee Churn* vs. *Eduljee*, I. L. R., 8 Cal., 678; nor in Bombay where the defendant is a British subject—*Kessowji* vs. *Khimji*, I. L. R., 12 Bom., 507. In addition to actual inhabitancy, the Supreme Court had jurisdiction by constructive inhabitancy on the ground of trading. The decisions on this point will be found in Merton's Reports, Morley's Digest, and 3 Moore's Indian Appeals. Carrying on business by factors was not sufficient to ground that jurisdiction—*Doss* vs. *Haniakram*, Fulton, 334.

A person who has no regular office, but comes once or twice a week from the Mofussil to a friend's house in Calcutta, and sees people there on business, and contracts with B in Calcutta for the hire of cargo boats, carries on business in Calcutta—*Grish Chunder Bannerjee* vs. *Collins*, 2 Hyde, 79; and so does the Captain of a foreign ship trading to this port—*Queen* vs. *Judge of Small Cause Court*, 2 Taylor and Bell, 7; see section 76, *post*.

Zomindari business is not business of the kind contemplated in this section—*Anonymous*, 23 W. R., 223; nor is the receipt of presents or offerings—*Shri Gosvami* vs. *Shri Govardhan*, I. L. R., 14 Bom., 341, p. 553.

Personally Works for Gain.—These words were inserted to give the Courts jurisdiction over persons who, though dwelling out of the local limits, personally worked for gain within them. A person residing at Ghoosery outside Calcutta, who habitually and constantly comes to Calcutta for the purpose of making contracts, and therefore for the purpose of carrying on his business as a contractor, carries on business and works for gain within the local limits—*Grish Chunder Bannerjee* vs. *Collins*, 2 Hyde, 79; an Advocate of the High Court, residing out of the local limits, but who holds himself out as ready to practise in the High Court and who goes wherever he is engaged to appear, personally works for gain within the local limits—*Rai Narain Dass* vs. *Newton*, 6 Alla, 43; compare *Shri Gosvami* vs. *Shri Govardhan*, I. L. R., 14 Bom., 551, p. 553.

Government—Government cannot be said to carry on business or work for gain within the meaning of this section, and can only be sued where the cause of action arises—*Rundle* vs. *Secretary of State*, 1 Hyde, 37; *Subbaraya Mudali* vs. *Government*, 1 Mad., 286; *Doya Narain* vs. *Secretary of State*, I. L. R., 14 Cal., 256.

Place for institution of suit where local limits of jurisdiction of Courts are uncertain.

"**16A.** (1) When it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect, and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction:

"Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

"(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an Appellate or Revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the Appellate or Revisional Court shall not allow the objection if in its opinion there was at the time of the institution of the suit, any reasonable ground for

uncertainty as to the Court having jurisdiction with respect thereto."

This section has been added by Act VII of 1888, section 6.

Suits to be instituted where defendants reside or cause of action arose.

17. Subject to the limitations aforesaid, all other suits shall be instituted in a Court within the local limits of whose jurisdiction—

(*a*) the cause of action arises ; or

(*b*) all the defendants, at the time of the commencement of the suit, actually and voluntarily reside, or carry on business, or personally work for gain ; or

(*c*) any of the defendants, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain :

Provided that either the leave of the Court is given or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution.

Explanation I.—Where a person has a permanent dwelling at one place and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

Explanation II.—A Corporation or Company shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

"*Explanation III.*—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely :—

(i) the place where the contract was made ;

(ii) the place where the contract was to be performed or performance thereof completed ;

(iii) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable." [Act VII of 1888, section 7.]

Illustrations.

(*a.*) A is a tradesman in Calcutta. B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A, and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(*b.*) A resides at Simla, B at Calcutta, and C at Delhi. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and

deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot be maintained without the leave of the Court.

Act XXIII of 1861, section 4; Pollock on Contracts, p. 53. This section applies to P. S. C. C.

Illustration (*a*) is taken from *Winter* vs. *Way*, 1 Mad., 200; and illustration (*b*) from *DeSouza* vs. *Coles*, 3 Mad., at p. 397.

Onus of Proof.—When the defendant is not within jurisdiction, plaintiff must show that, at the time of the commencement of the suit, the defendant actually and voluntarily resided or carried on business, or personally worked for gain, within the jurisdiction—*Modhu Soodun* vs. *Cochrane*, 6 C. L. R., 417.

ACQUIESCENCE.—If the defendants who do not reside within the local jurisdiction do not apply under section 20, *post*, they will be held to have acquiesced—*Venkata* vs. *Krishnasami*, I.L.R., 6 Mad., 344; compare *Babaji* vs. *Lakshmibai*, I. L. R., 9 Bom., 266.

Corporation.—The Government of India is not a corporation—*Doya Narain* vs. *The Secretary of State*, I. L. R., 14 Cal., 256.

Cause of Action.—Explanation III shows that the words cause of action in this section are not limited to mean the whole cause of action; but include any material portion of the nature stated in the text. The amendment is based on *Llewhellin* vs. *Chunni Lal*, I. L. R., 4 Alla., 423; *Bishunath* vs. *Ilahi Baksh*, I. L. R., 5 Alla., 277, following *Gopi Krishna Gossami* vs. *Nilkomal*, 13 B. L. R., 461, and not following *Jamoonah* vs. *Zaibunnassa*, 5 C. L. R., 268; *DeSouza* vs. *Coles*, 3 Mad., at p. 397. See also *Kalidhun* vs. *Shibanath*, I. L. R., 8 Cal., 483.

To constitute a cause of action there must be an infraction of a right—*Nurdin* vs. *Alavudin*, I. L. R., 12 Mad., 134.

A contract was entered into at Rutlam in foreign territory between the firm of L, who resided and carried on business in *Agra*, and the firm of Z carrying on business at Rutlam and elsewhere, for the establishment of a co-partnership for the purchase and sale of opium. The co-partnership business was carried on principally in Agra, and the business was conducted there by means of the capital advanced to the concern by the firm of L, and there the partnership books were kept. At the close of the partnership which was attended with loss, a balance was struck in Agra which shewed a debt due by the firm of Z to the firm of L. In an action brought by the firm of L against the firm of Z in the Zillah Court of Agra for recovery of the balance, it was pleaded by Z that as the contract was made at Rutlam where the firm resided, the Agra Court had no jurisdiction: it was held that the cause of action arose in Agra and was within the Court's jurisdiction, inasmuch as (1) the established place of business of the partnership was in Agra, and there the books were kept; and (2) it was there that the *balance* was struck and payment of the balance due—*Luckmee Chund* vs. *Zorawur Mull*, 8 Moore, 291. See *Orde* vs. *Skinner*, 7 Ind. App., 196.

Minor Removed.—See *Sarat Chunder* vs. *Forman*, I. L. R., 12 Alla., 213.

Rent Suits, Bengal.—See Act VIII of 1885, section 144.

High Court.—This section does not apply to the Original Side of the High Court, which is governed by its Charter, and under it the words "cause of action" mean the whole cause of action and not a material part of it. Thus in a case on contract it includes both the contract and the breach.—*Rampurtab* vs. *Premsukh*, I.L. R., 15 Bom., 93, and the cases cited; and see the cases cited in *Kalidhun* vs. *Shiba Nath*, I. L. R., 8 Cal., 483. If, however, only part of the cause of action arises in Calcutta, then the suit can be brought on the Original Side of the High Court if leave has been first obtained—*Dhunjisha* vs. *Fforde*, I. L. R., 11 Bom., 649; *Doya Narain* vs. *The Secretary of State*, I. L. R. 14 Cal., 256; *Mulchand* vs. *Duganchand*, I. L. R., 1 Bom., 23; but see *Muhammed Abdul Kadar* vs. *The East Indian Ry.*, I. L. R., 1 Mad., 375 as regards Madras.

Leave.—An order granting leave is not a mere formal order regulating procedure; but is a condition precedent to jurisdiction and from it an appeal lies—*Ds Souza* vs. *Coles*, 3 Mad., 384; *Hadjee Ismail* vs. *Hadjee Mahomed*, 13 B. L. R., 91. Leave should be distinctly sought and obtained and should not be inferred from the fact that the plaintiff has been allowed to sue as a pauper—*Jairam* vs. *Ajmaram*, I. L. R., 4 Bom., 482. Leave cannot be granted after the institution of the suit, and as it relates only to the cause of action disclosed in the plaint it cannot confer jurisdiction in respect of a substantially different cause of action, and the plaint cannot be amended as in an ordinary case—*Rampurtab* vs. *Premsukh*, I. L. R., 15 Bom., 93; *Hadjee Ismail* vs. *Hadjee Mahomed*, 13 B. L. R., 91.

Suit by Representative.—Although it has been said that to give the Courts jurisdiction all things which go to constitute the cause of action must occur within jurisdiction, yet this must be taken subject to the explanation that there is a clear distinction between

suing a man as a *representative* upon a cause of action arising out of his own acts, and upon a cause of action arising out of the acts of the person for whom he is substituted. In the latter case the representative may be sued in the Court within whose jurisdiction the cause of action with the deceased person arose—*Caleb Ladd* vs. *Parbutty Dassee*, 2 Hyde, 18.

Foreign Decree.—Suit brought in Bombay on an order of the Court of Chancery directing contributors to pay within four days of service of the order on them. Order served in Bombay on defendant who lived without jurisdiction. *Held*, service of the order was not necessary to complete the cause of action, and no part of it having arisen within the jurisdiction of the High Court, the suit would not lie—*London Bank* vs. *Badee Beebee*, I. L. R., 5 Bom., 42. See also *Sieveking* vs. *Focke*, 9 W. R., 215.

Libel—See *Geffert* vs. *Ruckchand*, I. L. R., 13 Bom., 178.

Hoondees, Promissory Notes, Bonds.—In an action to recover *money paid in Calcutta* on hoondees drawn by defendant beyond the local limits, but sent by him to Calcutta and there accepted and paid by the plaintiff, it was held that the whole cause of action arose within Calcutta—*Joan Mull* vs. *Munnoo Lall*, 1 Ind. J. (N. S.), 209. So where a resident in the Upper Provinces sent cotton to A in Calcutta for sale, and drew hoondees against it payable in Calcutta, and the hoondees were first negotiated and there accepted and paid by A's gomashta in Calcutta; in a suit by A not on the hoondees but for *a balance of account*, it was held that as the bills were made payable in Calcutta and presented there, the liability arose from the implied contract to repay the money, and the whole cause of action arose in Calcutta—*Dhanraj* vs. *Gobindaram*, 1 B. L. R., 76.

The High Court has jurisdiction in a suit on a promissory note if the note is payable to a payee who resides in Calcutta, and is made and delivered to him there—*Ramgopal* vs. *Blacquiere*, 1 B. L. R., 35; or is made payable within jurisdiction, and has been delivered within it — *Issur Chunder Sein* vs. *L. Cruz and another*, 1 I. J. (N. S.), 233; and *primâ facie* there is jurisdictlon if the note, though really made beyond jurisdiction, has been signed *as made* within jurisdiction and delivered within it—*Winter* vs. *Round*, 1 Mad., 202; but it is otherwise where a bond has been executed beyond the local limits, and the stipulation in the document is general, and no particular place of payment has been named—*Rajendra Rau* vs. *Sama Rau*, 1 Mad., 436 (following *Rex* vs. *Dancer*, 6 T. R., 242) In this case the Judge decided, following *Wilde* vs. *Sheridan*, 21 L. J. Q. B., 260, that if the contract had not been made in *Madras*, the High Court would not have jurisdiction. But in a later case it has been held that in the absence of any stipulation in the contract itself, the intention of the parties must guide the Court in determining the place of performance—*Dhunjisha* vs. *Fforde*, I. L. R., 11 Bom., 649; see also *Darragh* vs. *Purshotam*, I. L. R., 4 Mad., 372.

Where plaintiff sued on a promissory note executed beyond, but payable in, Calcutta, leave to sue not having been obtained before the institution of the suit, it was held that the High Court had no jurisdiction — *Mothoormohun Roy* vs. *Jadoomoney Dossee*, 10 B. L. R., 122; *Harjiban Dass* vs. *Bhugwan Dass*, 7 B. L. R., 102, 535; but where after settlement, an oral agreement to pay in Bombay was entered into and leave was obtained; *Held*, the Court had jurisdiction — *Pragdas* vs. *Dowlatram*, I. L. R., 11 Bom., 257. And where a deed of mortgage of land wholly situated out of Calcutta was executed (and also the money advanced) in Calcutta, a suit on the Original Side of the High Court for money lent, brought on the covenant to pay—no leave to sue having been obtained—was dismissed for want of jurisdiction—*Kanyeloll Dutt* vs. *Prince Sahab Allum*, (March 1, 1880, *per* Wilson, J.), and see *Dhunjisha* vs. *Fforde*, I. L. R., 11 Bom., 649, and sanction to sue must be obtained in a suit to recover from a person residing and carrying on business outside of Calcutta, goods pledged with him which have been obtained from the plaintiff by means of an offence or fraud, the offence or fraud alone having occurred within the jurisdiction — *Kartick Churn* vs. *Gopalkisto*, I. L. R., 3 Cal., 264.

Decree Fraud. — A suit to set aside a consent decree of the High Court, on the ground of fraud may be brought without previous leave to sue having been obtained, though all the defendants dwell without the jurisdiction — *Bibee Soloman* vs. *Abdool Aziz*, 4 C. L. R., 366.

Goods Sold.—In a suit for goods sold and delivered, where the defendant does not dwell within the local limits of the High Court, the cause of action,—*i.e.*, the sale and delivery of the goods,—must have taken place within those limits. Thus, where A sued B for goods sold in Madras and sent partly by sea and partly through the Post Office at A's risk to B, who lived outside the local jurisdiction, it was held that so long as the goods were at the risk of the consignor, there could be no delivery to the consignee, and that the cause of action did not arise within the local limits — *Winter* vs. *Way*, 1 Mad., 200; otherwise if they had been sent at the risk of the defendant—*DeSouza* vs. *Coles*, 3 Mad., 384, pp. 405-6.

Partnership.—Plaintiffs, living at Madras, entered into a contract with defendant, residing at Bimlipatam, the terms of which were that defendant should be entitled to half a share in any of the shipments made by him at Bimlipatam on his electing to take the

risk. Defendant elected at Bimlipatam. In a suit brought for losses sustained, it was held that the High Court had no jurisdiction—*DeSouza* vs. *Coles*, 3 Mad., 384. So, when an agreement in writing was signed by the plaintiff and defendant at Secunderabad in the Nizam's territories for a partnership in a tannery to be carried on at Bakaram, near Hyderabad, and, by the terms of the agreement, the hides were sent to the plaintiff at Madras for sale and shipment to England, and hoondees in respect of the goods sent were drawn upon the plaintiff in Madras and paid by him, and an account of the partnership transactions was sent to him once in every eight days, it was held that the cause of action did not arise within local limits. Bittleston, J., said : — "As regards a suit of this nature, where it appears that the partnership business is carried on substantially in two or more places, I think that the cause of action does partly arise in each of those places within the meaning of section 12 of our Charter. The weight of authority also appears to me to be in favour of so holding, and the case of *Luchmee Chund* vs. *Zorawur Mull*, 8 Moore, 291, is, I think, distinguishable ; for that case was decided on the ground that the whole business of the partnership was substantially carried on at one place, *viz.*, Muttra, which was within the jurisdiction of the Court in which the suit was brought. From the statement of that case it appears that the partnership books were kept at Muttra, the capital was supplied by the plaintiff at Muttra, and was employed by their agent there in the purchase of opium for the co-partnership ; that the opium was sent to Bombay and China for sale ; and the account sales and proceeds were remitted to Muttra, where also the accounts were closed, and the balance sued for was struck."—*Bavah Meah* vs. *Khajee Meah*, 4 Mad., 218.

Setting aside a Deed.—Plaintiff, a resident in Calcutta, sued H, a resident in Bombay, but carrying on business by his gomashta in Calcutta, and others resident in Bombay, to set aside a release executed in Calcutta of his interest in certain property situated in Bombay, on the allegation that it had been obtained from him on misrepresentations made by H : *Held*, that the cause of action included the effect of the release on the property in Bombay and did not wholly arise in Calcutta — *Hadjee Ismail* vs. *Hadjee Mahomed*, 13 B. L. R., 91.

Extra Territorial Jurisdiction —As to where the cause of action arises within three miles below low water mark, see *Baban Mayacha* vs. *Nagu*, I. L. R., 2 Bom., 19.

Suits for compensation for wrongs to person or moveables.

18. In suits for compensation for wrong done to person or moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the plaintiff may at his option sue in either of the said Courts.

Illustrations.

(*a.*) A residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

(*b.*) A residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or Delhi.

(*c.*) A, travelling on the line of a Railway Company whose principal office is at Howrah, is upset and injured at Allahabad by negligence imputable to the Company. He may sue the Company either at Howrah or at Allahabad.

This section applies to H. C. and P. S. C. C.

Suits for immoveable property situate in single district, but within jurisdiction of different Courts.

19. If the suit be to obtain relief respecting, or compensation for wrong to, immoveable property situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be instituted in the Court within whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject-matter of the suit, the entire claim be cognizable by such Court.

Suits for immoveable property situate in different districts.

If the immoveable property be situate within the limits of different districts, the suit may be instituted in any Court, otherwise competent to try it, within whose jurisdiction any portion of the property is situate.

Act VIII of 1859, sections 11 and 12. It applies to P. S. C. C., and is not in force in Jhansi.

Execution-Proceeding.—This section applies to execution-proceedings under section 223, *post*—*Shurroop Chunder* vs. *Ameerunnissa*, I. L. R., 8 Cal., 703; *Gapi Mohan* vs. *Doybaki*, I. L. R., 19 Cal., 13; note the reasoning in *Shamrav* vs. *Nilaji*, I. L. R., 10 Bom., 200; but see *Maseyk* vs. *Steel & Co.*, I. L. R., 14 Cal., 661.

Different Courts.—The suit for partition of property situated partly within and partly without jurisdiction, the claim was withdrawn in regard to the property within jurisdiction. *Held* · the Court could partition the property outside—*Khatija* vs. *Ismail*, I. L. R., 12 Mad., 380.

Different Districts.—It was held under section 12, Act, VIII of 1859, that the High Court could not, in appeal, confer jurisdiction on a Court in district A to deal with a suit relating to immoveable property all lying in district B—*Kamini Sundari* vs. *Kali*, I. L. R., 12 Cal., 225; 12 Ind. App., 215. See as to the previous practice—*Bolakee Lall* vs. *Thakoor Pertam*, I. L. R., 5 Cal., 928; 6 C. L. R., 371. Under this Code sanction is no longer necessary; but the opposite party may proceed under section 20.

Act VIII—Plaintiff claimed two estates, one in Rajshahye and the other in Nuddea, as belonging to her deceased husband, and alleged dispossession by the defendants. She got a decree in Rajshahye for the land situated in that district, and then sued for the land in Nuddea, alleging a different act of dispossession from that in the former suit: *Held*, that the object of both suits was to establish the plaintiff's husband's title and to obtain possession of the land as the husband's widow and representative; that the allegation of the separate acts of dispossession did not affect the case, as all the acts complained of were prior to the institution of the first suit; and that she should have proceeded under this section, and her suit was barred under section 7, Act VIII, 1859—*Jumoona Dassee* vs. *Bamasoonderee*, 2 W. R., 148; but in a similar suit in Madras the High Court held that it was not *barred*, on the ground that this section was *permissive*, and afforded a plaintiff the option of trying to proceed in one suit for the recovery of all the property claimed, but did not touch on the jurisdiction of each Court in respect of the portion of property situated within its jurisdiction—*Subba Rau* vs. *Rama Rau*, 3 Mad., 376, and see in regard to a second suit—*Grish Chander* vs. *Ramessure*, 22 W. R., 308. Compare, the rule in suits for partition by Hindus and by Mahomedans—*Chandu* vs. *Runahmed*, I L. R., 14 Mad., 324; *Hari Narayan* vs. *Ganpatrav*, I. L. R., 7 Bom., 272; *Haridas* vs. *Pran Nath*, I. L. R., 12 Cal., 566.

Suits for foreclosure of property partly in Calcutta and partly in the Mofussil—*Khetter Mohun Dass* vs. *S. M. Chunder Money Dabee*, Coryton, 125; for sale of lands in different districts by establishing the judgment-debtor's rights thereto—*Ashruf Hossein Khan* vs. *Doctor Lazarus*, S. D., N. W., 1861, p. 588, fall within this section.

Power to stay proceedings where all defendants do not reside within jurisdiction.

20. If a suit which may be instituted in more than one Court is instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly;

and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to

be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them.

In such case, if the plaintiff so requires, the Court shall return the plaint with an endorsement thereon of the order staying proceedings.

Application when to be made.

Every such application shall be made at the earliest possible opportunity, and in all cases before the issues are settled; and any defendant not so applying shall be deemed to have acquiesced in the institution of the suit.

This section applies to H. C. and, except the last paragraph, to P. S. C. C.

Notice must be given to the "other parties," so that if one defendant only applies, he is bound to serve the other defendant with notice, and where an application is made by one of several defendants without notice having been given to the defendants who do not apply, the application should be allowed to stand over till notice is given. The denial of an application made by one defendant prejudices the right of another defendant, *subsequently* served with summons to make a similar application. (See section 126, N. Y. Procedure Code.) See "*Acquiescence*," section 17, *ante*.

Scope of the Section.—It applies to suits under section 17, clause (*b*). See also illustration (*b*), section 17, *ante*. Possibly it does not limit the inherent right of every Court to protect itself from an abuse of its own procedure by staying or dismissing without proof actions which it holds to be vexatious—*Haggard* vs. *Pelicier*, App. Cas., (1892) 61; following *Lawrence* vs. *Norreys*, 15 App. Cas., 210.

Foreign Court.—The Courts in India cannot stay proceedings, because the costs in a previous litigation in a foreign Court have not been paid—*Bowles* vs. *Bowles*, I. L. R., 8 Bom., 571.

Justice is more likely to be Done.—See *Geffert* vs. *Ruckchand*, I. L. R., 13 Bom., 178, p. 182.

Appeal.—An appeal lies from an order under this section staying proceedings in a suit.—Section 588, clause 1, *post*.

Remission of Court-fee where suit instituted in another Court.

21. Where the Court, under section 20, stays proceedings, and the plaintiff re-institutes his suit in another Court, the plaint shall not be chargeable with any Court-fee:

Provided that the proper fee has been levied on the institution of the suit in the former Court, and that the plaint has been returned by such Court.

This section applies to H. C. and P. S. C. C.

Procedure where Courts in which suit may be instituted subordinate to some Appellate Court.

22. Where a suit may be instituted in more Courts than one, and such Courts are subordinate to the same Appellate Court, any defendant, after giving notice in writing to the other parties of his intention to apply to such Court to transfer the suit to another Court, may apply accordingly; and the Appellate Court, after hearing the other

parties, if they desire to be heard, shall determine in which of the Courts having jurisdiction the suit shall proceed.

This section applies to H. C.

Procedure where they are not so subordinate.

23. Where such Courts are subordinate to different Appellate Courts, but are subordinate to the same High Court, any defendant, after giving notice in writing to the other parties of his intention to apply to the High Court to transfer the suit to another Court having jurisdiction, may apply accordingly. If the suit is brought in any Court subordinate to a District Court, the application, together with the objections, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate. The High Court may, after considering the objections, if any, of the other parties, determine in which of the Courts having jurisdiction the suit shall proceed.

This section applies to H. C. It does not apply to the Jhansi division.
Applications under this section should be made by petition and affidavit—*Khatija* vs. *Taruk Chunder*, 13 C. L. R., 182; I. L. R., 9 Cal., 980.

Procedure where they are subordinate to different High Courts.

24. Where such Courts are subordinate to different High Courts, any defendant may, after giving notice in writing to the other parties of his intention to apply to the High Court within whose jurisdiction the Court in which the suit is brought is situate, apply accordingly.

If the suit is brought in any Court subordinate to a District Court, the application, together with the objections, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate,

and such High Court shall, after considering the objections, if any, of the other parties, determine in which of the several Courts having jurisdiction the suit shall proceed.

Act VIII, 1859, section 13. This section applies to H. C. It does not apply to the Jhansi division.
See the case of *Skinner* vs. *Orde*, I. L. R., 2 Alla., 241; 6 Ind. App., 126.
This section does not empower a High Court to transfer a suit, but only to declare in which Court it should proceed, and if necessary to stay proceedings within its own jurisdiction—*Tala Ram* vs. *Hdrjiwan*, I. L. R., 5 Alla., 60.

Transfer of suits.

25. The High Court or District Court may, on the application of any of the parties, after giving notice to the parties and hearing such of them as desire to be heard, or of its own motion without giving such notice, withdraw any suit, whether pending in a

Court of first instance or in a Court of Appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself, or transfer it for trial to any other such subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter.

For the purpose of this section the Courts of Additional and Assistant Judges, shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Act VIII, 1859, section 6. This section applies to H. C. and P. S. C. C. Not to the Jhansi Division, Ajmere or Merwara—Reg. 1 of 1877, sections 2 & 26.

Practice.—This section applies to cases of winding up Companies under Act VI of 1882—*West Hopetown Co.*, I. L. R., 9 Alla., 180. As to the power of a village Munsif trying a case under Reg. IV of 1816, to transfer, see the case of *Lakshmakka* vs. *Bali*, I. L. R., 8 Mad.. 500.

Punjab.—Commissioners and Deputy Commissioners may exercise the powers of a District Court, and these may be delegated to Subordinate Judges—Act XVIII of 1884, sections 34, 37 & 38.

Court of First Instance.—If the Court of first instance has no jurisdiction to hear the suit, this defect is not cured by transferring the case to another Court having jurisdiction—*Pachaoni* vs. *Ilahi Baksh*, I. L. R., 4 Alla., 478, and no order of transfer should be made—*Peary Lall* vs. *Komal Keshore*, I. L. R., 6 Cal., 30; *Ledgard* vs. *Bull*, 13 Ind. App., 134; *Sankumani* vs. *Ikoran*, I. L. R., 13 Mad., 211; *Queen-Empress* vs. *Mangal*, I. L. R., 10 Bom., 274; unless by consent of parties—*Petman* vs. *Bull*, I. L. R., 5 Alla , 377; see, however, *Ledgard* vs. *Bull*, *supra*, *Jaggivan* vs. *Mugdum*, I. L. R., 7 Bom., 487, and the consent must be such that the Court will infer that the defendant did in point of fact waive all objections and engage that the cause should be tried on its merits by the second Court—*Ledgard* vs. *Bull*, 13 Ind. App., 134.

On what grounds a Suit should be Transferred—Section 6, Act VIII of 1859, contained a clause to the effect that any suit instituted might be withdrawn by the District Court whenever it might see sufficient cause for so doing. Under this section it has been decided that the power given to a Zillah Judge for the withdrawal of suits from the Subordinate Courts should only be exercised upon cause shown and ordinarily not without opportunity given to the parties to the suit to be heard upon the question.

Notice.—Want of notice does not render the transfer void—*Sankumani* vs. *Ikoran*, I. L. R., 13 Mad., 211.

Remanded Suit.—Under Act VIII the District Court could not withdraw from the Subordinate Court suits which the Subordinate Court had received by order of remand from a Court to which the District Court was itself subordinate, unless the higher Court had, by its order of remand, so changed the original character of the suit remanded as to make it in effect a new suit—*Mahomed Zahoor Ali* vs. *Thakooranee Rutta*, 2 Alla., 481; see, however, *Tarucknath Mookerjee* vs. *Gouree Charn*, 3 W. R., 147.

High Court.—The High Court did not transfer a case from a Court which had jurisdiction to try it, where no application had been made to the Judge of the latter Court, nor any notice given to the plaintiff—*Kristo Dass Koondoo* vs. *Issur Chunder*, 11 W. R., 189.

The 13th section of the Letters Patent (1865) of High Court at Fort William gives the Court power to order a suit to be transferred for trial, only where the transfer is agreed on by the parties, or for the purposes of justice; and in the absence of agreement it must be made out that there will be inconvenience amounting to this—that if the case be tried in the Court in which it was originally tried, the trial will be unsatisfactory. The mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred—*Rajah Ojooderam Khan* vs. *Nobinmoney Dossee*, 1 Ind. Jur., N. S., 396; but where, on a motion to transfer, it appeared that the parties and witnesses resided in Calcutta, that it would be cheaper to try the suit there, and that the parties appearing on the motion consented, a transfer was ordered—*Payn* vs. *Administrator-General*, I. L. R., 5 Cal., 766; and

see *Jotendronauth* vs. *Raj Kristo*, I. L. R., 16 Cal., 771. It is no objection to the trial of a case transferred under this section that the transfer order was founded on a misconception—*Ram Bux* vs. *Girdharee Lall*, 2 Agra, 178.

Minor.—As to the application of a next friend when no guardian *ad litem* has been appointed, see *Jotendronauth* vs. *Rajkristo*, I. L. R., 16 Cal., 771.

At what stage a Suit may be Transferred.—Section 6, Act VIII of 1859, referred to suits instituted and did not authorize the transfer of proceeding already commenced and entertained; and consequently a District Judge had no authority to call up an execution case from the file of the Subordinate Judge to his own Court—*Moulve Abdool Hye* vs. *Macrae*, 23 W. R., 1; *contra*—*Gaya Pershad* vs. *Bhup Singh* I. L. R., 1 Alla, 180, and see *Hira Lall* vs. *Badri Das*, I. L. R., 2 Alla., at p. 796; nor transfer it—*Shaikh Hamidooddeen* vs. *Bhadas Sahoo*, 18 W. R., 345; nor could a Judge call a up a case to his own file after the evidence had been taken in the Subordinate Court—*Dumree Sahoo* vs. *Jugdharee*, 13 W. R., 398; *Ranee Asmud Koonwur* vs. *Tayler*, W. R. (1864), p. 14; *Syud Korshed Ali* vs. *W. Tayler*, W. R. (1864), p. 15. But the Code differs from Act VIII of 1859, and extends to all pending cases, but the High Court, of Calcutta still adheres to the previous view—*Kishori Mohun* vs. *Gul Mahomed* I. L. R., 15 Cal., 177; otherwise in Allahabad—*Bandhu Naik* vs. *Lakhi Kuar*, I. L. R., 7 Alla., 342, and see section 191, *post*; and in Bombay—*Balaji* vs *Ranchoddas*, I. L. R., 5 Bom., 680. If a part-heard case is transferred, it cannot be decided on the evidence taken in the first Court—*Bandhu Naik* vs. *Lakhi Kuar*, I. L. R., 7 Alla., 342; but see section 191, *post*.

Subordinate Court.—This section does not enable a District Judge to transfer a suit pending before himself to a Subordinate Court—*Sakharam* vs. *Gangaram*, I. L. R., 13 Bom., 654; but still he is competent to transfer the execution of a decree which has been passed by his own Court to the file of the Subordinate Judge for disposal, section 223, *post*—*Bishemun* vs. *Land Mortgage Bank*, 12 Ind. App., p 11.

As to the case of an Assistant Judge, see *The Assistant Collector* vs. *Ardesir*, I. L. R., 16 Bom., 277.

Court of Small Causes.—See *Mangal Sen* vs. *Rupchand*, I. L. R., 13 Alla, 324.

A Small Cause Court suit was instituted before a Judge invested with jurisdiction to try it. He retired from office, and the District Judge directed his successor, who had no Small Cause Court jurisdiction to try it: *Held*, the order must be considered as passed under this section, and no appeal lay from the decision to the District Court—*Kauleshar* vs. *Dost Muhammed*, I. L. R., 5 Alla., 274. See also *Nagireddi* vs. *Ramanna*, I. L. R., 7 Mad., 592.

Order.—Every suit requires a separate application to transfer—*Kishori Lall* vs. *Luchman Doss*, 2 N. W. P., 147. As to the presumption when there is no order on the face of the proceedings, see *Sheo Pershad* vs. *Kasiura*, I. L. R., 10 Alla., 119.

Revision.—An order passed under this section will not be interfered with in revision; an appeal lies from the final decree—*Farid* vs. *Dulari*, I. L. R., 6 Alla., 233.

CHAPTER III.

OF PARTIES AND THEIR APPEARANCES, APPLICATIONS AND ACTS.

Persons who may be joined as plaintiffs.

26. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court, in disposing of the costs of the suit, otherwise directs.

Judicature Acts, Order 16, Rule 1, altered. This section applies to H. C. and P. S. C. C.

Plaintiffs in respect of the same cause of Action.—The corresponding rule in England is not limited by the words "same cause of action," which mean not only the act complained of, but the right violated—*Nusserwanji* vs. *Gordon*, I. L. R., 6 Bom , 266, p. 275; but apparently they are implied in it—*Lingammal* vs. *Venkatammal*, I. L. R., 6 Mad. 239, p. 243. Reading this section with section 45, *post*, it appears that the Code does not authorize the joining of plaintiffs in a suit in respect of distinct causes of action in which they are not jointly interested, and their interests are not merely conflicting but antagonistic. The words "in the alternative" apply to cases in which there is a doubt as to the person entitled to sue upon the cause of action—*Lingammal* vs. *Venkatammal*, I. L. R., 6 Mad., 239, p. 243; (compare—*Fakirapa* vs. *Rudrapa*, I. L. R., 16 Bom., 119); and if one of two plaintiffs can sue for the claim and the second plaintiff is added as a matter of caution there is no misjoinder—*Bachubai* vs. *Shamji*, I. L. R., 9 Bom. 536, p. 547; but where thirteen persons who were committed to jail under one warrant sued jointly seeking damages for illegal detention, the plaint was taken off the file—*Ali Serang* vs. *Beadon*, I. L. R., 11 Cal., 524. So where six persons jointly sought a declaration that certain proceedings of a District Temple Committee removing them from office were illegal, the plaint was returned—*Ramanuja* vs. *Devanayaka*, I. L. R., 8 Mad., 361; on the other hand, where the managers of a temple passed a rule restraining the right of persons to enter the temple, it was held all could join in the suit for an injunction—*Kalidas* vs. *Gor Parjaram*, I. L. R., 15 Bom., 309, and several members of a *caste* have been allowed to join in a suit against trustees for maladministration—*Thakersey* vs. *Hurbhum*, I. L. R., 8 Bom., 432, p. 450. A suit against a company and its directors, by the agents, two of whom were shareholders, the plaintiffs were not allowed to join a cause of action based on the agreement with a cause of action common to only two as shareholders—*Nusserwanji* vs. *Gordon*, I. L. R., 6 Bom., 266, p. 275; and where a Hindu widow and her adopted son sued together to recover family property, the suit was disallowed, as the claims of the mother and son were conflicting—*Lingammal* vs. *Venkatammal*, I. L. R., 6 Mad., 239, p. 243.

Charities.—The Advocate-General is entitled to carry on all suits in the High Court for the administration of charitable funds, and to appear and represent the Crown in them if brought by another party—*Attorney-General* vs. *Brodie*, 4 Moore, 190; *Wardens of Nossa Senora* vs. *Hartmann*, Perry's O. Cases, 333; *Advocate-General* vs. *Damodhar*, *id.*, 526. See *Panchcowrie Mull* vs. *Chumroolall*, I. L. R., 3 Cal., 563; *Thakersey* vs. *Hurbhum*, I. L. R., 8 Bom., 432. Several persons can join in a suit under section 539, *infra*.

Foreign States—recognized by the Government of this country—can sue in their recognized names—*U. S.* vs. *Wagner*, L. R., 2 Ch. App., 582; *U. S.* vs. *McRae*, L. R., 3 Ch. App., 79, but none else—*Republic of Chili* vs. *Rothschild*, W. N. (1891), 138. A suit for property belonging to a Rajah cannot be brought in the name of his Political Agent—*Girdhari Das* vs. *Powlett*, I. L. R., 2 Alla., 690.

Joint Interest—All persons who entered into the contract should be made plaintiffs, even though they form a joint Mitakshara family—*Ramsebuk* vs. *Ramlall Koondoo*, I. L. R., 6 Cal., 815; *Kalidas* vs. *Nathu*, I. L. R., 7 Bom., 217, but see *Shirekuli* vs. *Ajjibal*, I. L. R., 15 Bom., 297. Thus a member of a Hindu family carrying on an ancestral money-lending business, who is not the managing member, cannot sue for a family debt—*Jugalkishore* vs. *Hulasi Ram*, I. L. R., 8 Alla., 264; but if the contract is in the name of one, he can sue—*Bungsee Singh* vs. *Sudist Lall*, 10 C. L. R., 263; *Unni Nambiar* vs. *Nilakandan*, I. L. R., 4 Mad., 141, even though he be a minor in an undivided Hindu family—*Yeknath Ramchandra* vs. *Waman*, I. L. R., 10 Bom., 241, and generally where there is no evidence—*Ragho Vinayak* vs. *Sheikh Daud*, I. L. R., 13 Bom., 51, and nothing on the face of the contract to show that the person named in it is not acting in his individual capacity he can sue—*Jaghabhai* vs. *Rustamji*, I. L. R., 9 Bom., 311. The rule in England is that all persons having a joint interest must join in an action at law, but in equity it is sufficient if all interested in the subject of the suit should be before the Court, either in the shape of plaintiffs or defendants—*Wilkins* vs. *Fry*, 1 Mer., 262; *Sandes* vs. *Dub. Tram. Co.*, 12 L. R., Ir., 206; *Guru Prashad* vs. *Ras Mohun*, 1 C. L. R., 431, and one of several mortgagees or trustees can maintain a suit, making the others co-defendants, if they are unwilling to be joined as plaintiffs, or have done some act which precludes them—*Luke* vs. *South Ken. Hot. Co.*, 7 C. D., 789; 11 C. D., 12; *Kalidas* vs. *Nathu*, I. L. R., 7 Bom., 217, and in the case of *Dwarkanath Mitter* vs. *Tara Prosunna*, I. L. R., 17 Cal., 160 a suit was dismissed because persons who had a joint interest were made defendants, without any allegation in the plaint that they had refused, and in *Parameswaran* vs. *Shangaran*, I. L. R., 14 Mad., 489, a suit by one of two unless the other being joined as defendant was dismissed, as there was no evidence that the latter had asserted an exclusive right to sue or had been consulted in regard to the suit; but in *Van Gelder* vs. *Sowerby Society*, 44 C. D., 374, where the plaintiffs would not apply, but would not object to placing a person as defendant whom the Court considered should be a co-plaintiff, the Court of Appeal considered it was the duty of the Judge to place him on the record as defendant and not

to dismiss the suit; see p. 394. See also *Barton* vs. *North Staffordshire Ry. Coy.*, 38 C. D., 458, p. 465; *Kendall* vs. *Hamilton*, 4 App. Cas., 504, p. 516. The Indian Courts follow the equity practice—*Unni* vs. *Nilakandan*, I. L. R., 4 Mad., 141; *Arunachala* vs. *Vithalinga*, I. L. R., 6 Mad., 27; *Omasundari* vs. *Halder*, 9 C. L. R., 13; *Phoolbas Koonwur* vs. *Jogeshur*, 3 Ind. App., 7, p. 25.

Where a document creates a joint obligation, all the parties should be on the record—*Gopal Chunder Goohoo* vs. *Juggodumba Dossia*, 10 W. R., 411; *Ramjoy Sing* v. *Nagur Ghazee*, 5 W. R., Act X, 68; and it is the same if the obligation is created by law. Thus one of the heirs of a Hindu cannot sue for his share of a debt due to the deceased—*Kandhiya Lal* vs. *Chandar*, I. L. R., 7 Alla., 313; but a surviving partner can sue for a partnership debt—*Gobind* vs. *Chandar*, I. L. R., 9 Alla., 486; this rule is not followed by the Calcutta High Court—*Ram Naraian* vs. *Ram Chunder*, I. L. R., 18 Cal., 86, (compare *Mohini Mohun* vs. *Bungshi Buddan*, I. L. R., 17 Cal., 580,) though it is in Madras—*Parameshvirane* vs. *Shangaram*, I. L. R., 14 Mad., 489. See note under section 32, *infra*.

Joint Family.—So in a suit to recover ancestral property, all the members of a joint family should sue together; those only who refuse should be made defendants—*Rajaram Tewari* vs. *Luchmun Pershad*, 12 W. R., 478; *Collector of Monghyr* vs. *Hurdai Narain*, I. L. R., 5 Cal., 425, and they cannot sue through some or one of their members—*Balkrishna* vs. *Municipality of Mahat*, I. L. R., 10 Bom., 32; *Hori Gopal* vs. *Gopaldas*, I. L. R., 12 Bom., 158. Nor can one member of an undivided family sue to establish a right of easement, unless he be the *kurta*, and sue as such; otherwise, all the members must be on the record as plaintiffs or defendants—*Arunachala* vs. *Vithialinga*, I. L. R., 6 Mad., 27 nor is he entitled to recover on a bond in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt was due to the joint family of father and son—*Venkataramanna* vs. *Venkayya*, I. L. R., 14 Mad., 377.

KARNAVAN.—A Karnavan can alone sue for tarwad property.—*Byathamma*, I. L. R., 15 Mad., 19.

Third Person.—To entitle a third person not named a party to a contract to sue on it, he must have a beneficial right under it, that is to say, a right to call upon a party to have the contract enforced and to protect his right—*Gandy* vs. *Gandy*, 30 C. D., 57, and compare *In re Cameron*, 37 C. D., 32.

Suit in Another's Name.—A person can sue on a bond in the name of another party if he shows by oral evidence that the debt secured by the bond was money advanced by him or by the party, in whose favour the bond was executed in his behalf—*Deva Rau* vs. *Venatesa Achariyar*, 1 Mad., 452; but the manager of an indigo concern cannot sue in his own name on a contract executed with a previous manager, and in which he has no personal interest—*Glascott* vs. *Gopal Shaikh*, 9 W. R., 254.

Benamidar.—In mere personal demands such as Bengal bonds the suit may be brought in the name of the person whose name is on the instrument, though he has no real interest in it, and the real owner can sue, but in a suit for property on title the real owner must sue—*Gopeekrist Gosain* vs. *Gungapersad*, 6 Moore, 53, at p. 72; *Hari Gobind* vs. *Akhoy Kumar*, I. L. R., 16 Cal., 364.

Rent.—In a suit in regard to an undivided fraction of rent, the other co-proprietors should be made parties—*Obhoy Gobind* vs. *Hurychurn*, I. L. R., 8 Cal., 277; nor can one sharer sue alone to enhance his fractional portion of rent, at least unless the other sharers have refused to join as plaintiffs, and then they should be made defendants—*Gopal* vs. *Macnaghtan*, I. L. R., 7 Cal., 751; *Jogender Chunder Ghose* vs. *Hurris Chunder*, 10 C. L. R., 331; *Kali Chandra* vs. *Rajkishore*, I. L. R., 11 Cal., 615; nor can one sharer sue for a kaboolyat of his share where the tenure is joint—*Guni Mahomed* vs. *Moran*, I. L. R., 4 Cal., 96; *Jogendro Chunder* vs. *Nobin Chunder*, I. L R., 8 Cal., 353. But see *Rashbehari Mukerji* vs. *Sakhi Sundari*, I. L. R., 11 Cal., 644, and I. L. R., 5 Cal., 902. Under the new Tenancy Act all the proprietors must be plaintiffs in a suit for additional rent or to enhance—*Gopal Chunder* vs. *Umesh Narain*, I. L. R., 17 Cal., 695; or to make an application under section 158 of that Act—*Moheeb Ali* vs. *Ameer*, I. L. R. 17 Cal., 538.

Forfeiture.—In a suit on a condition to re-enter all the parties suing must join as plaintiffs—*Reasut Hossein* vs. *Choswar*, I. L. R., 7 Cal., 470; *contra*—*Ebrahim* vs. *Curseiji*, I. L. R., 11 Bom., 644; so one sharer can not bring a suit to avoid an under-tenure—*Dwarkanath Pal* vs. *Grishchunder*, I. L. R., 6 Cal., 827.

Agent.—A Karayama Samudayam cannot sue in his own name in suits on behalf of the *Devaswam*—*Unni* vs. *Nilakandan*, I. L. R., 4 Mad., 141. Nor can a gomashta sue for rent in his own name—*Kunjo Behari* vs. *Purno Chunder*, 12 C. L. R., 55. So in a suit for declaration of title against a zemindar, the zemindar and not his *karindah* should be made a party—*Madhao Rao Apa* vs. *Thakoor Pershad*, 3 Agra, 127. So also a manager appointed under Act XXXV of 1858, cannot sue in his own name for possession of the lunatic's property—*Nemava* vs. *Devandrappa*, I. L. R., 15 Bom., 177.

Club Secretary.—A suit for the price of goods supplied to the member of a non-proprietors club, cannot be brought in the name of the secretary—*Michael* vs. *Briggs*, I. L. R., 14 Cal., 362.

Assignee.—In England the right to bring an action could not at Common Law be transferred or assigned, so that the assignee might bring a suit in his own name; in this country not only may a cause of action be so assigned, but also the liability to be sued. A assigned his interest in an indigo factory to B, and in the deed there was a recital that B should take over the *dena-pawna* account of the factory as it stood on the 30th of September 1856. C sued A and B jointly to recover rent in respect of lands occupied under lease for the use of the factory. *Held* that, by the law of this country, the right of action to recover a debt is capable of being legally assigned so as to give the assignee a remedy by action at law, and there seemed no reason why the liability of the debtor should not also be assignable, and that the contract gave C a right to sue A and B jointly and he was not bound to elect between them—*Kearnes* vs. *Bhawani Churn Mitter*, B.L.R., F. B., 54. But see the Transfer of Property Act (IV of 1882), section 136, which declares that "no judge, pleader, mukhtar, clerk, bailiff, or other officer connected with a Court of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions."

After Suit Brought.—Assignees need not be parties; but may be added—*Suput Singh* vs. *Imrit*, I. L. R., 5 Cal., 720, p. 724.

Lessee-Lessor Out of Possession.—As to suit by a lessee, whose lessor is out of possession at the date of the lease—*Tiery* vs. *Kristodhun Bose*, 1 Ind. App., 76; *Lokenath Ghose* vs. *Jugobundhoo Roy*, I. L. R., 1 Cal., 297; *Achayga* vs. *Hanumantrayudu*, I. L. R., 14 Mad., 269; *Ugarchand* vs. *Madapa*, I. L. R., 9 Bom., 324. See also *Bai Suraj* vs. *Dalpatram*, I. L. R., 6 Bom., 380; *Vasudev* vs. *Tatia*, I. L. R., 6 Bom., 387.

Partition.—In all cases of joint ownership, each party has a right to enforce partition—*Mitta Kunth* vs. *Neerunjun*, 14 B. L. R., 166; *Padmamani Dasi* vs. *Jugadamba Dasi*, 6 B. L. R., 134; *Shama Soonderee* vs. *Jardine, Skinner*, 14 B. L. R., 167.

In a partition between half brothers after the death of their father, the mother must be made a party—*Toritabhoosun* vs. *Taraprosuno*, 4 C. L. R., 161.

See "*Partition*," section 11, *ante*.

Receiver.—A receiver may alone sue for everything due to the estate—*Bachubai* vs. *Shamji*, I. L. R., 9 Bom., 536; but see *Drobomoyi* vs. *Davis*, I. L. R., 14 Cal., 323, p. 339. See note under section 503, *post*.

Sale.—A mortgagee may sue to set aside a sale of the mortgaged property for arrears of revenue—*Gobind Lal* vs. *Biprodas*, I. L. R., 17 Cal., 398.

Court may substitute or add plaintiff for or to plaintiff suing.

27. Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may, at any stage of the suit, if satisfied that the suit has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons, with his or their consent, to be substituted or added as plaintiff or plaintiffs upon such terms as the Court thinks just.

The words "at any stage of the suit" and "with his or their consent" were added by Act VII of 1888, section 8.

Judicature Acts, Order 86, Rule 2. This section applies to H. C. and P. S. C. C.

This section does not give a Court unlimited power to remodel the proceedings—*Turquand* vs. *Fearon*, 4 Q. B. D., 280. It does not mean that a party's case should be so framed as to succeed, but it should be so framed that it can be adjudicated on by the Court—*Long* vs. *Crossby*, 13 C. D., 388. See also *Smith* vs. *Hasaltine*, W.N., 1875, p. 250. See, however, the *Val de Travers Co.* vs. *London Tramways Company*, 48 L. J., C.P., 312.

A plaintiff can only be added under this section where there has been a *bonâ fide* mistake. Where certain persons having only an expectation, and not an interest, brought an action for administration, the persons directly interested not being parties and apparently objecting, it was held this section did not apply—*Clowes* vs. *Hilliard*, 4 C. D., 413. The mistake may be of law as well as of fact. One shareholder sued on behalf of himself and others to set aside a contract not mentioned in the prospectus; on

demurrer the Court added the Company as co-plaintiff *without their consent*—*Duckett* vs. *Gover*, 6 C. D., 82; *Mason* vs. *Harris*, 11 C. D., 106; see also *Smith* vs. *Haseltine*, Weekly Notes, 1875, p. 250; *Long* vs. *Crossby*, 13 C. D., 388; *Ayscough* vs. *Bullar*, 41 C. D., 341.

Where a person has been made a plaintiff under this section, a motion to strike out his name can only be made by himself—*Duckett* vs. *Gover*, 6 C. D., 82; *Judooputtee Chatterjee* vs. *Chunder Kant*, 9 W. R., 309. In an action to set aside certain mortgages, an *ex-parte* application was made to strike out the plaintiff, a trustee and substitute three infants, *cestuis qui trust*, as plaintiffs and to make plaintiff a defendant: *Held*, that the three infants might be joined as plaintiffs, but the plaintiff could not be made a defendant, and the parties altered on an *ex-parte* application—*Tildesley* vs. *Harper*, 3 C. D., 277.

Limitation.—A change of parties as plaintiffs under this section does not give rise to such a question of limitation as arises under section 32, *post*—*Subodini* vs. *Cumar*, I. L. R., 14 Cal., 400.

Persons who may be joined as defendants.

28. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Judicature Acts, Order 16, Rule 3, altered. This section applies to H. C. and P. S. C. C.

All Persons—A ship is a person within this section—*The Bombay Steam Co.* vs. *Shepherd*, I. L. R., 12 Bom., 237, p. 241.

Cantonment Committee.—See *The Cantonment Committee* vs. *Barjorji*, I. L. R., 14 Bom., 286.

Any Relief.—Persons against whom no relief is asked in respect to the matter should not be made parties for the purposes of discovery or to make them pay costs—*Barstall* vs *Beyfus*, 26 C. D., 35, p. 40, referring to *Barnes* vs. *Addy*, L. R., 9 Ch., 244, p. 255.

The same Matter.—The result of this section, when read with section 26, is to enable all persons who claim or against whom is claimed any right "jointly, severally or in the alternative" to be made plaintiffs or defendants respectively, and judgment to be given for one or more of the plaintiffs against one or more of the defendants according to their respective liabilities—*Bungsee Singh* vs. *Soodist Lall*, I. L. R., 7 Cal., 740, p. 745. When two or more plaintiffs sue jointly, the defendant may set off against each individual separate ascertained sums—The *M. S.* and *L. Railway Company* and the *N. W. Railway Company* vs. *Brooks*, 2 Ex. D., 243. In a suit instituted against six persons, plaintiff prayed for khas possession of one-fourth of a certain lot, or in the alternative for a decree for arrears of rent against the defendants or such of them as should on enquiry be deemed liable. Plaintiff had been kept out of possession by one defendant only, and if he were entitled to a decree for arrears of rent, another defendant was liable for a portion only: *Held*, the suit was properly framed—*Janokinath Mookerjee* vs. *Ramrunjun Chuckerbutty*, I. L. R., 4 Cal., 949; but a suit for possession by an auction-purchaser against several persons will not lie unless it is shown they acted in concert or held under a common title—*Sudhendu Mohen* vs. *Durga*, I. L. R., 14 Cal., 435; see, *Loke Nath Surmah* vs. *Keshab Ram*, I. L. R., 13 Cal., 147. And where the plaintiff claimed certain properties attached as his purchased properties, but his claim being disallowed, the properties were sold in five lots to five different persons, he was allowed to sue them together —*Hira Lal* vs. *Prosunno*, 12 C. L. R., 556; but see *Ram Narain* vs. *Annoda*, I. L. R., 14 Cal., 681. A charterer may sue both owner and master on a charter-party entered into with the owner's agent—*Hasonbhoy* vs. *Clapham*, I. L. R., 7 Bom., 51.

But the power to join persons as defendants in a suit is not so wide as under the English procedure, and they cannot be joined, except in regard to one contract (s. 29), or where the relief sought against them all is in respect to the same matter—*Narsing* vs. *Mangul*, I. L. R., 5 Alla., 163; explained in *Indar Kuar* vs. *Gur Prasad*, I. L. R., 11 Alla., 33. See *Bhagwati* vs. *Bindeshri*, I. L. R., 6 Alla., 106; I. L. R., 14 Cal., 435, 681.

In the Alternative.—A party may be added as a defendant, though the relief prayed against him be inconsistent with the alternative relief prayed against the other defendant—*Child* vs. *Stenning*, 5 C. D., 695; *Buddree Doss* vs. *Hoare Miller & Co.*, I. L. R., 8 Cal., 170. And alternative relief may be claimed against one or more of the defendants—*Rajdhur* vs. *Kali Krishna*, I. L. R., 8 Cal., 903.

A leased certain lands to B for a term and afterwards sold to D, who became entitled to the rents from a certain date. D applied for payment to B, who said he had paid that whole in advance to A. *Held*, D could sue A and B for the rent, praying a decree for rent against B, or a decree against A, if B's allegation was correct—*Madan Mohun* vs. *Holloway*, I. L. R., 12 Cal., 555.

In an action brought by a company against A and B, the plaint stated that A, through B, who professed to be, and in fact was, the agent of A, contracted to take a certain number of debentures in the plaintiff company, which contract A failed to perform, and that A denied that B was authorised by him to make the contract. The plaintiff prayed for specific performance of the contract or for damages against A, or in the alternative, if it should appear that B had no authority to act as A's agent, then for specific performance and damages against B. B having applied to have judgment entered up in his favour, or to have his name struck out as a defendant: *Held*, that, under the circumstances above stated, the plaintiffs were entitled to join A and B as defendants, and to claim alternative relief against them under this section—*Honduras Railway Co.* vs. *Tucker*, 2 Ex. D., 301. See also *Shafto* vs. *Bolcrow*, 34 C. D., 725; *Eder and Co.* vs. *Attenborough, &c.*, 23 Q. B. D., 130.

To Declare there is no Right of Way – In a suit by the owner of land to have it declared that land declared to be a public road by a Magistrate, is private property the Secretary of State is not a party—*Chuni Lall* vs. *Ramkishen*, I. L. R., 15 Cal., 460; save in Bombay—*Bolaram* vs. *The Magistrate of Igatpuri*, I. L. R., 6 Bom., 672.

Mortgage.—In a suit for foreclosure every party having the right to redeem should get notice and be made a defendant; such as the assignee of the mortgagor—*Mohun Lall* vs. *Goluck Chunder*, 10 Moore, 1; or a puisne mortgagee of whole or of part, whether in possession or not—*Radhabai* vs. *Shamrav*, I. L. R., 8 Bom., 168; *Namdar* vs. *Karam*, I. L. R., 13 Alla., 315; but it is not absolutely necessary to make puisne incumbrancers parties, though if not, they are not bound by the decree—*Muhammed Samiuddin* vs. *Man Singh*, I. L. R., 9 Alla., 125; *Namdar* vs. *Karam Raji*, I. L. R., 13 Alla., 315, and may impeach the decree on the ground of fraud or claim to redeem—*Sita Ram* vs. *Amir Begam*, I. L. R., 8 Alla., 324; *Dullabhdas* vs. *Lakshmandas*, I. L. R., 10 Bom., 88.

Owner of a Share.—But a suit by the purchaser of the interest of one of several mortgagees will not lie unless all the other mortgagees are on the record—*Parsotam Saran* vs. *Chiranji*, I. L. R., 9 Alla., 68. On the same principle the owner of a portion of the equity of redemption must make all his co-sharers parties—*Nilakant* vs. *Suresh Chunder*, 12 Ind. App., p. 180; even though he sues for his own share—*Ragho Salvi* vs. *Balkrishna*, I. L. R., 9 Bom., 128; *Fakir Baksh* vs. *Sadat Ali*, I. L. R., 7 Alla., 376.

As to the presumption of a mortgage taken by a Hindu member of a joint family being his own, see *Ragho* vs. *Daud*, I. L. R., 13 Bom., 51.

Bonds for Purchase-Money.—Lands were sold and purchase-mony paid, and the vendor, unable to give possession or repay, gave bonds for the amount due; it was held that other part-owners of the land were not liable on the bonds, nor could the vendor be taken to have executed the bonds as their agent as well as on his own account —*Ram Lall Bhagut* vs. *Kullabuttee Koonwaree*, Marsh., 9.

Suit for Land.—In a suit for land by one lessee against another, their lessors need not be parties—*Nagur Chand* vs. *Doorga Doss*, 11 W. R., 137; but if in addition, plaintiff requires a declaration that the defendant's lessors hold under a forged lease, they should be made parties—*Dukhsena Mohun* vs. *Ameeruddeen*, 12 W. R., 247.

Other Cases.—In a suit for land where defendant's wife claims that her husband erected a house on it with her separate money, she should be made a party—*Gour Gopal Dutt* vs. *Bishonath Ghose*, Coryton, 41, and if it has been mortgaged, the mortgagor and mortgagee can be sued together—*Indar Kuar* vs. *Gur Prasad*, I. L. R., 11 Alla., 33.

To compel Registration —In a registration suit under section 77, Act III, 1877, the Registrar need not be made a party—*Wishwambhar* vs. *Prabhakar*, I. L. R., 8 Bom., 269.

Joint Wrong-doers.—A suit will lie against several persons for possession, on the ground that they have combined, forged a document, and, making it the basis of their action, ousted plaintiff—*Gujadhur Pershad* vs. *Saheb Roy*, 19 W. R., 203, against several persons for a joint assault—*Ramessur Bhattacharjee* vs. *Shib Narain*, 14 W. R., 419; and against joint trespassers—*Sheikh Omur* vs. *Sheikh Welayet*, 4 C. L. R., 455.

And where plaintiff having obtained a formal possession of lands, attempted to measure them but was resisted by the persons in possession, a declaratory suit against 86 defendants on the ground that they had conspired to keep plaintiff out of possession was allowed—*Loke Nath* vs. *Keshab Ram*, I. L. R., 13 Cal., 147.

Joinder of parties liable on same contract.

29. The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills-of exchange, hundís and promissory notes.

Judicature Acts, Order 16, Rule 5. This section applies to H. C. and P. S. C. C.

This section is very similar to section 120 of the N. Y. Proc. Code, which declare that persons severally liable upon the same obligation or instrument, including parties to bills-of-exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff. It has been held under this section that, though the several parties to a bill or note may be sued in one action, it does not make them jointly liable as joint debtors; that an action may be brought against the maker and the executor of the indorser of a promissory note, although the maker is solvent, but separate judgments must be entered. And it has been held that, where a subsequent indorser sued prior indorsers to recover the amount he had been compelled to pay in a suit on the note, the action was for *money paid for the use of the defendants*, and not an action on the note, and, therefore, could not be maintained (Voorhie's 10th edition, 108). This, however, is not the law in India—*Mohendro Lall* vs. *Jadhub Kissen*, 14 W. R., O. J., 5.

The drawer and acceptor of a bill-of-exchange can be joined as defendants in a suit brought by the holder—*Pestonjee* vs. *Mirza Mahomed*, I. L. R., 3 Cal., 541.

Contract.—This section does not refer to the case of liability to account under a will—*Smith* vs. *Harrison*, 2 Ch. (1891), 349.

One party may sue or defend on behalf of all in same interest.

30. Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable), by public advertisement, as the Court in each case may direct.

Judicature Acts, Order 16, Rule 9. This section applies to H. C. and P. S. C. C.

As to the law previous to Act X of 1877, see the case of *Anandrav* vs. *Shankar*, I. L. R., 7 Bom., 323; *Manohar* vs. *Lakhminaram*, I. L. R., 12 Bom., 247, and cases under section 539, *post*.

Object of the Section.—This section introduced a new procedure into the Mofussil Courts. The general rule is that all persons interested in the subject-matter of a suit in respect of its object should be made parties; but in cases in which there is a large class of individuals having the same interest, the Courts, for the sake of convenience, allow them to be represented by one of the class for himself and the others—*Cockburn* vs. *Thomson*, 16 Ves., 325. But it does not enable a person to sue on behalf of the *general* public. Thus it will not support an action to set aside an obstruction in a public highway without proof of special damage—*Adamson* vs. *Aramugam*, I. L. R., 9 Mad., 463; *Siddeswara* vs. *Krishna*, I. L. R., 14 Mad., 177. See, however, *Chuni* v. *Ramkishen*, I. L. R., 15 Cal., 460. Moreover, the plaintiff must have himself a cause of action and in the same interest—*Raghubar Dial* vs. *Kesho Ramanuj*, I. L. R., 11 Alla., 18; *Ragva* vs. *Rajaratnam*, I. L. R., 14 Mad., 57.

Permission.—If the Court's permission has not been previously obtained, the suit will be dismissed—*Jan Ali* vs. *Atawur*, 9 C. L. R., 433; *Oriental Bank Co.* vs. *Gobind Lall Seal*, 13 C. L. R., 142; I. L. R., 9 Cal., 604; *Lutifunnissa* vs. *Nazirun*, I. L. R., 11 Cal., 33; but see *The Secretary of State* vs. *Mathurabai*, I. L. R., 14 Bom., 213, and compare the case of *Ramayyangar* vs. *Krishnayyangar*, I. L. R., 10 Mad., 185; and *Mahomed Azmat* vs. *Lalli*, I. L. R., 8 Cal., p. 434; and if a suit is brought on behalf of a minor for himself and others without sanction, and the next friend does not satisfy the Court that it is for the benefit of the minor, he will be made to pay the costs—*Geereeballa* vs. *Chunder Kant*, I. L. R. 11 Cal., 213—See "LEAVE OF THE COURT," section 44, *post*.

DEFECTIVE ORDER—If an order purporting to be made under this section does not give permission to any definitely named persons, and notice has not issued, it is void—*Kali Kanta* vs. *Gour Prasad* I. L. R., 17 Cal., 906. And see *Ragava* vs. *Rajaratnam*, I. L. R., 14 Mad., 57.

RES JUDICATA—Though plaintiff claim a right in common with others, yet if he does not get permission, the result of the suit only binds the actual litigants.—*Thanakoti* vs. *Muniappa*, I. L. R., 8 Mad., 496; and see *Rajava* vs. *Rajaratnam*, I. L. R., 14 Mad., 57; compare *May* vs. *Newton*, 34 C. D., 347.

AMENDMENT—Note the reasoning in *Rampurtab* vs. *Premsukh*, I. L. R., 15 Bom., 93.

Plaintiffs—It is essential that the parties should be numerous; twenty have not been sufficient—*Harrison* vs. *Stewardson*, 2 Hare, 530. No formal statement to that effect has been necessary in the English Courts, and if the fact appears upon the face of the plaint, or by a schedule to a deed incorporated with it, that has been held sufficient—*Weld* vs. *Bonham*, 2 Sim. & S., 93. The plaintiffs or defendants must distinctly assert that they are competent to sue or be sued on behalf of all parties so concerned—*Baldwin* vs. *Lawrence*, 2 Sim. & S., 629; *Good* vs. *Blewitt*, 13 Ves., 397. Where a crew were 80 in number, and 64 of them appointed two agents who sued for an account on behalf of the 64 only, and the remaining 16 were in no way brought before the Court, it was held impossible to take the account without bringing the 16 before the Court—*Leigh* vs. *Thomas*, 2 Ves., Sr., 312.

In England the plaintiff cannot be compelled to give up the names and addresses of the persons on whose behalf he is suing—*Leathley* vs. *McAndrew and Company*, Weekly Notes, 1875, p. 259. He retains absolute dominion over the suit until decree, and may dismiss the bill at his pleasure: but after decree he cannot deprive the persons of the same class from the benefit of it (Daniell, 215; 2 Ex. D., 382), and a defence to him is a defence to the suit—*Leathley* vs. *McAndrew*, Weekly Notes, 1876, p. 38. If the suit is dismissed before decree, it is no bar to a suit by the others; but the decree binds both sides—*Srikhanti* vs. *Induparam*, 3 Mad., 226, in the absence of fraud or collusion—*Commissioners of Sewers* vs. *Gellatly*, 3 C. D., 610.

Same Interest.—The parties must have *the same interest*. Thus one creditor can sue on behalf of himself and all the other creditors of the deceased, for the object of each is to make out the estate of the deceased to be as large as possible—*Worraker* vs. *Pryer*, 2 C. D., 109; see also *Woolridge* vs. *Nones*, L. R., 6 Eq., 410; *Ruse River Co.* vs. *Atwell*, L. R., 7 Eq., 347; and so can one creditor under a trust-deed for payment of debts (1 Daniell, 5th edition, 209), but he cannot sue alone—*Manickavelu* vs. *Arbuthnot*, I. L. R., 4 Mad., 404; *Burjorji* vs. *Dhunbai*, I. L. R., 16 Bom., 1; and also legatee on behalf of himself and all other legatees (*id.*); *Geereeballa* vs. *Chunder Kant*, I. L. R., 11 Cal., 213; and an appointee under a will—*Manning* vs. *Thesiger*, 1 Sim. & S., 106; and some of the proprietors of a trading concern, on behalf of themselves and others, for an account against their co-partners—*Chancy* vs. *May*, Prec. in Ch., 592; and a freeholder or copyholder for a right of common—*Smith* vs. *Brownlow*, L. R., 9 Eq., 241; *Commissioners of Sewers* vs. *Glasse*, L. R., 7 Ch. App., 456; and a copyholder for himself and other copyholders—*Phillips* vs. *Hudson*, L. R., 2 Ch. App., 243; and one person on behalf of himself and others, to avoid paying a cess—*Attorney-General* vs. *Heeles*, 2 Sim. & S. 76; and an officer of a privateer for himself and crew against the owners for an account of capture according to the articles—*Good* vs. *Blewitt*, 13 Ves., 397; and an officer of the East Indian army for himself and other officers and privates, for a distribution of prize-money in a certain way—*Brown* vs. *Harris*, 13 Ves., 556; and a person for himself and others to protect property pending litigation and to prevent waste (1 Daniell, 5th edition, 215); and the owner of land against one villager for himself and others asserting a right of way—*Chuni* vs. *Ramkishen*, I. L. R., 15 Cal., 460.

Objection to Join.—If any of the persons whom plaintiff claims to represent consider that he does not represent him, his proper course is to apply to be put on the record, and then he can apply to get rid of any order he may think injurious to him or to take the conduct of the case out of the plaintiff's hands—*Watson* vs. *Cave*, 17 C. D., 19; *Fraser* vs. *Cooper*, 21 C. D., 718; and see *May* vs. *Newton*, 34 C. D., 347, p. 349.

Action by Company.—One member of a corporation can sue on behalf of himself and others to restrain the commission of an act which is *ultra vires*—*Bloxam* vs. *Met. Railway Co.*, L. R., 3 Ch. App., 337; *Clinch* vs. *Finan. Corporation*, L. R., 5 Eq., 450; L. R., 4 Ch. App., 117; (he may also sue in his own name) *Hoole* vs. *Great Western Railway Co.*, L. R., 3 Ch. App., 262; or if the directors and majority are using their power for the purpose of doing something fraudulent against the minority—*Atwool* vs. *Merryweather*, L. R., 5 Eq., 464, note; *Mason* vs. *Harris*, 11 C. D., 97; *Silber Light Co.* vs. *Silber*, 12 C. D., 717. And one director can sue the others in his own name on the ground of individual injury, if they wrongfully restrain him from acting as director—*Pulbrook* vs. *Richmond Consolg. Mg. Co.*, 9 C. D., 610. But as one object of incorporating bodies in England was to avoid a multiplicity of suits, in all other cases the corporate body must sue—*Gray* vs. *Lewis*, L. R., 8 Ch. App., at 1051. As to when a company may be made a co-plaintiff in such suits, see *Harben* vs. *Phillips*, 23 C. D., 14.

Not same Interest.—If the parties have not the same interest in the suit, this procedure cannot be adopted. Where three persons filed a bill on behalf of themselves and others as subscribers to a Peruvian loan to rescind the contracts and have the subscription moneys returned, the bill was not allowed, as it did not necessarily follow that every subscriber desired to retire from the speculation—*Jones* vs. *Garcia Del. Rio*, 1 T. & R., 297; *Attorney-General* vs. *Heeles*, 2 Sim. & S., 76; see also *Weale* vs. *West Middlesex Waterworks*, 1 J. & W., 358; and so where a shareholder filed a bill on behalf of himself and others to restrain the directors from enforcing a call and to obtain a return of the deposit and allotment money on the ground of misrepresentation, it was held that it would not lie on that ground; for the case of each person deceived by the misrepresentation was peculiar to himself and must depend on its own circumstances—*Hollows* vs. *Ferme*, 3 Ch. App., 471; nor will a suit lie by a shareholder for himself and others, when the act complained of is only voidable and capable of confirmation by the members of the company, or a mere matter of internal regulation—*Russell* vs. *Wakefield Waterworks*, L. R., 20 Eq., 474; nor to dissolve a partnership—*Long* vs. *Yonge*, 2 Sim., 386. It will not be allowed in cases in which questions of priority or other matters are introduced, which may give rise to opposition between the plaintiff and the others, such as a suit by an incumbrancer for himself and others where the claims are not precisely of the same degree—*Newton* vs. *Egmont*, 5 Sim., 137.

Endowments.—This section does not refer to subscribers, worshippers or devotees of an idol complaining of breach of trust—*Thackersey* vs. *Hurbhum*, I. L. R., 8 Bom., 432; otherwise if a declaration of a joint right is sought—*Kalidas* vs. *Gor Parjaram*, I. L. R., 15 Bom., 300; nor to any cases in which an individual right has been violated, but there are not many persons *jointly* interested in obtaining relief, such as the right of a person to use a mosque for prayer—*Jawahra* vs. *Akbar*, I. L. R., 7 Alla., 178; *Raghubar Dial* vs. *Kesho Ramanuj*, I. L. R., 11 Alla, 18; see, however, *Jan Ali* vs. *Ram Nath*, I. L. R., 8 Cal., 32; *Lutufunnisa* vs. *Nazirun*, I. L. R., 11 Cal., 33; nor to the case where one of numerous co-sharers sues to prevent some of them retaining exclusive possession of the joint property—*Hira Lal* vs. *Bhairon*, I. L. R., 5 Alla., 602.

Other Cases.—This procedure will not be applied in such cases as the following; in these all the persons interested must be brought before the Court; namely, suits to foreclose or enforce a vendor's lien—*Attorney-General* vs. *Sittingbourne*, L. R., 1 Eq., 636; *Bishop of Winchester* vs. *Mid Hants Railway Co.*, L. R., 5 Eq., 17; suits for partition—*Pahaladh Singh* vs. *Luchmunbutty*, 12 W. R., 256; suits for contribution—*Ibn Husain* vs. *Ramdai*, I. L. R., 12 Alla., 110.

Costs.—Defendant applied to have the names of others added as plaintiffs to secure his costs: *Held*, that it was not shewn the other names were necessary to completely adjudicate on the questions involved, and as to costs, the Court might interfere and order security—*De Hart* vs. *Stevenson*, 1 Q. B. D., 313.

Defendants—Like plaintiffs the defendants must be numerous, and it must be alleged in the plaint that the suit is brought against them personally and on behalf of the others—*Lanchester* vs. *Thompson*, 5 Mad., 13; the number of defendants named must be so large that it can be justly said they will fairly and honestly try the legal right between themselves and all other persons interested and the plaintiff—*Adair* vs. *New River Co.*, 11 Ves., 444; and every right adverse to the plaintiff should be represented—*Mayor of York* vs. *Pilkington*, 1 Atk., 284; *Cramer* vs. *Bird*, L. R., 6 Eq., 143. Where fifteen hundred persons had a claim against a person for costs, which all depended on the same question, namely, the validity of certain certificates, it was held that he could file a bill against some of them to restrain the proceedings of all until the validity of the claims had been decided—*Sheffield Waterworks* vs. *Yeomans*, L. R., 2 Ch. App., 8.

If a person interested in the suit is of opinion that the defendant does not represent him, he should apply to be made a defendant—*Frazer* vs. *Coopers*, 21 C. D., 718.

Karnavan.—In *Malabar* there is a practice of allowing the Karnavan to sue and be sued as representative of the tarwad, but it is doubtful if such a practice should be allowed to continue, and whether these cases should not be dealt with under this section—*Muringa* vs. *Valia Tumburatti*, I. L. R., 7 Mad., 87.

Execution of Decree.—See *Sadagopachari* vs. *Krishnamachari*, I. L. R., 12 Mad., 356; *Commissioners of Sewers* vs. *Gellatly*, 3 C. D., 610; *Ragava* vs. *Rajaratnam*, I. L. R., 14 Mad., 57.

Suit not to fail by reason of mis-joinder.

31. No suit shall be defeated by reason of the mis-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

This section applies to H. C. and P. S. C. C.

The first paragraph of this section is the first sentence in Order 16, Rule 13, of the Judicature Acts, as it originally stood. In 1883, the rule was amended by adding the words "or non-joinder" after "mis-joinder." No amendment of this section seems to have been thought necessary. Probably the power given by the last clause of the first paragraph, would be held equivalent to a direction to the Court not to a dismiss suit on the ground of either mis-joinder or non-joinder—*Janokinath* vs. *Ramrunjun*, I. L. R., 4 Cal., 949; *Werderman* vs. *Société Generale*, 19, C. D., 246, but the plaint should be rejected—*Sudhendu* vs. *Durga*, I. L. R., 14 Cal., 435; on the other hand, if there is mis-joinder both of parties and causes of action the suit should be dismissed—*Ram Narain* vs. *Annoda*, I. L. R., 14 Cal., 681. But the second clause of this section does not apply to a case where the persons as plaintiffs make common cause against the defendant and do not claim to hold under antagonistic titles, for then they can be made co-plaintiffs under section 26, *ante*—*Fakirapa* vs. *Rudrapa*, I. L. R., 16 Bom., 119.

Non-Joinder.—Hindu widow sued heiress of her husband and pending suit adopted a son under a power, it was objected in the Privy Council that the son should have been joined, but their Lordships overruled the objection—*Dhurm Das Panday* vs. *Shama Soondri*, 3 Moore's I. A., 229; but in certain classes of suits the plea of non-joinder if raised in time is fatal, such as a suit on a joint contract and all the contractors are not parties—*Ramsebuk* vs. *Ramlall*, I L.R., 6 Cal., 815, or only three out of four managers sue for trust property and the fourth has not been put on the record—*Rajendronath* vs. *Shaikh Mahomed*, I. L. R., 8 Cal., 42., or on suits of the nature referred to in *Kendall* vs. *Hamilton*, 4 App. Cas., 504.

And when plaintiff who was insurer under a contract of indemnity, sued to recover money paid by him on behalf of the person he indemnified and in appeal it was objected that the person insured should have been made a party; the suit was not dismissed, but remanded.—*The Chief of Sundi* vs. *The Secretary of State*, I. L. R., 14 Bom. 299.

Cases of mis-joinder may be divided into five classes:—

(*a*)—Mis-joinder of plaintiffs. Under the old Equity Practice this was a fatal objection—See *Luke* vs. *South Kensington Hotel Co.*, 11 C. D., 121. This class is covered by section 31.

(*b*)—Mis-joinder of defendants. This class is also covered by section 31.

(*c*)—Mis-joinder of causes of action or subjects of suit. This class is dealt with in section 45, *post*.

(*d*)—Mis-joinder of plaintiffs, and mis-joinder of causes of action or subjects of suit. This is impliedly forbidden by the second paragraph of section 31, read with section 26, *ante*. Thus, the respective occupiers of several houses cannot join in an action for a nuisance.—*Hudson* vs. *Madison*, 12 Sim., 416; and see notes to section 26, *ante*, pp. 58, 59. See also *Smith* vs. *Richardson*, 4 C. P. D., 112.

(*e*)—Mis-joinder of defendants and mis-joinder of causes of action or subjects of suit. This is *multifariousness*, strictly so called, and will be discussed in the notes to section 45, *post*.

Court may dismiss or add parties.

32. The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out;

and the Court may at any time either upon or without such application, and such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Consent of person added as plaintiff or next friend.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Parties to suits instituted or defended under section 30.

Any person on whose behalf a suit is instituted or defended under section 30 may apply to the Court to be made a party to such suit.

Defendants added to be served.

All parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, 1877, section 22), the proceedings as against them shall be deemed to have begun only on the service of such summons.

Conduct of suit.

The Court may give the conduct of the suit to such plaintiff as it deems proper.

Judicature Acts, Order 16, Rules 11, 13. This section applies to H. C., P. S. C. C. and the Revenue Courts—*Shib Gopal* vs. *Baldeo Sahai*, I. L. R., 2 Alla., 264.

General Rule.—The general rule is that all persons having an interest in the object of the suit, and in whose absence the subject-matter of the suit cannot be fully investigated and disposed of, ought to be made parties, so that the questions raised in it shall not be raised again between the parties to the suit, or any of them and third parties—*Vydianadayyan* vs. *Sitaramayyan*, I. L. R., 5 Mad., 52; and that a person whose interests might in any way be affected should be put on the record—*Ahmedbhoy* vs. *Vullesbhoy*, I. L. R., 8 Bom., 323; but a person who has no interest, against whom there can be no relief given, ought not to be a party—*Khajah Abdool Gunnee* vs. *Pogose*, 12 W. R., 436; *Fergusson* vs. *Government*, 9 W. R., 158; *Nga Tha Yah* vs. *Mee Khan Mhone*, 13 W. R., 443; further, that persons should not be made co-plaintiffs unless their cause of action is the same as that of the other plaintiffs—*Government* vs. *Bourie Bhoomiz*, 2 W. R., 280; thus, a person claiming adversely to both plaintiff and defendant should not be made a party—*Joy Gobind* vs. *Gouresproshad*, 7 W. R., 202.

Questions involved in the Suit.—The words "questions involved in the suit" must be taken to mean questions directly arising out of and incident to the original cause of action in which the person proposed to be joined has an identity or community of interest with one or other of the parties—*Naraini Koer* vs. *Durjan Koer*, I. L. R., 2 Alla, 738; *Kanhye Roy* vs. *Shaikh Hyder*, 25 W R., 29; but see *Gooroo Prosunno* vs. *Guggun Chunder*, 20 W R., 383; see also the cases at 19 W R., 248: 13 W. R., 73, they do not refer to questions arising between co-defendants or co-plaintiffs — *Har Naraian* vs. *Kharay Singh*, I. L. R., 9 Alla., 447; such as deciding who is the legal representative of a plaintiff or defendant—*Muhammed Husain* vs. *Krushalo*, I. L. R., 10 Alla., 223; *Vithu* vs. *Bhime*, I. L. R., 15 Bom., 145.

New Cause of Action.—And no new cause of action should be introduced—*Dalton* vs. *Guardians*, &c., 47 L. T., 349. Thus it has been held that a Court is not competent to allow of the introduction into a suit of a person against whom no relief is sought by the plaintiff; nor has the Court any authority to receive a written statement from such person, or to permit him to appear at the hearing—*Moharanee Surno Moyee* vs. *Bykunt Chunder*, 25 W. R., 17. See also *Horwell* vs. *London Omnibus Co.*, 2 Ex. D., 365; and in a suit for damages by the purchaser of goods by sample, an application of the vendors to have their vendor on the same samples made a party was refused—*Mahomed Badsha* vs. *Nicol Fleming*, I. L. R., 4 Cal., 355.

Not to change Suit—But care should be taken that the nature of the suit is not changed. Where plaintiff sued for his share of the property of a person deceased, it was held the Court could not add parties, and turn it into a general administration suit—*Oh Ling Tee* vs. *Awkinifee*, 10 W. R., 86; and so where one person sues for himself and others, the names of the parties jointly interested will not be added—*De Hart* vs. *Stevenson*, Weekly Notes, 1876, p. 83.

Party must be Added.—(See *Cormack* vs. *Grofrain*, Weekly Notes, 1876, p. 22), if the suit cannot go on without so doing such as a suit on a joint contract, contractors not parties—*Ramsebuk* vs. *Ramlall*, I. L. R., 6 Cal., 815; or for possession of property and

complete justice cannot be done in the absence of one trustee—*Rajendronath* vs. *Shaik Mahomed*, I. L. R., 8 Cal., 42; 8 Ind. App., 135, the suit should be dismissed unless he should be made a defendant—*Juggodumba Dassee* vs. *Haran Chunder*, 10 W. R., 109; and see *Dwarkanath Mitter* vs. *Tara Prusanna*, I. L. R., 17 Cal., 160; provided the objection has been by the parties and an issue has been decided on the point—*Shirekuli* vs. *Ajjibal*, I. L. R., 15 Bom., 297. See note to sections 26 and 31.

Defendant Added.—Where an action is brought against one of several joint contractors, the defendant is entitled as of right, to have the other contractors added as defendants—*Piley* vs. *Robinson*, 20 Q. B. D., 155; *Ramsebuk* vs. *Ramlall*, *supra*. And in a suit on a bond the obligor was described as manager of an endowment. His sons, the defendants, pleaded that the money was borrowed for the endowment: *Held*, the representative of the endowment was rightly added.—*Thirthesami* vs. *Gopala*, I. L. R., 13 Mad., 32.

WHEN NECESSARY.—In an action to recover letters patent, an applicant asserted that plaintiff had assigned three-fourths of his interest to him, and applied to be added as a plaintiff. The Court, though leaning to the opinion that the affidavit in support of the application should, under section 27, *supra*, show that a *bonâ fide* mistake had occurred, granted the application under this section, Weekly Notes, 1875, p. 250. Where a Hindu widow sues in respect of rights inherited by her from her deceased husband, and afterwards adopts a son, the latter should be made a co-plaintiff—*Paravatani* vs. *Ambalavana*, 1 Mad., 197. A suit instituted by a guardian in the name of the minor was dismissed on the ground that the plaintiff had not got a certificate. On special appeal the minor, then of age, applied to have his name entered and leave was granted—*Madhub Chunder* vs. *Buktessuree*, 12 W. R., 102. And where a Hindu sued his brothers for his share of the family property, and was transported, his children were added as co-plaintiffs—*Byreddi* vs. *Chinna*, I. L. R., 6 Mad., 331. In general where the plaintiff has assigned a share in the proceeds of a suit, and the agreement is not void, the defendant can apply to have the assignee made a party—*Chander Kant Mookerjee* vs. *Ram Coomar Koondu*, 13 B. L. R., 530; 2 App. Cas., 186.

Partition.—In a suit for partition, the mortgagee of the plaintiff need not be made a party—*Mohindrobhoosun* vs. *Soshee Bhoosun*, I. L. R., 5 Cal., 882; but all the sharers must be brought before the Court—*Kali Kanta* vs. *Gouri Prosad*, I. L. R., 17 Cal., 906; *Timappaya* vs. *Lakshmi Narayana*, I. L. R., 6 Mad, 284; see, however, *Chandu* vs. *Kunhammed*, I. L. R., 14 Mad., 324.

Rent Act.—Under the old law a shareholder could not sue for a fractional portion of rent unless there had been a separate agreement or separate collections—*Manohur* vs. *Manzur*, I. L. R., 5 Alla., 40; *Guni Mahomed* vs. *Morase*, I. L. R., 4 Cal., 96, though one sharer could sue for apportionment—*Ishwar Chunder* vs. *Ram Krishna*, I. L. R., 5 Cal., 902, but he should make his co-sharers parties—*Abhoy Gobind* vs. *Hury Churn*, I. L. R., 8 Cal., 277; *Tara Chunder Banerjee* vs. *Ameer Mundle*, 22 W. R., 394; *Beharee Lall Dass* vs. *Radha Nath Dass*, 22 W. R., 229; and under the same circumstances a co-sharer could not enhance—*Bheekoo* vs. *Oomar Khan*, 1 Alla., 236, (but see *Doorga Prosad Mytiee* vs. *Joynarain Hazrah*, I. L. R., 2 Cal., 474; *Rashbehari* vs. *Sakhi*, I. L. R., 11 Cal., 644; *Jogendro Chunder* vs. *Nobin Chunder*, I. L. R., 8 Cal., 353); nor measure—*Santee Ram Panjah* vs. *Bykunt Paray*, 19 W. R., 280; and compare *Abdool Hossein* vs. *Lall Chand*, I. L. R., 10 Cal., 36; nor eject—*Tulsi Panday* vs. *Lala Bachu*, 12 C. L. R., 223; *Doli vs. Ikram Ali*, 4 C. L. R., 63; otherwise on the Original Side of the High Court—*Ebrahim* vs. *Cursetji*, I. L. R., 11 Bom., 644. But an application under section 15, of the Bengal Tenancy Act cannot be made by one co-sharer, all must join—*Moheeb* vs. *Ameer Rai*, I. L. R., 17 Cal., 538.

Possession.—Nor can one member of a joint family sue for property belonging to himself and the others- *Gokool Pershad* vs. *Etwaree Mahto*, 20 W. R., 138; *Balkrishna* vs. *Muncipality of Mahad*, I. L. R., 10 Bom., 32; even if he be manager—*Hari Gopal* vs. *Gokaldas*, I. L. R., 12 Bom., 158; and all the trustees or *sebaits* must be parties in a suit for recovery of the trust property—*Rajendra Nath* vs. *Shaikh Mahomed*, I. L. R., 8 Cal., 42; *Bechu Lal* vs. *Oliullah*, I. L. R., 11 Cal., 338,

Right to Settlement.—Where a suit is brought to obtain a settlement of a chur, to obtain a declaration of title with possession, and to set aside a settlement of the chur made with the defendant; *held* that the Government should be made a party—*Krishno Lall* vs. *Bhyrub Chunder*, 22 W. R., 52; *Cannoor* vs. *Bissonath*, 5 C. L. R., 154; and in a suit regarding a Talkudari settlement in Bombay, the officer must be a party—*Sirdar Singhji* vs. *Ganpet Singhji*, I. L. R., 14 Bom., 395, p. 399.

Other Cases.—On the death of the obligee of a money-bond one heir cannot sue for his share—*Kandhiya* vs. *Chandar*, I. L. R., 7 Alla., 313. *Parsotam* vs. *Mulu*, I. L. R., 9 Alla., 68; but a surviving partner can sue for a trade debt without making the representatives of a deceased partner parties—*Govind Prasad* vs. *Chandar*, I. L. R., 9 Alla., 487; *contra*, *Ram Narian* vs. *Ram Chunder*, I. L. R., 18 Cal., 86. One member of a Malabar tarwad cannot sue the Karnavan for maintenance without making the other members parties or to set aside a deed binding the property—*Moudin* vs. *Krisnan*, I. L. R.,

10 Mad., 322; *Mammali* vs. *Pakki*, I. L. R., 7 Mad., 428; and in a suit for redemption all parties interested must be on the record—*Ragho* vs. *Balkrishna*, I. L. R., 9 Bom., 128; *Bhaudin* vs. *Ismail*, I. L. R., 11 Bom., 425; (though a sharer can redeem the whole —*Mora Joshi* vs. *Ramchandra*, I. L. R., 15 Bom., 24), and so in case of foreclosure or to enforce a vendor's lien—*Attorney-General* vs. *Sittingbourne*, L. R., 1 Eq., 636; or to determine the rights of contending mortgagees—*Hughes* vs. *Delhi Bank*, I. L. R., 15 Cal., 35; or for contribution.—*Ibn Hussain* vs. *Ramdai*, I. L. R., 12 Alla. 110.

A sued her co-heir B, who had taken out a certificate under Act XXVII, 1860, for her share of the deceased's property. At the trial it appeared that B's agent had got possession of the property; it was held that A could follow the property into the hands of B's agent and the agent was made a party—*Nga Tha Yah* vs. *Mee Khan Mhone*, 13 W. R., 443. Plaintiff sued certain persons for money due on a contract entered into by A as defendants' agent, defendants denied the agency: *Held*, that the name of A could be added and the plaint amended so as to sue for alternative relief against the agent—*Buddree Doss* vs. *Hoare, Miller & Co.*, I. L. R., 8 Cal., 170.

Revenue Sale—In a suit to set aside a revenue sale the Secretary of State is not a party—*Bal Makoond* vs. *Jirjudhun*, I. L. R, 9 Cal., 277.

WHEN UNNECESSARY.—Plaintiff having successfully sued for possession a person holding his land, subsequently brought a suit for *mesne* profits. Defendant applied under this section that the plaintiff's sister, to whom he had paid the rent, might be made a party. Archibald, J., held:—"The procedure, of which the defendant wishes to avail himself, rather contemplates the case of a defendant who is not liable, or who is, to a great extent, free from any default. Here the defendant is a trespasser. Why should the plaintiff be put to prove that any money was paid to Miss Lovell. If the defendant was led to believe that Miss Lovell was the person to whom the rent should be paid, and paid it under a mistake of fact, he has a simple remedy against her for money had and received"—Weekly Notes, 1876, p. 53. A sues his lessor for possession of land, C intervenes, claiming it to be his; C should not be made a party to the suit—*Rucha Sing* vs. *Mirza Mashook*, 15 W. R., 572; *Joy Gobind* vs. *Gouresproshad Shaha*, 7 W. R., 202; *Joy Kishen* vs. *Raj Kishen*, 16 W. R., 101; but see *Kalee Pershad* vs. *Joy Narain*, 11 W. R., 361, referred to in *Ram Coomar* vs. *Chunder Canto*, I. L. R., 2 Cal., 233, p. 240; *Ram Taruck* vs. *Radha Bullab*, 15 W. R., 97. A sued the widows of B, declaring that he was entitled to 12 annas of B's estate, and asked to set aside the certificate obtained by them. C intervened, claiming a portion of the property as heir, and was made a defendant in the lower Court; it was decided that it should not have been allowed—*Ahmed Hossein* vs. *Mussamut Khodeja*, 10 W. R., 369; see, however, *Vijdianadayyan* vs. *Sitaramayyan*, I. L. R., 5 Mad., 52; *Ahmedbhoy* vs. *Vullebhoy*, I. L. R., 8 Bom., 323, p. 331, but a mortgagee before suit, a purchaser *pendente lite*, and a special legatee in a suit against executors have been added—*Ahmedbhoy* vs. *Vullebhoy*, I. L. R., 8 Bom., 323. See "JOINDER," *post*. In a suit between parties, each contending that he is the judgment-creditor, the judgment-debtor need not be made a party—*Abdool Gunnee* vs. *Pogose*, 12 W. R., 436.

Rent-Suit.—Whether an intervenor in a rent-suit should be made a party or not is not quite settled. The latest decision is to the effect that he should not—*Lodai Mollah* vs. *Kally Dass Roy*, I. L. R., 8 Cal., 210; and probably it is impossible to lay down beforehand in what rent-cases an intervenor should be made a party. In some cases a rent-suit is either a suit for ejectment of the tenant or can be made the basis of it. Compare the law in England where the intervening landlord is entitled to defend the suit though not named in the writ—*Butler* vs. *Mendith* 24 L. J., Ex., 246; Dicey on Parties, p. 495, and see *Shafto* vs. *Bolckow*, 34. C. D., 725.

Probate.—See *Ward* vs. *Huckle*, 12 P. D., 110.

Specific Performance.—In a suit for specific performance of a contract, a stranger to the contract should not be made a party—*Luckumsey* vs. *Fazulla*, I. L. R., 5 Bom., 177; but see *Mokund Lall* vs. *Choray*, I. L. R., 10 Cal., 1061; and where the contract is to take a lease of a share, the plaintiff's co-sharer need not be joined in a suit for a counterpart—*Purushottama* vs. *Raju*, I. L. R., 11 Mad., 11. See note to section 28, *ante*.

Corporation.—Where a corporate body was sued through its agent, and not as a corporation, it was held that the corporation could not be affected by the result of the suit, and that an application to make it a party was properly refused—*Nabeen Chunder Paul* vs. *Stephenson*, 15 W. R., 534; but where a Magistrate was sued instead of the Secretary of State, an amendment was allowed in special appeal—*Nilkanthapa* vs. *The Magistrate of Sholapur*, I. L. R., 6 Bom., 671; and see *Manni Kasaundhan*, vs. *Booke*, I. L. R., 2 Alla., 216.

Limitation.—It has been held that when a person is added as a co-plaintiff, limitation is counted against him down to the date of the institution of the suit only—*Kalee Kishore* vs. *Luckhee Debia*, 6 W. R., 172; section 22, Act XV of 1877. A plaintiff should not be added whose right is barred—*Kishen Lall Chowdhry* vs. *Chunder Coomar Roy*, W. R., 1864, p. 152; and where two defendants were made plaintiffs, at a time where if they had sued their claim would have been barred, the order was set aside as illegal—*Krishna* vs. *Collector of Salem*, I. L. R., 10 Mad., 44; but the plea must be raised on the first opportunity—*Shirekuli* vs. *Ajibal*, I. L. R., 15 Bom., 297.

No Limitation.—In *The Oriental Bank* vs. *Charriol*, I. L. R., 12 Cal., 642, it was held that where the Court exercises the powers conferred upon it by the second clause of the section, limitation did not apply. And see *Sohna* vs. *Khalak Singh*, I. L. R., 13 Alla., 78, and compare *Krishna* vs. *The Collector of Salem*, *supra*.

Joint Plaintiffs.—In a suit on a joint contract all the parties must be added, whether the claim was barred against them or not, and if barred as against some of the joint plaintiffs, the suit must be dismissed—*Ramsebuk* vs. *Ramlall*, I. L. R., 6 Cal., 815; but if when the plaint is presented a person is named as one of the plaintiffs and he does not repudiate the suit, he must be considered as a party from the commencement of the litigation.—*Mohini Mohun* vs. *Bungsi*, I. L. R., 17 Cal., 580. And the same rule applies if a necessary defendant has been added after time—*Ramdoyal* vs. *Junmenjoy*, I. L. R., 14 Cal., 791. A and his three brothers formed a joint Hindu family. A with their consent sued for a joint debt, and when an objection was raised on the ground of non joinder, it was too late to make the brothers co-plaintiffs. The suit was dismissed—*Kalidas* vs. *Nathu*, I. L. R., 7 Bom , 217. See, however, *Oma Sundari* vs. *Ramji*, 9 C. L. R., 13. In a suit for pre-emption if the claim is barred against either vendor or vendee, it must be dismissed—*Habibullah* vs. *Ichaibar*, I. L. R., 4 Alla., 145.

In Appeal.—If a person is a party to the suit, but not a party to an appeal from the decision in it, he can be made a party after the period for appealing has expired—*Manikya* vs. *Baroda*, 11 C. L. R., 430.

S sued R and N jointly for money. The first Court decreed the suit against N and dismissed it in regard to R. N appealed but S did not. At the first hearing of the appeal R was made a respondent, the period allowed to S to appeal having expired. The Appellate Court dismissed the suit as against N and gave S a decree against R: *Held*, that the Court was not competent to give S a decree against R, the former not having appealed within the proper period—*Ranjit Singh* vs *Sheo Prosad*, I. L. R., 2 Alla., 487.

Assignment—The proviso as to limitation does not apply where the original plaintiff having the sole interest assigns it to others after suit is brought—*Suput Singh* vs. *Imrit*, 6 C. L. R., 62.

Corporation—Limitation does not apply where a Corporation is sued in the name of the wrong officer—*Manni Kasaundhan* vs. *Crooke*, I. L. R., 2, Alla., 296. The Poona Cantonment Committee is a Corporation—*The Cantonment Committee* vs. *Barjorji*, I. L. R., 14 Bom., 286.

Application.—An application may be *ex-parte* to add parties, Weekly Notes, 1876, p. 23; but not if it be to strike out or change the parties on the record—*Tildesley* vs. *Harper*, 3 C. D., 277. See, however, *Horwell* vs. *London Omnibus Co.*, 2 Ex. D., 365, 379, 382-3. In the case of a plaintiff consent is necessary—*Omasundari Dasi* vs. *Ramji*, 9 C. L. R , 13; *Umasundari* vs. *Ramji*, I. L. R., 7 Cal., 242; but the section does not require that the consent of a person proposed to be added as plaintiff should be given in writing. It is sufficient if any solicitor consents on his behalf—*Cox* vs. *James*, 19 C. D., 55.

Who may Apply.—A person not a party may apply to be added—*Athiappa* vs. *Ayanna*, I. L. R., 8 Mad., 300; *Oriental Bank* vs. *Charriol*, I. L. R., 12 Cal., 642; *Bâbbaba* vs. *Noorjehan*, I. L. R., 13 Cal., 90.

A plaintiff applying under this section to join another as co-plaintiff must have a cause of action. A company transferred all its property, estates, and effects with appurtenances, "including a mortgage with the benefit of all securities" to a new company. At the date of transfer the old company claimed a right of action for breach of trust in respect of this mortgage. The new company sued; *held*, that the right of action did not pass to them; and as they had no right of action, they could not join the old company as co-plaintiffs—*New Westminster Brewery* vs. *Hannah*, Weekly Notes, 1876, p. 215; *Dwarkanath* vs. *Grishchunder*, I. L R., 6 Cal., 827; *Chunder Coomar* vs. *Gocool Chunder*, I. L. R., 6 Cal., 370; *Chinnan* vs. *Ramchandra*, I. L. R., 15 Mad., 55; but see *Manni Kasaundhan* vs. *Crooke*, I. L. R., 2 Alla., 296.

Costs.—See in case of striking out parties—*Amos* vs. *Herne Bay Pavilion*, 54 L. T., 264.

Struck Out.—On the application of either party at or before the first hearing, the name of any person improperly joined may be struck out—*Khadar* vs. *Chotshibi*, I. L. R., 8 Bom., 616. A builder sued both the lessor and lessee for work and labour done. The lessor stated he had no interest in the action, and applied to have his name struck out. There was a dispute between the lessor and the lessee as to the liability: *Held*, the question could not be decided summarily, and the lessor's name must stand—Weekly Notes, 1875, p. 203; but where a merchant sued his solicitors for negligence, and their defence was that the negligence, if any, was that of A B, whom they had instructed, the name of A B was inserted in the Lower Court, but struck out in appeal — *Lereculey* vs. *Harrison*, Weekly Notes, 1876, p. 39. A share of a village held in usufructuary mort-

gage was purchased at an auction-sale in execution against a shareholder, and sold by the auction-purchaser to plaintiff, who sued his vendor, mortgagor and mortgagee for possession on the ground that the mortgage had been paid off. It was held that the auction-purchaser's name should be struck out—*Syud Sukhawat Ali* vs. *Kesho Tewari*, 6 Alla., 208. A sued B; C intervened, and was made a party. On appeal, the name of C was struck out and the suit remanded for trial. *Held*, that all the evidence C had produced should be removed from the record—*Bucha Singh* vs. *Mirza Mashook Ali*, 15 W. R., 572.

A person who has an interest in a thing assigned to a trustee for the benefit of himself and others cannot sue the debtors of the estate, his remedy is to file a bill against the trustee to enforce execution of the trust—*Sharpe* vs. *San Paulo Ry.*, 8 Ch. App., 610. Where a creditor of a deceased person sued the Administrator-General, and other persons also claiming against the estate were made parties on the allegation that they had realized and were in possession of assets of the estate of the deceased, it was held that there was nothing to show that such persons were in the position of an executor or administrator *de son tort*, or partners of the deceased, or that the Administrator-General could not sue them, and that there being no other circumstances which would make it equitable that they should be jointly sued with the Administrator-General, they were wrongly made parties, and the suit ought to be dismissed—*Dhunraj* vs. *Broughton*, 15 B. L. R., 296; see also *Oriental Bank* vs. *Gobindlall Seal*, I. L. R., 10 Cal., 713.

Name struck Out, Effect of.—All the evidence produced by the party whose name has been struck out should be removed from the record—*Bucha Singh* vs. *Mirza Mashook Ali*, 15 W. R., 572. If when a name is struck out the Court has not jurisdiction to try the case the plaint should be returned to be presented in the proper Court—*Shrindhar* vs. *Chima*, 10 Bom., 17.

Joinder.—Courts should not dismiss a suit merely on account of defect of parties, but should exercise the discretion vested in them by this section—*Ruchpaul* vs. *Johuree*, 2 Agra, 147; *Jonab Ali Mollah* vs. *Golam*, 21 W. R., 187; *Vydianadayyan* vs. *Sitaramayyan*, I. L. R., 5 Mad., 52; *Ahmedbhoy* vs. *Vullebhoy*, I. L. R., 8 Bom., 323; *Van Gelder* vs. *Sowerby & Coy.*, 44 C. D., 374.

Benamidar: Real Owner Joined.—A suit by a benamidar, not the real purchaser, will not lie—*Hari Gobind* vs. *Akhoy Kumar*, I. L. R., 16 Cal., 364; but if the real purchaser be made a co-plaintiff, the suit should be allowed to proceed and not dismissed—See *Sita Nath Shaha* vs. *Nobin Chunder Roy*, 5 C. L. R., 103; *Gopenath Chobey* vs. *Bhugwat*, I. L. R., 10 Cal., 697; and "BENAMIDAR," section 26, *ante*. In a suit for rent, defendant pleaded non-liability on the ground that he was a benamidar, and that the jote belonged to A: *Held*, A should not have been made a defendant by the Court on its own motion—*Maharanee Surno Moyee* vs. *Bykunt*, 25 W. R., 17.

Name Added, Effect of.—In a suit to recover property from plaintiff's vendor, who did not substantially contest the claim, a person claiming the property was made a defendant. *Held* the plaintiffs having proved their title against the original defendant it was for the added defendant to prove his possesssion.—*Balma Kundu* vs. *Adikunda*, C. L. R., 560, following *Juggodanund* vs. *Hamid*, 10 W. R., 52, see, however, *Ram Taruk* vs. *Radha Bullab*, 15 W. R., 96; *Bhyarubnath* vs. *Mohesh Chunder*, 13 W. R., 196. Where a person is added evidence already on the record cannot be used against him without his consent—*Watson & Co.* vs. *Hurgobind*, 22 W. R., 35.

Plaintiff Objects.—In England, the rule is, that if the plaintiff objects to the third person being introduced, the Court would consider whether the plaintiff would be prejudiced in any way, or delayed in his action by such proceeding. "The object of these enactments was to prevent the same question being tried twice over where there is any substantial question common as between the plaintiff and defendant in the action, and as between the defendant and a third person, and in such a case the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all. And the point really is whether there is such a question in the present case, which can advantageously be tried and decided, not only as between the plaintiffs and the defendants, but as between the defendants and the third party"—*The Swansea Shipping Co., Limited* vs. *Duncan, Fox & Co.*, 1 Q. B. D., 644. And in *Bower* vs. *Hartley*, ibid, 652, Mellish, J., said—"If there is a material common question which it is important to have tried once for all, the Court has power to make an order that a third party shall be bound by the trial of that particular question, even though he is not interested in the whole subject-matter of the action. But this power is a discretionary one, and in the exercise of its discretion the Court ought to consider whether the plaintiff's interests will be prejudiced or affected, and, if the plaintiff will be prejudiced or delayed, the power ought not to be exercised." And James, L. J., said:—"I think that the convenience of having this question determined once for all in this action is not enough to outweigh the injury to the plaintiff which may result from the introduction of the third parties." In an action for collision against a tow, the defendant was not allowed to join the tug—*The Bianca*, 8 P. D., 91.

Defendant be made Plaintiff.—In a partnership suit for account in which there were twenty-one defendants, plaintiff having settled with most of them, wished to withdraw. Two of the defendants applied that they should be made plaintiffs, and the plaintiff a defendant. The application was granted—*Edulji* vs. *Vullebhoy*, I. L. R. 7 Bom., 167.

At any Time.—The words in Act VIII, 1859, section 73, "at any hearing of a suit," have been omitted; and application under this section may now be made before hearing. Under Act VIII, section 73, it was held that where the Judge in appeal considered a party was necessary as respondent, he should act under this section and not dismiss the suit—*Achumba Pauray* vs. *Ram Sahoy Pauray*, W. R. 1864, p. 136; and this is the present practice—*Thirthasami* vs. *Gopala*, I. L. R., 13 Mad, 32; and in one case in special appeal the High Court added a party after the suit had been dismissed —because the person who brought it had not a certificate under Act XL of 1858 —*Madhub Chunder* vs. *Busktessuree*, 12 W. R., 102. Where the receiver of an estate, under permission of the Court, and on behalf of the parties interested in the estate, brought a suit by mistake in his own name, it was held in appeal that the receiver having full power to institute the suit, and no objection having been taken in the first Court, the error could be rectified without the consent of the persons interested, and that no further notice of appeal was necessary—*Juggunnath Pershad* vs. *Hogg*, 12 W. R., 117; and where a decree had been passed referring the suit to the Commissioner to take an account and sell the property, the Court held that it had power to add fresh parties to the suit—*Vakatchand* vs. *Advocate General*, 8 Bom., 96; see *Ahmedbhoy* vs. *Vullebhoy*, I. L. R., 8 Bom., p. 336; but where a District Judge dismissed a suit with costs, and after an appeal had been preferred, he found on enquiry that others were interested, and making them parties, ordered that their names should be added to the decree for costs, his order was set aside, as there was no case pending before him—*Ram Nidhee* vs. *Ajoodhya*, 20 W. R., 123. In special appeal in the case of a minor the High Court struck out her name and changed it to defendant—*Krishnabhi* vs. *Sonabha*, 2 Bom., 310. But, as a rule, amendment should not be allowed at a late stage of the case—*London and Bombay Bank* vs. *Bhanji*, I. L. R., 2 Bom., 116; though the Court is not prevented by the Limitation Act from making the order at any time—*Oriental Bank* vs. *Charriol*, I. L. R., 12 Cal., 642. See note under section 34, *post*.

After Decree.—Where an applicant possessed an eight-anna interest in the suit, his name was added after decree—*Singamal* vs. *Chenna*, I. L. R., 6 Mad., 227; and where in execution of decree against a Hindoo widow as representing the estate, a claim was made on behalf of an adopted son, it was decided that he should be made a party—*Sotish Chunder* vs. *Nil Comal*, I. L. R., 11 Cal., 45; distinguished in *Subhanna* vs. *Venkato Krishnan*, I. L. R. 11 Mad., 408; *Akoba Dada* vs. *Sakharam*, I. L. R., 9 Bom., 429. See also *Hurst* vs. *Hurst*, 21 C. D., 289; *Attorney-General* vs. *Corporation of Birmingham*, 15 C. D., 425; *Campbell* vs. *Holyland*, 7 C. D., 166. See note on section 372, *post*, and the cases cited in *Ahmedbhoy* vs. *Vullebhoy*, I. L. R., 8 Bom. 323, p. 330. But this procedure is not necessary in all cases, and if a minor adopted son is bound by a decree, execution may be rightfully sought against him through his guardian, and it is no answer that his name is not on the record—*Hari Saran* vs. *Bhubaneswari*, I. L. R., 16 Cal., 40; and compare *Mungiram* vs. *Gurliakut*, I. L. R., 17 Cal., 347; and in no case can a person who has acquired a title after judgment be added in execution—*Goodall* vs. *The Mussooris Bank*, I. L. R., 10 Alla., 97.

Appeal.—One of several plaintiffs can appeal making those who decline to concur respondents—*Beckett* vs. *Attwood*, 18 C. D., 54.

Appeal—Revision.—An appeal lies from any order under this section striking out or adding the name of any person as plaintiff or defendant, but not from an order refusing to make a person a party—*Karman Bibi* vs. *Misri Lal*, I. L. R., 2 Alla. 904; *Abirunnisa* vs. *Komurunnisa*, I. L. R., 13 Cal., 100; and from an order making a plaintiff defendant—*Lukshmana* vs. *Paramasiva*, I. L. R., 12 Mad., 489; but where there is no appeal the order must be attacked under section 591, *post*, in appeal from the final decree—*Googlee Sahoo* vs. *Premlall*, I. L. R., 7 Cal. 148, and then only if the order has affected the decision on the merits or the jurisdiction of the Court—*Ridhnath Sahoy* vs. *Gopee Sahoy*, 14 W. R., 90; *Har Narain* vs. *Kharag*, I. L. R., 9 Alla., 447.

If no objection is raised in the original or first Appellate Court, the order cannot be made the subject of a special appeal—*Rakhal Dass Mondal* vs. *Pertab Chunder*, 12 W. R., 455; *Beer Chunder Roy* vs. *Tumezoodeen*, 12 W. R., 87; *Shaikh Lall Mahomed* vs. *Shaikh Peer Musur*, 18 W. R., 112; and possibly if the order is not objected to at first, it cannot be contested in regular appeal—*Kewul Sahoo* vs. *Issur Dyal*, 12 W. R., 334.

In a suit for rent the defendant alleging that a person not a party had a joint-interest with the plaintiff got his name put upon the record against the wish of the plaintiff: *Held*, in special appeal, that if added at all it should be as defendant—*Googlee Sahoo* vs. *Premlall Sahoo*, I. L. R., 7 Cal., 148.

Revision.—An order to strike out not being *ultra vires*, no action can now be taken under the Charter Act—*Judooputtee* vs. *Chunderkant*, W. R., 309; nor if based on an erroneous construction of the section is it subject to revision under section 622, *post*—*Rabbaba* vs. *Noorjeehan*, I. L. R., 13 Cal., 90.

Where defendant added, plaintiff to amend.

33. Where a defendant is added, the plaint, if previously filed, shall, unless the Court direct otherwise, be amended in such manner as may be necessary, and an amended copy of the summons shall be served on the new defendant and the original defendants.

Judicature Acts, Order 16, Rule 13. This section applies to H. C. and P. S. C. C.

It has been decided that the corresponding rule in England is not applicable to an application to add a new defendant in a consolidated action—*In re Wortley*, 4 C. D., 181.

Time for taking objections as to non-joinder or mis-joinder.

34. All objections for want of parties, or for joinder of parties who have no interest in the suit, or for mis-joinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the first hearing; and any such objection not so taken shall be deemed to have been waived by the defendant.

See Order 16, Rule 12. This section applies to H. C. and P. S. C. C.

Earliest Time—Objection for want of parties should be taken at the earliest opportunity and before the first hearing—*Rajnarain Bose* vs. *Universal Life Assurance Co.*, I. L. R., 7 Cal., 594; see also *Phoolbas Koonwur* vs. *Jogeshur* 3 Ind. App., 7, p. 25.

If an objection is taken in time, and the Court finds that the suit has been carried on without adding necessary parties, it must be dismissed—*Ramsebuk* vs. *Ramlall*, I. L. R., 6 Cal., 815; *Kalidas* vs. *Nathu*, I. L. R., 7 Bom., 217; and see *Kendall* vs. *Hamilton*, 4 App. Cas., 504, pp. 515, 527—553; *Hammond* vs. *Schofield*, 1 Q. B. (1891), 453, p. 457.

Plaintiff.—A Hindu widow sued for partition, pending the suit adopted a son, but still carried on the litigation in her own name. It was held that it should be assumed as a matter of law that she litigated as his guardian, and the suit should not be dismissed because the son was not a party—*Dhurm Das* vs. *Thama Soondri*, 3 Moore, 229; *Hari Sahan* vs. *Bhutaneswari*, 15 Ind. App., 195; and where in a suit by the executors of a Hindu's will (before the Hindu Wills Act) it was urged that the heirs should be co-plaintiffs, the objection was disallowed both because it was not taken in the written statement and the executors took in their representative capacity—*Rajnarain Bose* vs. *Universal Life Assurance*, I. L. R., 7 Cal., 594, and where one member of a joint Hindu family sued for family property, and it was contended in the Court of first appeal that he could not sue alone, the contention was considered too late—*Paramsiva* vs. *Krishna*, I. L. R., 14 Mad., 498. See also *Uma Sundari* vs. *Punji*, I. L. R., 7 Cal., 242; 9 C. L. R., 13.

Plaintiffs were the widow and alleged adopted son of defendant's uncle and they sued on title. The first Appellate Court considering that the interests of the plaintiffs antagonistic the dismissed the suit for mis-joinder: *Held*, the objection had been taken too late—*Fakirapa* vs. *Rudrapa*, I. L. R., 16 Bom., 119.

In a suit to enforce a right of pre-emption the vendor was not made a party; held this objection could not be raised in special appeal—*Hiralal* vs. *Ram Jas*, I. L. R., 6 Alla., 57. So when maintenance was decreed to a mother and her two children jointly, an objection in special appeal that there were three causes of action and separate sums should have been adjudged, was rejected—*Toolshee* vs. *Gopal Ray*, I. L. R., 6 Alla., 633.

First Hearing.—This section would not prevent a defendant from objecting to the want of a proper party after first hearing if the objection did not exist at that time—*Modhe* vs. *Dongre*, I. L. R., 5 Bom., 609.

Parties.—An apparent objection to parties may sometimes mean an attempt to sue on a different cause of action. See *Scarf* vs. *Jardine*, 7 App. Cas., 345; *The London Bank* vs. *Bhanji*, I. L. R., 2 Bom., 116.

Practice.—If a question concerning parties is raised at or before first hearing, it probably should be tried quickly—See *Richards* vs. *Batcher*, 62 L. T., 86; and if the Judge finds that the objection is valid, he should act under section 32, *ante*, and not dismiss the suit—see remarks of Bowen J.; in *Van Gelder* vs. *Sowerby*, 44. C. D., 374.

Each of several plaintiffs or defendants may authorise any other to appear, &c., for him.

35. When there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding under this Code: and in like manner, when there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any such proceeding.

Authority to be in writing signed and filed.

The authority shall be in writing signed by the party giving it, and shall be filed in Court.

Act VIII, 1859, section 115. This section applies to H. C. and P. S. C. C.

A decree-holder for himself and as agent for his nephews, applied for execution of a decree passed in favour of the applicant and the father of the nephews. The application was rejected on the grounds—(1), that although applicant produced a mukhtarnama authorising him to execute the decree, it was special and on a stamp of 8 annas, and not a general power under section 17, clause 1, Act VIII, 1859; and (2) that the mukhtarnama was not produced with the application. It was held that under this section no general powers of attorney were necessary; and as the mukhtarnama was filed before the Judge had passed his order, the application should have been granted—*Ambaram* vs. *Himatsingh*, 2 Bom., 103.

By section 40, Act XX, 1865, any suitor may appear, plead and act in any suit, appeal or other proceeding on behalf of any co-suitor; but he cannot recover any fee or reward.

Recognised Agents and Pleaders.

Appearances, &c., may be in person, by recognised agent or by pleader.

36. Any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party to a suit or appeal in such Court may, except when otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf:

Provided that any such appearance shall be made by the party in person if the Court so direct.

See Act VIII, 1859, section 16. This section applies to H. C. and P. S. C. C.

Appearance—See *Ram Chundra* vs. *Madhav*, I. L. R., 16 Bom., 23.

Recognized Agent.—Under this section a recognized agent can file an application or enter an appearance on behalf of his principal; he cannot institute or defend a suit nor appear in his own name—*Mokha Hurruckraj* vs. *Bissessur*, 13 W. R., 344; *Carter* vs. *Misree*, 2 Alla., 179; nor can he address the High Court as a suitor himself may do—*Prannath Chowdry* vs. *Ganendro Mohun*, 3 W. R., 108.

Objection to not Allowed.—A suit should not be dismissed by the first Appellate Court, on the ground that the plaint has not been filed by a recognised agent; such an error does not affect the merits of the case—*Munoo Dossee* vs. *Ishan Chunder*, 15 W. R., 245. See "OBJECTION TO AGENT ACTING," section 37, *post*.

Pauper Suits.—Applications to sue *in formâ pauperis* under section 404, *post*, cannot be made by recognised agent—*Devigirgura Sumbhagir*, 4 Bom., 91; *Mokha Harakraj* vs. *Biseswur*, 5 B. L. R., App., 11; 13 W. R., 344.

Authorised Agent.—In the case of *Buzl-ul-Ruheem* vs. *Ramgopaul Manna*, 8 Sev., 941, it was held that, looking at clause 10 of the Charter, an authorised agent under section 17, Act VIII (corresponding to section 37, *infra*), could not file a petition of appeal on the Appellate Side of the High Court, and that the Act did not apply. Section 37, *infra*, possibly does apply; see section 638, *infra*; *Meares's case*, 14 B. L. R., 106.

Foreign Princes, Government.—See sections 412, 417 and 419, *infra*.

Pleader.—Under the Letters Patent, advocates, vakeels and attorneys appear for suitors, and plead or act, or plead and act for them; advocates may appear and plead only. Hence, it has been held that an advocate is not entitled to file an application in the Registrar's Office of the Appellate Side of the High Court—*Ram Taruck* vs. *Sidhessuree*, 13 W. R. 60. But see "EMPOWERING HIM TO ACT," section 39, *infra*, and note under section 2, *ante*.

Recognised agents.

37. The recognised agents of parties by whom such appearances, applications and acts may be made or done are—

Persons holding powers-of-attorney from parties out of jurisdiction.

(*a*) persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorising them to make and do such appearances, applications and acts on behalf of such parties;

Certificated mukhtárs.

(*b*) mukhtárs duly certificated under any law for the time being in force, and holding special powers-of-attorney authorising them to do, on behalf of their principals, such acts as may legally be done by mukhtárs;

Persons carrying on trade or business for parties out of jurisdiction.

(*c*) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts.

Recognised agents in Punjab, Oudh and Central Provinces.

Nothing in the former part of this section applies to the territories now administered respectively by the Lieutenant-Governor of the Punjab and the Chief Commissioners of Oudh and the Central Provinces; but in those territories the recognised agents of parties by whom such appearances, applications and acts may be made and done shall be such persons as the Local Government may, from time to time, by notification in the official Gazette, declare in this behalf.

This section applies to H. C. and P. S. C. C. As to Oudh, see Act XVIII of 1876, s. 18.

General Power.—A general power-of-attorney requires to be stamped—See Act I of 1879, cl. 50. A warrant of attorney to the attorney of a defendant, to receive a declaration or plaint, in any action or suit to be brought for the recovery of certain moneys, and to confess the same action or suit, or else to suffer or consent to a judgment or decree in the said action or suit by default, or in any other way to pass or be pronounced against the defendant, empowers the attorney to accept service and appear for the defendants within the meaning of this section—*Khaulut Chandra Ghose* vs. *Sarada Soondery Dossee*, Bourke, 244.

Vakalutnamahs, whether executed by principals or their attorneys or agents, and mukhtarnamahs, under the authority of which vakalutnamahs are executed, need not be verified on oath; the responsibility for their correctness rests with the vakils. A mukhtarnamah under seal is as valid as a mukhtarnamah under signature—*Petition of the Maharajah of Burdwan*, 7 W. R., 475.

Within Jurisdiction.—This is an enabling section, and should be construed liberally. A lived for 40 years in Pen when he returned to his native village to get his sisters married, leaving an agent holding a general power-of-attorney. He was away for four months: *Held*, he was not resident in Pen, and his attorney was a recognised agent—*Ramchandra* vs. *Keshav*, I. L. R., 6 Bom., 100.

See also as to the meaning of "RESIDENT" the note under section 16, *supra*.

Power to Refuse.—A person holding a power-of-attorney authorising him to appear and defend suits may act or not, as he pleases, upon the power. He is at liberty to refuse to accept service of summons—*In re Luchmee Chund*, I. L. R., 8 Cal., 317, p. 326.

Mukhtars.—By section 11, Act XX, 1865, mukhtárs could, subject to the conditions of their certificates as to the class of Courts in which they were authorized to practise, appear and act in any Civil Court, and appear, plead and act in any Criminal Court within the same limits. They could not *plead* in Civil Courts. Merely bringing a plaint to a vakil for his signature—*Muddun Mohun Biswas*, 6 W. R., Ref., 29, or standing behind a pleader and giving him information, did not amount to an appearance as mukhtár in contravention of Act XX, 1865—*Gujraj Singh*, 10 W. R., 355. And see *Kali Kumar* vs. *Nobin Chunder*, I. L. R., 6 Cal. 585; 7 C. L. R., 562. Previous to this Act a mukhtár was not looked on as a recognised agent—*Kristo Chunder Goopto* vs. *Fuzl Ali Khan*, 17 W. R., 380.

The present Act is Act XVIII of 1879; under section 9, the High Court is empowered to prescribe rules for mukhtárs, and these are to be found at the *Calcutta Gazette*, Feb. 15, 1882, Part 1, p. 152-3. As to this Act, see *Tussuduq Hossein* vs. *Girhar*, I. L. R., 14 Cal., 556.

Special Power.—A mere power to sue does not authorise an agent to do more than employ a vakil on the terms of paying him a reasonable remuneration—*Keshav* vs. *Narayan*, I. L. R., 10 Bom., 18; it does not enable him to terminate a suit by the oath of the opposing party—*Sada Shiv* vs. *Maruti*, I. L. R., 14 Bom., 455; and a mere authority to look after a case does not make the donee of the power a recognised agent under this section—*Bhugwan* vs. *Nund Lall*, I. L. R., 12 Cal., 173, p. 178.

CLAUSE (*c*).—In Act VIII, 1859, section 17, the words "where no other agent is expressly authorised" imply that the persons so carrying on trade or business for or in the names of parties not within the jurisdiction of the Court, are purely agents: and the words "carrying on trade or business for or in the names of parties not within the jurisdiction of the Courts" refer to gomasta or agent, and not to a partner—*Luchmeput Dogare* vs. *Sibnarain Mundle*, 1 Hyde, 97. This decision was subsequently dissented from in *Ram Chandra Bose* vs. *Snead*, 7 B. L. R. App., 58, so that the point may still be considered as undetermined. These cases were decided with reference to the question whether, in an action against the firm, service of summons on a partner was sufficient. It is so now; see section 74, *infra*; but the service should be made at the place of business—*Kustoor Mull* vs. *Jokeeram*, 11 B. L. R. App., 26.

Not Agents.—Clause (*c*) of this section and section 76 are to be construed together, and are intended to carry out the same scheme of relief, which rests upon the idea that where an agent has been put forward substantially to take the place of his principal within a particular jurisdiction, he should take the place of such principal (at the option of any person who has dealt with him) in any legal proceeding that may arise out of the business or work in which the agent has been virtually a local principal. The manager or agent contemplated by the Code is one who has an initiative and independent discretion, although subject possibly to principals and general orders prescribed for his guidance. A mere servant employed to carry out orders or to execute, or a factor, or commission agent who is not identified with the firm for which he acts, is not such an agent—*Goculdas* vs. *Ganeshlal*, I. L. R., 4 Bom., 416. A Bombay firm, simply employed by the owners, resident in England, or a ship visiting Bombay, to procure

freight for her for a particular voyage, cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners, and therefore cannot be deemed authorised agents within this section—*Ratansi* vs. *Saunders*, 8 Bom., 159. See also the case reported in the note at page 111 of vol. 7, Bombay High Court Reports.

A Political Agent is not, as such, a recognised agent—*Venkatrav* vs. *Madhavrav*, I. L. R., 11 Bom., 53.

Objection to Agent Acting.—An agent cannot act under this clause so long as his principal is within jurisdiction. Thus, where the manager of a firm instituted a suit to recover a sum of money while one of the partners was within jurisdiction, it was held that the partner and agent should have joined in presenting the plaint or appointing a pleader; but that, unless the irregularity affected the merits of the case, the Appellate Court ought not, on that account, to dismiss the suit—*Bisandas* vs. *Lakhmichand Kisanchand*, 6 Bom., 159. And where a recognised agent obtained a decree in appeal without objection, it was held the debtor could not in execution of it object to the agent in the same Court—*Parvatibai* vs. *Vinayek*, I. L. R., 12 Bom., 68. See "*Objection not Allowed*," section 36.

Agency Ceasing.—A gomasta of a firm ceases to be a recognised agent as soon as the firm ceases to exist—*Mokha Hurruckraj* vs. *Bissessur*, 13 W. R., 344; but the munim of a firm which has ceased to transact business, who is engaged in collecting the assets of that firm and otherwise winding up its affairs, is a recognised agent of the owner of such firm within the meaning of clause 2, section 17, Act VIII of 1859, and can on behalf of his absent principal, maintain or defend a suit brought in respect of the business of the firm whose affairs he is engaged in winding up—*His Highness Tukoji* vs. *Pitambardas*, 9 Bom., 427.

Resident.—See *Ramchandra* vs. *Keshav*, I. L. R., 6 Bom., 100.

Carrying on Trade or Business.—See note under section 16, *supra*.

PUNJAB.—The provision regarding Punjab, Oudh and Central Provinces will enable the Local Governments to keep, if they think fit, the special rules on the subject now in force in those territories, *viz.*, Notification (Punjab) No. 1225, dated 26th September 1866; and the order of the Governor-General in Council as regards Oudh, dated 6th August 1861.

AJMERE.—See Ajmere Regulation I of 1877, section 28, and section 3, *ante*.

Service of process on recognised agent.

38. Processes served on the recognised agent of a party to a suit or appeal shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

The provisions of this Code for the service of process on a party to a suit shall apply to the service of process on his recognised agent.

This section applies to H. C. and P. S. C. C. As to Oudh, see last section.

This section does not bar service of notice on the parties themselves—*Ram Lall Chowdhry* vs. *Soondery Shah*, W. R., 1864, Mis., 21.

Service upon an attorney's clerk of an order directed to be served on the attorney is not good—*Emritlall Saligram* vs. *Kidd*, 2 Hyde, 116.

A person to whom a power of attorney has been given may refuse to accept service of summons, that is, refuse to act on the power—*In re Luchme Chand*, I. L. R., 8 Cal., 326.

Appointment of pleader.

39. The appointment of a pleader to make or do any appearance, application or act as aforesaid, shall be in writing, and such appointment shall be filed in Court.

When so filed, it shall be considered to be in force until revoked with the leave of the Court, by a writing signed by the client and filed in Court, or until the client or the pleader dies, or all proceedings in the suit are ended so far as regards the client.

No advocate of any High Court established by Royal Charter shall be required to present any document empowering him to act.

This section applies to H. C. and P. S. C. C.

Appointment in Writing.—A legal practitioner can transfer his brief orally, under a rule of the Allahabad High Court—*Matadin* vs. *Gangabai*, I. L. R., 9 Alla., 613.

Vakalutnamahs require a stamp. They may be executed by the principal or any person holding a power-of-attorney, whether enrolled as a mukhtar or not—*Shaikh Nubee Buxsh*, petitioner, 7 W. R., 481, and neither the mukhtarnamah under which the vakalutnamah has been executed, nor the vakalutnamah itself requires to be verified on oath; the responsibility of all such documents being properly executed rests with the vakil—*Maharajah of Burdwan*, petitioner, 7 W. R., 475.

The acceptance of a vakalutnamah should be unconditional to all cases—*Goopeenath Mudduck*, petitioner, 14 W. R., 7. It remains in force until revoked, with the leave of the Court, in writing by the client—*King* vs. *King*, I. L. R., 6 Bom., 416, p. 420.

No fresh vakalutnamah is necessary to appear in any proceedings subsequent to decree, even in such as an appeal to the Privy Council—*Shah Makhun* vs. *Sreekishen Singh*, 8 W. R., 92, or in an application for a new trial—*Sutto Churn Ghossal*, petitioner, 12 W. R., 465, or for execution of decree, or to answer a claim put forward under section 246 of Act VIII, 1859—*Gopal Jaya Chand* vs. *Hargovind*, 5 Bom., 83, or to appear in a remanded case, 4 Mad., xliii.

Empowering him to Act.—Subject to the rules of the High Court, an Advocate may perform all the duties of a pleader without producing a vakalutnamah—*Bakhtawar* vs. *Sant Lal*, I. L. R., 9 Alla., 617. See "PLEADER," section 36, *ante*.

Court of Wards.—The Collector of the District as Agent of the Court of Wards gave a vakalutnamah to a pleader whom he retained to conduct the case of a ward. The Collector died before judgment. *Held*, a second vakalutnamah was unnecessary—*Krishna* v. *Marudanayagam*, I. L. R., 15 Mad., 135.

Service of process on pleader.

40. Processes served on the pleader of any party or left at the office or ordinary residence of such pleader, relative to a suit or appeal, and whether the same be for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes in relation to the suit or appeal as if the same had been given to or served on the party in person.

Act VIII of 1859, section 18. This section applies to H. C. and P. S. C. C.

Service of notice of appeal upon respondent's pleader is good service on him—*Ishur Dutt* vs. *Shib Pershad*, 15 W. R., 290. So also is service of summons calling on a party to appear and give evidence—*Shivrudrappa* vs. *Kashinath Vishnu*, 6 Bom., 141; and service on the attorneys on the record is good even after a decree *nisi* in a divorce suit —*King* vs. *King*, I. L. R., 6 Bom., 416.

Agent to receive process.

41. Besides the recognized agents described in section 37, any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

His appointment to be in writing and to be filed in Court.

Such appointment may be special or general, and shall be made by an instrument in writing signed by the principal, and such instrument, or, if the appointment be general, a duly attested copy thereof, shall be filed in Court.

Act VIII of 1859, sections 50, 51. This section applies to H. C. and P. S. C. C.

CHAPTER IV.

OF THE FRAME OF THE SUIT.

Suit how to be framed.

42. Every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them.

This section applies to H. C.

Suit to include whole claim.

43. Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.

If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several remedies.

A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

Illustration.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1881 and 1882 is due and unpaid. A sues B only for the rent due for 1882. A shall not afterwards sue B for the rent due for 1881.

Act VIII of 1859, section 7, altered.

Cause of Action.—The words cause of action have been held from the earliest time, to mean every fact which it is material to be proved to entitle the plaintiff to succeed; every fact which the defendant would have a right to traverse.—*Cooke* vs. *Gill*, L. R., 8 C. P., 107. It does not depend on the relief claimed.—*Shankar* vs. *Dya Shankar*, 15 Ind App., 66; I. L. R., 15 Cal., 422, and has no relation whatever to the defence, but refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in its favour—*Chand Kour* vs. *Partab Sing*, 15 Ind. App., 156. Thus where plaintiff sued as the assignee of a debt, the assignment was held to be part of the cause of action—*Read* vs. *Brown*, 22 Q. B. D., 128. One test in deciding whether the cause of action in two suits is the same is whether the same evidence would support both—*Brunsden* vs. *Humphrey*, 14 Q. B. D., 141, p. 149; and see *Soorasoonderee* vs. *Golam Ali*, 19 W. R., 141.

Application and Principle of this Section.—This section applies to H. C. and P. S. C. Courts; to suits under the N.-W. P. Rent Act—*Madho* vs. *Murli*, I. L. R., 5 Alla., 406; and to suits under Act X of 1859—*Purbhoo* vs. *Ramjeewan*, 1 Alla., 119; *Ram Soonder* vs. *Krishno*, 17 W. R., 380; *Adhirani* vs. *Raghu*, I. L. R., 12 Cal., 50; and to suits under the Deccan Agriculturists Relief Act—*Bhau* vs. *Hari*, I. L. R., 7 Bom., 377. It does not apply to cases where the previous suit has been withdrawn with leave to bring a fresh suit—*Venkata* vs. *Ranga*, I. L. R., 10 Mad., 160; *Mulchand* vs. *Bhikari*, I. L. R.,

7 Alla., 624. It also applies to a person applying to have an award filed in Court and asking leave to abandon a portion of his claim.—*Grish Chunder* vs. *Brojonath*, 20 W. R., 56.

As to the last paragraph, see the Transfer of Property Act (Act IV of 1882), section 99.

The principle on which this section is founded, is that where the cause of action is the same, and the plaintiff has had an opportunity in the former suit of recovering what he seeks to recover in the second, the former recovery is a bar to the later action—*Nelson* vs. *Couch*, 15 C. B. (N. S.) 99; and see *Hanaman* vs. *Hanuman*, 18 Ind. App., 158, unless in the first action plaintiff had no opportunity of satisfying his claim—*Brunsden* vs. *Humphrey*, 14 Q. B. D., 141.; *Serrao* vs. *Noal*, 15 Q. B. D., 549, p. 556. As to reversioners, when the right to sue does not revive in the death of the last owner see *Chagaroram* vs. *Bai*, I. L. R., 14 Bom., 512; and where a case is decided on one view of a document which view is acquiesced in by a party, he can not succeed on a different construction subsequently—*Gandy* vs. *Gandy*, 30 C. D., 57.

Execution-Proceeding.—This section does dot apply to proceedings in execution of decree—*Radha Kishen* vs. *Radha Pershad*, I. L. R., 18 Cal., 513.

Leave of the Court.—The leave may be obtained when the case is called on for first hearing—*Pestonji* vs. *Abdul Rohman*, I. L. R., 5 Bom., 463.

Claim in respect of the same cause of Action.—In *Buzloor Rohim* vs. *Shumsoonnissa*, 11 Moore, 551; 8 W. R., P. C., 12, a wife sued her husband to recover real and personal property, (including Government paper,) which she said she had intrusted to him, and which he had misappropriated and refused to restore: she afterwards sued, on the same allegation to recover a piece of Government paper, which through ignorance she had omitted to claim in her former suit. *Held*, the second suit was barred. The Judicial Committee, speaking subsequently of *Buzaloor Rohim's* case, said: "In that case their Lordships held that on their construction of section 7, Act VIII of 1859, the correct test is whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit, and secondly, that the section included accidental error and involuntary omission of the subject of the new suit; that is to say, that if the matter was omitted to be brought in the former suit through error or mistake, that would not prevent the operation of the section. *There was one conversion by the husband of several Government Securities belonging to his wife. It was one entire conversion and one cause of action and not a separate cause of action in respect of each of the Government Securities*"—*Ramhurry* vs. *Mothoor Mohun*, 20 W. R., 450. Accordingly the second suit was held barred in *Radha* vs. *Ram Coomar*, 3 B. L. R. (A. C.), 265; 12 W. R., 79, where both suits were brought in respect of an alleged misappropriation by the *Kurta* of a joint Hindu family; and in *Punju* vs. *Oodoy*, 18 W. R., 337, where both suits were brought in respect of an alleged wrongful seizure of plaintiff's property by the defendant in execution of a decree against a third party—[See for same point.—*Mohubut* vs. *Shoorendro*, 4 W. R. (S. C. C. Ref.), 20.] See also *Munghroo* vs. *Gyaram*, 14 W. R., 253, where both suits were for damages for the wrongful detention of plaintiff's property by the defendant; and *Sooruj* vs. *Sahit Lall*, 3 W. R., 25; *Jardine* vs. *Ranee Shama Soondurce*, 13 W. R., 196; *Ram Soondur* vs. *Delanney*, 20 W. R., 103.

A sued B for a declaration of his right to a mokurrari lease and to certain moneys deposited in the Collectorate for the mokurraridar: the suit was withdrawn with liberty to bring a fresh suit. Second suit, A *vs.* B, for a declaration of title to the mokurrari, decree in favour of the plaintiff. Third suit, A *vs.* B, for a declaration of right to the moneys in the Collectorate, barred—*Lalla Luchmun* vs. *Ramsaru*, 20 W. R., 144; but where the first suit was for possession of land, portion of which had, unknown to the plaintiffs, been taken up by the Collector, and after the institution of the first suit the defendant drew the compensation money from the Collectorate, a second suit for that money was held not barred—*Nund Lall* vs. *Meer Aboo*, I. L. R., 5 Cal., 597.

Where a Hindu widow suing for maintenance got a decree declaring her entitled to maintenance at the rate of Rs. 40 per month; a second suit by her to have the maintenance charged on the family property was held barred—*Rangamma* vs. *Vohalayya*, I. L. R., 11 Mad., 127; and see *Samarapuri* vs. *Shanmuga*, I. L. R., 3 Mad., 47; *Latha Saminatha* vs. *Rangathammal*, I. L. R., 12 Mad., 285. A owed B Rs. 4,000. B gave an order to his agent to pay A Rs. 2,500 from the income of certain villages, and he promised to pay the remaining Rs. 1,500 within a month. A sued B to recover the Rs. 2,500. A subsequent suit to recover the Rs. 1,500 was held barred—*Appasami* vs. *Ramasami*, I. L. R., 9 Mad., 279. When the owner of two adjoining mouzahs leased one to the defendant and the other to the plaintiff, the latter brought his suit for a portion of the lands of Bund Mahata. The suit was dismissed on the ground that those lands though situated in the plaintiff's mouzah, had been included in the defendant's lease. A second suit for all the lands of Bund Mahata was held barred—*Sundhya Mulla* vs. *Dabi Chhurn. Dutt*, I. L. R., 6 Cal., 715.

A suit to redeem on the ground of the mortgagee being over-paid will bar a subsequent suit for the over-payment—*Balaji* vs. *Tamangonda*, 6 Bom. 97. In April 1879 B gave a usufructuary mortgage to A for four years certain and after until redemption.

A never got possession, and in 1882 he instituted suit for interest unpaid. Subsequently he sued for other interest and the principal sum, it was held that the non-delivery of possession was the cause of action in both cases, and the second suit would not lie—*Hikmatulla* vs. *Imam Ali*, I. L. R., 12 Alla., 203.

After the purchase by A of a putni taluk at a sale under Regulation VIII of 1819, he made default in payment of the putni rent and the tenure was again sold. The original owners of the putni had the sale to A set aside on the ground of irregularity. It was held in a suit by the original owners against A, that all claims against the latter in respect of his default in payment of the putni rent should be joined in one suit—*Tarinee Pershad* vs. *Khonooo Monee*, 13 W. R., 261; *Tarinee Pershad* vs. *Rughub Chunder*, 13 W. R., 203; and so in regard to all claims arising out of a false and fraudulent representation by the defendant—*Nil Monee Singh* vs. *Issur Chunder*, 9 W. R., 121; but see *The Darley Co.* vs. *Mitchell*, 11 App. Cas., 127, when the wrongful act of the defendant caused successive subsidences of the plaintiff's land.

In *Ukha* vs. *Daga*, I. L. R., 7 Bom., 182, the first suit was for partition of certain debts due to the joint family, the plaintiff alleging that all the rest of the joint family property had been divided; the suit was compromised and withdrawn. The same plaintiff again sued for partition of certain lands which had been left joint on the first partition. *Held*, that the suit was barred. In *Shib Kristo* vs. *Abdool*, 15 W. R., 408; the first suit was for specific performance of a contract to sell lands against the vendor and a subsequent purchaser who had notice on the contract; the suit was decreed. A subsequent suit for damages arising out of the vendor's breach of contract was held to be barred. In *Abhiram* vs. *Sriram*, 3 B. L. R. (A. C.), 421, a Hindu reversioner brought a suit for possession of land against a purchaser from the two widows of the last full owner, alleging that the widows were dead. The suit was dismissed. A second suit against the same person for possession of the same land on the allegations that one widow was dead, the other unchaste, and the kobala fraudulent, was held to be barred, and see *Luchmun* vs. *Priag*, 2 Agra, 305. Where an auction-purchaser entitled to be paid in Azimabad rupees sued for the amount in Company's rupees, *held*, that he was barred from suing afterwards for the difference—*Meer Mahomed* vs. *Forbes*, 5 W. R., Act X, 90.

Will a suit (A *vs.* B.) for the price of goods sold and delivered, bar a subsequent suit (A. *vs.* B.) for non-acceptance of other goods, all the goods having been sold to the defendant under one contract, and default both in payment and acceptance having been made before he first suit was brought—*Anderson* vs. *Kalagarla*, I. L. R., 12 Cal., 339.

The following case seems to go very far. After A's death, B denying that A was entitled to two estates situated in the districts of Rajshahye and Nuddea, respectively, dispossessed A's widow from both estates at different times. The widow afterwards sued B for possession of the Rajshahye estate in the Rajshahye Court and got a decree. A subsequent suit brought by her in the Nuddea Court for possession of the Nuddea estate was held to be barred—*Jumoona* vs. *Bamasoonderee*, 2 W. R., 148. This principle was not followed by the Madras High Court in *Subba Rau* vs. *Rama Rau*, 3 Mad. 376. A was entitled to six sahams of a certain property as heir of her brother, and to two sahams of the same property as heir of her father. In March 1874, A sold the six sahams to B, and in May 1874, she sold the two sahams also to B. B sued C for possession of the six sahams and got a decree. A subsequent suit by B against C for possession of the two sahams was held to be barred—*Shafkatunnissa* vs. *Shib Sahai*, I L.R., 4 Alla., 171. But the *Karnavan* of a Malabar tarwad is not barred from bringing successive suits for and in possession of an Andravan—*Kannan* vs. *Tenju*, I. L. R., 5 Mad. 1.

Arrears of Rent—Instalments—Illustration.—On a date when the rents for 1281; 1282, and 1283, were due, the lessor sued for the rent of 1281 only. *Held*, a second suit for the rents of 1282 and 1283 was barred—*Taruck Chunder* vs. *Panchu*, I. L. R., 6 Cal., 791; *Madan Mohan* vs. *Lalla Sheosanker*, I. L. R., 12 Cal., 482. See also *Macintosh* vs. *Gill*, 12 B. L. R., 37, a suit on a promissory note payable by instalments: *Rookminee* vs. *Ram Tohul*, 21 W. R., 223, a suit for mesne profits: *Seam* vs. *Kamaluddy*, 22 W. R., 424, a suit for damages for dispossession. As to whether all claims arising under one contract should be joined in one suit, see *Anderson* vs. *Kalagarla*, I. L. R., 12 Cal., 339; *Sheo Shunkur* vs. *Hridoy*, I. L. R., 9 Cal., 143; and *Shri Shailapa* vs. *Balapa*, I. L. R., 7 Bom., 446, where two successive suits for interest were brought after principal and interest became due. In *Alagu* vs. *Abdoola*, I. L. R., 8 Mad., 147, two suits for rents of successive years were filed on the same day in the S. C. Court. The High Court allowed plaintiff to withdraw them, and bring one suit in a competent Court. A suit for the rent of 1289 at an enhanced rate will not bar a subsequent suit for the rent of the same year at the old rate—*Sudduruddin* vs. *Bani Madhub*, I. L. R., 15 Cal., 145, as the cause of action is different.

Not the same cause of Action:—A Hindu died, leaving his widow and his mother surviving. The former succeeded to his estate and mortgaged (with the concurrence of the mother) one of the mouzahs which had belonged to the deceased to Fyz Ali, who entered into possession thereof. She then (also with the concurrence of the mother) made a gift of the mortgaged mouzah and other mouzahs which had belonged to the deceased to certain donees. After the death of the widow the mother succeeded to the

estate of the deceased, and a suit was then instituted by the next reversioner against the mother and the donees to set aside the gifts and for possession. The mother died before decree and the reversioner obtained a decree for possession. While this suit was pending, the same plaintiff instituted a suit against Fyz Ali for possession of the mortgaged mouzah on the ground that the mortgage had been made without necessity, and was therefore invalid as against the plaintiff. *Held*, that the second suit was not barred under section 7 of Act VIII of 1859, as "the causes of action in the two cases were essentially different"—*Rao Kurun Singh* vs. *Fyz Ali*, 14 Moore, 187, p. 196. A Mahomedan widow sold a portion of her deceased husband's property to A, and afterwards sold another portion to B. The heirs of the husband sued the widow and B to set aside the alienation to the latter, and they subsequently sued the widow and A to set aside the alienation to him. *Held*, that the second suit was not barred—*Jehan* vs. *Saivuk*, 1 Agra, F. B., 109. A sued B for possession of his share of property bought with joint funds in the name of X. His heir afterwards sued B for possession of his share in other property bought with joint funds in the name of Y. *Held*, that the second suit was not barred—*Ramhurry* vs. *Mothoor Mohun*, 20 W. R., 450; for a similar decision, see *Riabullah* vs. *Nasir*, I. L. R., 6 Alla., 616, where the plaintiff who claimed two houses under the same title had been dispossessed of them at different times by the defendant's ancestor.

A, by will, left part of her immoveable property to B and part to C and directed her moveable property to be equally divided between them. After A's death C tried to get his name registered for B's portion of the immoveable property. B then sued C for possession, and for a declaration of B's right to registration. B afterwards sued C for a half share of the moveable property. *Held*, that the second suit was not barred—*Pittapur Raja* vs. *Surlya Rau*, I. L. R., 8 Mad., 520; 12 Ind. App., 116. A creditor of a deceased person sued some of the heirs of the latter to recover the debt and obtained a decree, which he partly satisfied by execution against the property of the deceased in the defendant's hands. *Held*, that a second suit against other heirs of the deceased for the balance of the debt was not barred—*Purum Sookh* vs. *Surbhan*, 2 Agra, 323. A and B were two joint Hindu brothers governed by the Dayabagha School. B died, leaving a widow; then A died, leaving a will providing for the maintenance of B's widow and bequeathing all the property which had belonged to him and B jointly to his nephew. The widow sued the nephew for her maintenance under the will and obtained a decree; she afterwards sued to recover her husband's share of the property, and it was held that the suit was not barred under section 43 of the Code of Civil Procedure—*Pramada* vs. *Lakhi*, I. L. R., 12 Cal., 60.

A mortgagee obtained a decree against his mortgagor for sale of the mortgaged properties. At the date of the institution of the suit, some of those properties had been taken up by Government for public purposes and the sale proceeds deposited in the Collector's Court to the credit of the mortgagor. A subsequent suit by the mortgagee against attaching creditors of the mortgagor to have it declared that his mortgage covered the money in the hands of the Collector, held, not to be barred—*Kristodass* vs. *Ramkant*, I. L. R., 6 Cal., 142. The purchaser of the equity of redemption of a share of certain mortgaged property sued the mortgagee in possession for the recovery of his share by redeeming the whole, and obtained a decree under which he got possession of his share. He afterwards purchased the mortgagor's interest in the remainder of the mortgaged property and sued the mortgagee for possession thereof. *Held*, that the suit was not barred—*Brahannayaki* vs. *Krishna*, I. L. R., 9 Mad., 92. A lessee for a term of years resumed certain rent-free lands under a power of resumption contained in his lease. After the expiration of the lease, the lessee refused to give up possession to his lessor of the resumed lands and he also kept possession of a portion of the lands which had been leased to him. *Held*, that separate suits might be brought for possession of the resumed lands and the leased lands, respectively—*Doorga Nath* vs. *Roy Kalee*, 24 W. R., 212.

A suit on a second mortgage is no bar to a suit on the first—*Moro* vs. *Balaji*, I. L. R., 13 Bom., 45.

On the 1st of July 1878 there was a settlement of accounts between the plaintiff and the defendants, and a debt was acknowledged due by the latter to the former, and on the same day the plaintiff and the defendants entered into a trading partnership which was carried on till August. On the 30th of September the defendants extorted a release from the plaintiff, whereby the plaintiff's claims against them arising out of the two transactions mentioned and all other transactions between them were released. A suit to set aside the release and to recover the money due to the plaintiff on the 1st of July 1878 was held not to bar a subsequent suit to wind up the partnership—*Subbaya* vs. *Venkatesappa*, I. L. R., 6 Mad., 49. See also *Nawab Medhi* vs. *Mahomed Wajid*, 1 Alla., 70. A owed B, on a money bond, Rs. 300 for principal and Rs. 200 for interest. Separate bonds were given for the Rs. 300 and the Rs. 200, and the original bond was cancelled, *held*, that B need not sue on both bonds in one suit—*Umed Dholchand* vs. *Pir Saheb*, I. L. R., 7 Bom., 134. A held, as plaintiff's guardian, an 8 annas share in a village which she sold to M. Subsequently A and D (the husband of M and the owner of the other 8 annas share of the village) sued to recover possession of some lands

in the village and obtained a decree. In 1867, M (after D's death) obtained possession of the lands sued for in execution of the decree. Meantime in 1862, the plaintiff, having attained majority, sued A and M to set aside the sale and obtained a decree in his favour. A second suit which he brought for his share of the land of which M had obtained possession in execution was held not to be barred—*Ramlochun Lall* vs. *Goorpershad*, 5 Alla., 172.

A creditor of a deceased person sued some of the heirs of the latter to recover the debt and obtained a decree which he partly satisfied by execution against the property of the deceased in the defendant's hands: *Held*, that a second suit against other heirs of the deceased for the balance of the debt was not barred—*Porum Sookh* vs. *Surtan*, 2 Agra, 323. A got a money decree on a mortgage bond against his mortgagor, and then sued a purchaser of part to enforce his lien. He afterwards brought a second suit against the purchaser of the remainder. It was held that he might have sued, but was not bound to sue both purchasers in one suit—*Huree Mohun Paramanick*, 15 W. R., 486; see *Ram Tewary* vs. *Luchmun Persad*, 8 W. R., 15; and as to the propriety of suing all such persons jointly—see *Hiralall* vs. *Prosunno*, 12 C. L. R., 556. A suit on a mortgage bond against the mortgagors does not bar a subsequent suit to enforce the mortgage lien against the mortgagor and subsequent mortgagees who denied the plaintiff's right to priority over them—*Bungsee Singh* vs. *Sudist Lal*, 10 C. L. R., 263.

A suit for rent in the Revenue Court will not bar a suit in the Civil Court to realise a mortgage given by the lessee to secure payment of the rent—*Chunni Lall* vs. *Banaspat*, I. L. R., 9 Alla., 23; *Banda* vs. *Abadi*, I. L. R., 4 Alla., 180.

Cancellation of a Document—A suit to cancel a document on the ground that it had not been executed, is not the same as a suit to obtain a declaration that it had been executed only for a nominal purpose—*Nagathal* vs. *Ponnusami*, I. L. R., 13 Mad. 44.

Partition.—In a suit for partition, a certain field in the possession of a mortgagee was not included. It was afterwards redeemed by the defendant in the partition suit and by him mortgaged to X. The plaintiff in the partition suit then sued the defendant in that suit and X for possession of his share of the land. It was held that the suit was not barred as the land included in the second suit was not available for partition at the time the first suit was brought—*Narayan* vs. *Pandurang*, 12 Bom., 148; otherwise, if it had been available—*Ukka* vs. *Daga*, I. L. R., 7 Bom., 182; *Sooruj* vs. *Saheb Lal*, 3 W. R., 25; *Moro* vs. *Balaji*, I. L. R., 13 Bom., 45. And where the land could not have been included in the first suit without the previous permission of the Government, it was held not to be incumbent on the plaintiff to ask for such permission before bringing the first suit—*Pattarary* vs. *Audimula*, 5 Mad., 419. Compare 2 W. R., 148.

Mortgage. Possession.—A sued B to redeem the land in dispute which he alleged had been mortgaged to B. The suit was dismissed as the mortgage was not proved. A then sued for possession on title. *Held*, the suit was not barred—*Naro Balvant* vs. *Ramchandra*, I. L. R., 13 Bom., 326. Nor does failure in a suit of simple ejectment affect a subsequent suit to enforce a mortgagor's right to be redeem—*Shridhar Vinayak* vs. *Narayan*, 11 Bom., 224, p. 230; *Amanat Bibi* vs. *Imdad Husain*, 15 Ind. App., 106.

Possession and Mesne Profits.—In 1855 A sued B for possession and mesne profits from September 1852 (the date of dispossession) to decree. The suit was dismissed in the Zillah Court in 1859. The plaintiff appealed to the High Court on the question of possession and obtained a decree in execution of which he obtained possession in December 1864. In August 1865, A brought a second suit for mesne profits: *Held*, that he was entitled to recover mesne profits for the six years previous to suit (excluding the period from December 1864 to August 1865). A suit to redeem does not bar a suit for mesne profits for the period between the date of the suit and the delivery of possession in execution of the decree—*Baboo Gour* vs. *Sahay*, 7 W. R., 364; nor does a suit for possession and partition do so—*Chowdhry Imdad* vs. *Boonyad*, 14 W. R., 92; *Sitaram* vs. *Bhagvant*, 6 Bom., 109; *Venkoba* vs. *Subbanna*, I. L. R., 11 Mad., 151. And a suit for mesne profits does not bar a subsequent suit for possession—*Monohur* vs. *Gouri Sunkur*, I. L. R., 9 Cal., 283; *Tirupati* vs. *Narasimha*, I. L. R., 11 Mad., 210.

The Pleadings must be Compared.—A second suit by the same plaintiff will not be barred unless the same cause of action be found within the four corners of the plaint in the first suit—*Jibunti Nath* vs. *Shib Nath*, I. L. R., 8 Cal., 819; followed in *Komola Kaminey* vs. *Loke Nath*, I. L. R., 8 Cal., 825; and in *Monoo* vs. *Anand*, I. L. R., 12 Cal., 291; and if the question is that the second claim should have been included in the first, the pleadings and judgment of the first case can be referred to—*Jagatjit* vs. *Sarabjit*, I. L. R., 19 Cal., 159. In *Jibunti Nath* vs. *Shib Nath*, A sued B for a declaration of his title to certain property of which he alleged himself to be in possession. The suit was dismissed on the ground that he was not in possession at the time of filing the suit. A subsequent suit for possession was held not to be barred—I. L. R., 8 Cal., 819. See also *Ram Sewak* vs. *Nakched*, I. L. R., 4 Alla., 261; *Ambu* vs. *Kellilamma*, I. L. R., 14 Mad., 23; and *Houston* vs. *Marquis of Sligo*, 29 C. D., 448.

This section governs only the second suit and not the first—*Choe Sing* vs. *Bahadoor Sing*, 1 Agra, 55; *Soonder Bebee* vs. *Khilloo Mull*, 2 Alla., 90. If it has been held in the first suit that the plaint discloses no cause of action, the second suit will not be barred—*Ram Soondur* vs. *Krishno Chunder*, 17 W. R., 380.

A person having been killed in a railway accident his widow took out letters of administration to his estate. She then sued the Railway Company under Lord Campbell's Act (see the corresponding Indian Act XIII of 1855) for damages and got a decree by consent. She afterwards sued the Railway Company for damage suffered by the personal estate and effects of the deceased. *Held*, that the former suit was no bar to maintaining the second one—*Leggatt* vs. *The Great Western Railway Co.*, 1 Q. B. D., 599. The plaintiff while driving his cab came into collision with a van of the defendant's through the negligence of the defendant's servant, whereby he sustained bodily injury and his cab was damaged. He then sued the defendant in the County Court for damage done to the cab. The defendant paid the sum claimed into Court, and the action was discontinued. The plaintiff again sued the defendant in the Queen's Bench Division for the bodily injury sustained by him. *Held*, that the second suit was not barred—*Brunsden* vs. *Humphrey*, 14 Q. B. D., 141.

"Omit to Sue in respect of or Intentionally Relinquish"—The words in section 7, Act VIII of 1859 were "relinquish or omit to sue for" and it was held, that these words included "accidental or involuntary omissions as well as acts of deliberate relinquishment"—*Moonshe Buzloor Ruheem* vs. *Shumsoonnissa*, 11 Moore 551 at p. 605, of portions of one whole claim arising from *one* cause of action, *i.e.*, the cause of action for which the suit is brought—*Pittapur Rajah* vs. *Venkata*, L. R., 12 Ind. App., 116; see also *Ram Churn* vs. *DropoMoye*, 17 W. R., 122; *Bulwunt* vs. *Chittan*, 3 Alla., 27. This portion of the section assumes that the plaintiff was, at some time prior to the suit, aware or informed of the claim, or aware of the facts which would give him a cause of action—*Venkata* vs. *Krishnasami*, I. L. R., 6 Mad., 344; for "a right which a litigant possesses without knowing or ever having known that he possesses it can hardly be regarded as a 'portion of his claim' within the meaning of" section 7 of Act VIII of 1859—*Amanat Bibi* vs. *Imdad Husain*, 15 Ind. App., 106; *Ambu* vs. *Ketillamma*, I. L. R., 14 Mad., 23. A plaintiff cannot reserve his right to sue again by asserting in his plaint that he intends bringing a second suit for the portion omitted—*Soonder Bebee* vs. *Khilloo Mull*, 2 Alla., 90.

A person entitled to more than one remedy in respect of the same cause of Action, &c.—This paragraph formed no portion of Act VIII of 1859, section 7, which only referred to the cause of action—*Jibunti* vs. *Shib Nath*, I. L. R., 8 Cal, 819. A suit for rent would bar a second suit to enforce a forfeiture for non-payment of the same rent—*Subbaraya* vs. *Krishna*, I.L.R., 6 Mad., 159; and a suit for specific performance of a contract will bar a subsequent suit for damages for failure to perform—*Shib Krishto* vs. *Abdool Sobhan*, 15 W. R., 408. A mortgagee obtaining a money decree on a mortgage bond, might execute his decree against the mortgaged property in the hands of the mortgagor by attachment and sale, and he might bring a subsequent suit to charge the property in the hands of a person who had purchased from the mortgagor subsequently to the mortgage—See *Syud Emam Momtazooddeen* vs. *Raj Coomar Dass*, 14 B. L. R., 408; *Narsidas* vs. *Joglekar*, I. L. R., 4 Bom., 57; *Bharaichi Surja Naik*, I. L. R., 4 Alla., 257; *Jonmejoy Mullick* vs. *Duss Money Dossee*, I. L. R., 7 Cal., 714. But since the passing of the Transfer of Property Act IV of 1882, a mortgagee holding a money decree against his mortgagor cannot execute it against the mortgaged property, but must bring a suit under section 67 of the same Act—See Transfer of Property Act, section 99; *Kaveri* vs. *Ananthayya*, I. L. R., 10 Mad., 129; and see on this point *Durgayya* vs. *Anantha*, I. L. R., 14 Mad., 74; *Dinendra* vs. *Chunder*, I. L. R., 12 Cal., 436; *Bobu* vs. *Rakhal*, I. L. R., 12 Cal., 583.

A Hindu widow who has obtained a decree for maintenance against her husband cannot bring a second suit to have it declared that it is a charge on certain lands becuse he had alienated other properties to defraud her of her maintanance—*Saminatha* vs. *Rangathammal*, I. L. R., 12 Mad., 285.

A suit for a declaration of right to enjoy separate possession of certain lands will, not bar a subsequent suit for partition of those lands—*Andi* vs. *Thatha*, I. L. R., 10 Mad., 347.

When the holder of a bond, in which property is hypothecated, sues for all his remedies and obtains a decree declaring his lien, but which is infructuous on account of the Court having no jurisdiction over the land, he can bring a second suit to enforce his lien against a subsequent purchaser from the mortgager—*Grish Chundra* vs. *Ramessuree*, 22 W. R., 308; *Bungsee Singh* vs. *Sudist Lal*, 10 C. L. R., 263; I. L. R., 7 Cal, 739.

Under Act VIII of 1859, a declaratory decree might be sued for and obtained, and a subsequent suit brought for the consequential relief—*Kalidhun* vs. *Shiba Nath*, I.L. R., 8 Cal., 483; *Sarsuti* vs. *Kunj Behari*, I. L. R., 5 Alla., 346; *Gobind Mohun* vs. *Sheriff*, I. L. R., 7 Cal., 169; *Sabeer Khan* vs. *Kalli Dass*, 1. W. R., 199. But see now the Specific Relief Act I of 1877, section 42; *Sardarsingji* vs. *Ganpatsingji*, I. L. R., 14 Bom., 395.

Previous Judgment refusing to Adjudicate—If the Judge in the first case refuses to adjudicate on the effect of a document, a subsequent suit will lie though it is on the same cause of action—*Thakore Becharji* vs. *Thakore Pujaji*, I. L. R., 14 Bom., 31, p. 55.

Only certain claims to be joined with suit for recovery of land.

44. *Rule a.*—No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except—

(*a*) claims in respect of mesne profits or arrears of rent in respect of the property claimed.

(*b*) damages for breach of any contract under which the property or any part thereof is held, and

(*c*) claims by a mortgagee to enforce any of his remedies under the mortgage.

Claims by or against executor, administrator or heir.

Rule b.—No claim by or against an executor, administrator or heir as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Judicature Acts, Order 18, Rules 2, 5. This applies to H. C. and except Rule *a*, to P. S. C. C. Rule (*b*) applies to P. S. C. C.

Procedure on Objection—An objection for mis-joinder of causes of action must be taken in the Court of first instance—*Dhondiba* vs. *Ramchandra*, I. L. R., 5 Bom., 554, and if the Court instead of rejecting the plaint or returning it for amendment proceed to trial, it should not subsequently dismiss the suit for mis-joinder, but dispose of it on the merits—*Kishna Ram* vs. *Rakmini*, I. L. R., 9 Alla., 221. See "RETURN OF PLAINT," section 45, *post*.

Meaning of Section.—Rule (*a*) refers to a suit formed upon an existing title in which the plaintiff asks for a declaration of such title or for possession—*Cutts* vs. *Brown*, 7 C. L. R., 171; I. L. R., 6 Cal., 328. It does not prevent joinder of several causes of action to recover immoveable property, but only the joinder with such causes of action of certain other causes of action of a different charactor—*Chidambara* vs. *Ramasami*, I. L. R., 5 Mad., 161. See also *Sheo Ratan* vs. *Sheosahai*, I. L. R., 6 Alla., 358. Nor does it prevent a plaintiff suing for moveable and immoveable property if the cause of action is the same—*Giyana* vs. *Kandasami*, I. L. R., 10 Mad., 375, p. 506; *Gadhill* vs. *Hunter*, 14 C. D., 493.

Sale.—A suit for recovery of a mortgage debt with an alternative prayer for sale of the mortgaged property is not a suit to recover immoveable property—*Govinda* vs. *Mana Vikraman*, I. L. R., 14 Mad., 284.

Foreclosure.—In England it has been held that a suit for foreclosure is not a suit for land under this section, and leave has been given to join in one suit claims for the administration of the trusts of a mortgage deed, and for foreclosure of the mortgage—*Tarrell* vs. *State Company*, 3 C. D., 629; and it seems desirable in such suits to add a claim for possession—*Nithal* vs. *Nixon*, 28 C. D., 413.

Suits to establish Title.—In England an action to establish title to land and recover rent but not claiming possession is not an action for land—*Gadhill* vs. *Hunter*, 14 C. D., 492; this case has been specially provided for in this section.

Specific Performance.—A suit for specific performance of an agreement to sell a share of a house may be joined with a suit to recover a sum of money due from a defendant on promissory notes—*Cutts* vs. *Brown*, 7 C. L. R., 171; I. L. R., 6 Cal., 328.

Leave of Court.—Application for leave should be made before the plaint is filed—*Pilcher* vs. *Hinds*, 11 C. D., 492, though possibly, on good cause shown, leave may be given afterwards—*Musgrave* vs. *Stevens*, W. N., 1881, p. 163; *Clark* vs. *Wray*, L. R., 31 C. D., 68, and see *Mulkern* vs. *Doerks*, 53 L. J., Q. B. D., 526.

Leave Given.—Leave will be given to join whenever it is sought to recover immoveable and moveable property comprised in the same instrument. Thus leave has been given to join in one suit claims for recovery of possession of land, an injunction to restrain the defendants from receiving the rents of the land, the appointment of a receiver, delivery up and cancellation of a deed under which the defendant claimed to be entitled to the land sought to be recovered—*Cook* vs. *Enchmarch*, 2 C. D., 111; and claims for the administration of personal estate and to establish a title to real estate have been joined, where both estates rested on a common gift in the same will—*Whelstone* vs. *Devis*, 1 C. D., 99.

The law does not compel a plaintiff to get leave to join distinct causes of action—*Sheo Ratan* vs. *Sheosahai*, I. L. R., 6 Alla., 358; *Becharji* vs. *Pujaji*, I. L. R. 15 Bom., 31, p. 53.

Jurisdiction.—Under the old procedure claims against the same person might be joined and tried by a Judge, although the value of one of the items was below the amount cognizable by him—*Luchmee Purshad* vs. *Kallaso*, B. L. R., (F. B), 620; and now jurisdiction depends on the aggregate value, see section 45, *infra*.

Clause (*b*).—The meaning of the clause is this:—In suing an executor or administrator it frequently becomes a question whether he should be sued as legal representative or personally, and the minds of the framers of that rule were directed to *Ashby* vs. *Ashby*, 7 B. & C., 444, and cases of the same class (see *Farhall* vs. *Farhdll*, L. R., 7 Ch., 123) where the executor or administrator has been dealing with the assets, or making contracts, in the course of the administration properly and fairly in his character of executor or administrator; and then it becomes a question wether the contracts being personally entered into by him, he should be sued in his character of legal personal representative, or in his personal character, being left afterwards to get payment, if he could, out of the assets, in the course of administration. The object of the clause was to get over such difficulties. The rule is one of a series of rules allowing different causes of action to be combined together, and they are guarded by certain restrictions. Thus by the 8th rule of Order XVII (section 46), "Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time (before issues are settled) apply to the Court or Judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding." And rule 9 (section 47) provides:—"If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as of such cannot be conveniently disposed of in one action, the Court or a Judge may order any causes of action to be excluded, and may direct the statement of any claim ... to be amended accordingly and may make such order as to costs as may seem just"—*Padwick* vs. *Scott*, 2 C. D., 743. See also *Smith* vs. *Richardson*, 4 C. P. D., 112.

Heir as such.—This means that the plaintiff rests his claim entirely on the allegation that he is the heir of another, and as such asserts a right against the defendant—*Ashabai* vs. *Haji Tyeb*, I. L. R., 6 Bom., 390.

Appeal.—No appeal lies from an order under Rule (*a*) refusing leave to join another cause of action with a suit to recover immoveable property. But where a plaint containing two such causes of action was filed and registered without leave, and the Judge subsequently refusing sanction, directed that the plaint should be returned in order that separate suits should be brought, it was held that the order was a decree and subject to appeal—*Bandhan* vs. *Solhu*, I. L. R., 8 Alla., 191.

Plaintiff may join several causes of action.

45 Subject to the rules contained in Chapter II and in section 44, the plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant, or the same defendants jointly, may unite such causes of action in the same suit.

Court may order separation.

But if it appear to the Court that any such causes of action cannot be coveniently tried or disposed of together, the Court may, at any

time before the first hearing, of its own motion or on the application of any defendant, or at any subsequent stage of the suit, if the parties agree, order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

When causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit, whether or not an order has been made under the second paragraph of this section.

The first two paragraphs are derived from the Judicature Acts, Order XVIII, Rule 1; and are more restricted (in language) than the corresponding paragraphs in section 45 of Act X of 1877. This section applies to H. C. and P. S. C. C.

Application of this Section.—This section applies to cases where there are only one plaintiff, one defendant, and several causes of action, and to cases where the plaintiffs (or defendants), though consisting of two or more individuals, may be considered as a unit with reference to all the different causes of action.—See *Narsingh Das* vs. *Mungal Dubey*, I. L. R., 5 Alla., 163; *Bhagwati* vs. *Bindeshri*, I. L. R., 6 Alla., 106. It does not apply to cases of *multifariousness*, strictly so called. See the remarks of Selborne L. C., in *Burstale* v. *Beyfus*, 26 C. D., 35, p. 39. See notes to section 31, *ante*.

Where the purchaser of two different portions of the same tenure, brought separate suits for the enhancement of each portion, it was held that the Court of first instance was right in consolidating the two suits and trying them as one—*Enayetoollah* vs. *Radha Churn*, 15 W. R., 395. "If one or more persons holding several portions of land in one zemindary fall into arrears, it is rather for the comfort of the defendant that he should be sued in one suit, and not have several suits brought against him"—*Suroop Chunder* vs. *Nimchand*, 13 W. R., 284. Where a landlord sued four tenants holding three distinct tenures to enhance the rent of each tenure, *held*, that separate trials should have been ordered—*Juggut Chunder* vs. *Ear Mahomed*. 24 W. R., 217.

Where A sued B for possession, and C, claiming the lands sued for was made a party without A or B objecting, *held*, that this section did not empower the Court to strike C's name off the record; but only to order separate trials—*Khadar* vs. *Chotibibi*, I. L. R., 8 Bom., 616.

Multifariousness.—"There are three analogous vices to which bills in equity are subject—mis-joinder of plaintiffs, misjoinder or defendants, and multifariousness or mis-joinder of subjects of suit ..... . Multifariousness properly so called, exists when one of the defendants is not interested in the whole of the relief sought, as the old form of the demurrer for multifariousness shows. Mis-joinder of subjects of suit is when two subjects distinct in their nature are united in one bill, and for convenience sake the Court requires them to be put in two separate records. The case of *Salvidge* vs. *Hyde*, (5 Mad., 138; Jac., 151,) in which the bill was for the administration of a testator's estate, and to set aside a sale made of part of it by the executor was an instance of this. There the Court refused to allow the two subjects to be united, although the plaintiff was interested in each, and the defendants were liable in respect of each. In the present case, the mis-joinder is of this nature; the suit is first an ordinary suit against the devisees in trust and executors for the administration of the real and personal estates of the testator; and, secondly, the plaintiff's claim to have the partnership accounts taken as between the testator's estate and the defendant William Pointon, the testator's partner and one of the executors and trustees; and then the suit is further complicated in this way; it is alleged that William Pointon has sold to himself or taken possession of the partnership assets at a valuation under a power in the will, and that he has not paid for them. It is suggested that not only is the price of such assets in his hands, but that having sold to himself, without payment, what was purported to be sold remain assets of the testator till the price is paid."—Wickens, V. C., in *Pointon* vs. *Pointon*. L. R., 12 E., 551. There the bill was demurred to on the ground that it was an endeavour to mix up together three different causes of suit, *viz.*, the administration of the testator's estate, the administration of the partnership affairs, and the question whether William Pointon ought to be restrained by injunction from dealing with the property which he had purchased, and one moiety of which was his own. The demurrer was overruled. In *Coates* vs. *Legard*, L. R., 19 E., 56, Jessel, M. R., says:—I regard the law with respect to multifariousness as settled by *Campbell* vs. *Mackay*, 1 My. & Cr., 603, that where all the plaintiffs have a common interest in the whole of

the matter comprised in the bill, the objection of multifariousness set up by defendants who are concerned only in a portion of the subject-matter, is a question of discretion, to be determined upon considerations of convenience with regard to the circumstances of each particular case. The question is according to *Pointon* vs. *Pointon*, (L. R., 12 Eq., 547,) whether the various subjects as to which relief is sought are such as, if fit for discussion, can be properly dealt with in one suit."

Suits not Multifarious.—Where A obtained a decree against B for the possession of certain lands, in which 86 persons had distinct and separate tenures, and these 86 persons in consequence of a combination entered into by them, had joined in keeping A out of possession of the lands, it was held that A might join the 86 tenants as defendants in one suit—*Loke Nath* vs. *Keshab Ram*, I. L. R., 13 Cal., 147. [But see *Hurro* vs. *Onookool*, 8 W. R., 461.] In *Haranund* vs. *Prosunno*, I. L. R., 9 Cal., 763, certain distinct properties were sold to A by private contract. Subsequently the properties were attached and sold in execution of a decree against A's vendors, and bought by different persons in separate lots. A sued his vendors and the decree-holders and the purchasers in execution to establish the priority of his private sale. The only defence on the merits, and this defence was common to all was that the plaintiff's purchase was invalid, *held*, that the suit was not multifarious. When a mortgagee by conditional sale foreclosed under Regulation 17 of 1806, but was prevented from taking possession by persons who had purchased distinct portions of the mortgaged property from the mortgagor on various dates subsequent to that of the mortgage, *held* that the mortgagee might sue his mortgagors and the purchasers in one suit—*Bal Kishen* vs. *Bistoo Churn*, 22 W. R., 532; *Srinath Das* v. *Khetter Mohun*, I. L. R., 16, Cal., 693, and in a suit for possession of property the person in possession and his mortgagee may be sued together—*Indar Kuar* vs. *Gur Prasad*, I. L. R., 11 Alla., 33. [And see *Krishna* vs. *Hurry*, 25 W. R., 60.] And when the judgment-creditor of A sued A's representative and several persons had purchased distinct properties from A, to have it declared that the purchases were not genuine, and that he was entitled to execute his decree against the properties, *held*, not multifarious—*Wise* vs. *Gureeb Hossein*, 13 W. R., 271; but see *Bisheshur* vs. *Ram Churun*, 5 Alla., 25. A suit may be brought against a number of alienees of a deceased member of a joint (Mitakshara) family for the recovery of family property illegally alienated by him—*Vasudeva* vs. *Kuleadi*, 7 Mad., 290; and for a declaration against a Karnavan and his alienees—*Abdul* vs. *Ayaga*, I. L. R., 12 Mad., 234; or against plaintiff's guardian and persons to whom the guardian sold the plaintiff's property during his minority.—*Sami* vs. *Ammani*, 7 Mad., 260, [*Contra*, *Mata Pershad* vs. *Bhugmanee*, 1 Alla., 128.] The principle laid down in 7 Mad., 290, was followed in *Mahommed* vs. *Krishnan*, I. L. R., 11 Mad., 106, where the Judges seemed to dissent from *Kachar* vs. *Bai*, I. L. R., 7 Bom., 289. And where one of the three widows of A (a Mahommedan) sued two other widows of A, and A's other heirs to have her rights of inheritance declared and two deeds of gift in lieu of dower given to the two widows, defendants, separately, declared to be not genuine, the Judges of the High Court differed as to whether the suit was well brought—*Ameerun* vs. *Wuseehun*, 12 W. R., 11. But where plaintiff sued six persons and asked for *khas* possession of one-fourth of a parcel of land or in the alternative for a decree for arrears of rent against such of them as should be found liable. Only one of the defendants kept him out of possession, and if he was entitled to rent another of them was only liable for a portion of it. *Held*, the suit should not be dismissed—*Janokinath* vs. *Ramdunjun*, I. L. R., 4 Cal., 949; and see *Narsing* vs. *Mangal*, I. L. R. 5 Alla., 163, p. 179.

Suits held to be Multifarious.—The following suits were dismissed on the ground of multifariousness: A suit by a person holding a decree for possession of certain lands against the defendant in the former suit, and against other persons in possession who claimed title to distinct portions of the land, there being no collusion or combination between the defendants to keep the plaintiff out of possession—*Ram Narain* vs. *Annoda Prosad*, I. L. R., 14 Cal., 681 (but see *Shoroop* vs. *Mothoor*, 4 W. R., 109): and the same rule applies if an auction-purchaser sues several persons holding under different titles—*Sudhendu* vs. *Durga*, I. L. R., 14 Cal., 433. A suit brought during the lifetime of a Hindu widow against the widow, and purchasers from her of separate and distinct portions of her husband's property, for a declaration and an injunction—*Kachar* vs. *Bai*, I. L. R., 7 Bom., 289; *Banee* vs. *Koondun*, 2 Alla., 221, or for mesne profits—*Koondun* vs. *Rae*, 3 Alla., 86 (but see 7 Mad., 290): A suit for pre-emption by one of three co-sharers of a village against the other two co-sharers and against A, who purchased the share of each at different times—*Bhagwati* vs. *Bineshri*, I. L. R., 6 Alla., 106 (compare I. L. R., 5 Alla., 163): A suit for the specific performance of a contract to sell certain lands against A and for a declaration against B that he is not entitled to a charge on those lands—*Luckumsey* vs. *Fazulla*, I. L. R., 5 Bom., 177; and see *Probhooram* vs. *Robinson*, 11 W. R., 398; but see *Mokund Lall* v. *Choiay*, I. L. R., 10 Cal., 1061: A suit for possession of lands against a number of defendants who claiming distinct interests, dispossessed the plaintiff from distinct portions of the lands on different dates—*Ranee Surut* vs. *Soorjee Kant*, 11 W. R., 397: A suit by a talookdar (who had been the owner of five distinct talooks

under the same zemindar) against the zemindar and against five persons who had purchased the talooks at five different sales (where the talooks were sold each for its own arrears of rent) to have those sales set aside—*Imrit Nath* vs. *Roy Dhunput*, 18 W. R., 288: A suit against two defendants for the price of timber separately purchased by them from the plaintiff—*Baroo* vs. *Massim*, 21 W. R., 206: And a suit for possession against a number of defendants who have been retained in possession by the Magistrate under the Code of Criminal Procedure—*Tara* vs. *Koomaree*, 23 W. R., 389 (compare I. L R., 14 Cal., 681). The principles on which the foregoing cases were decided were laid down in *Raja Ram* vs. *Luchmun*, 8 W. R., 15, and *Baboo Motee* vs. *Ranee*, 8 W. R., 64.

Multifariousness—Procedure to be followed.—In *Subramanya* vs. *Sadasiva*, I. L. R. 8 Mad., 75, a suit was brought by a Hindu for partition of joint family property against his father, brothers, and sixteen other persons to whom it was alleged, the father had improperly alienated numerous parcels of the said property at different times. The alienees were the only defendants who opposed the plaintiff's claim, and as to them the suit was dismissed on the merits. On appeal the High Court said that the Court of first instance should have directed separate trials in respect of the alienations. And in a suit of a similar kind the High Court, in special appeal, said the first Appellate Court should have tried the suits separately—*Shoroop* vs. *Mothoor Mohan*, 4 W. R., 109. See also as to the procedure which ought to be follwed—*Massamut Rutto* vs. *Dumree*, 2 Alla., 153; *Vithu* vs. *Narayan*, 5 Bom. (App. civ.), 30; *Koondun* vs. *Rae*, 3 Alla., 86. In *Ram Coomar* vs. *Koomar Narain*, 20 W. R., 482, the joint claim against all the defendants was tried and the other claims were excluded.

In one case where A, an auction-purchaser at a revenue sale, sued a number of persons for possession of some *chur* land, and the defendants claimed portions of the land under different titles and pleaded mis-joinder, the suit was not dismissed, but the plaint was rejected—*Sudendhu* vs. *Durga*, I. L. R., 14 Cal., 435.

Multifariousness—Duty of Appellate Court.—The sons of A and of B and of C possessed proprietary rights in two mahals of a certain mauza. D possessed proprietary rights in one of those mahals. In April 1879, the sons of A sold their proprietary rights in both mahals to X. In August 1879, the sons of B sold their proprietary rights in both mahals to X. Later in the same month the sons C sold their proprietary rights in both mahals to Y. X sued Y to enforce a right of pre-emption in respect of the sale to the latter and obtained a decree. D then sued to enforce a right of pre-emption in respect of the three sales mentioned above, so far as they related to the mahal of which he was a co-sharer, joining as defendant X and Y and their vendors. X alone objected in the Court of first instance to the frame of the suit. The Court overruled the objection and gave D a decree. The Lower Appellate Court reversed this decree on the ground of mis-joinder: *Held*, that in respect of X there was no mis-joinder, and that as he alone objected to the frame of the suit, the Lower Appellate Court ought not, regard being had to section 578 of the Code of Civil Procedure, to have reversed the decree of the original Court—*Kalian* vs. *Gur Dayal*, I. L. R., 4 Alla., 163 (but see *Bhagwati* vs. *Bindeshri*, I. L. R., 6 Alla., 106); see also *Ram Kanaye* vs. *Prosonno*, 13 W. R., 176. In *Tarinee* vs. *Huneman*, 20 W. R., 240, PHEAR, J., stated the result of the decisions to be as follows:—

"If an objection on this ground is pressed and carried to a decision in the first Court, this Court will, even upon special appeal, upon its being shown to be well founded, give the objector the benefit of it. But on the other hand, if it is not pressed and carried to a decision in the first Court, and if the parties go to trial in the same way as if the objection had not been made, then the objection will not be given effect to at alat er stage, unless it appears clearly that there was a defect in the original trial in consequence of the causes of action to which the objection is directed." See also *Ram Dyal* vs. *Ram Doolal*, 11 W. R., 273. And in some cases, the High Court would not in special appeal interfere with the order of the Lower Court, disallowing the objection—*Mahomed Hossein* vs. *Potan*, 20 W. R., 147; *Shunker* vs. *Lala*, 2 Alla., 443. The objection of mis-joinder should be taken in the first Court—*Kishna Ram* vs. *Rukmini*, I. L. R., 9 All., 221.

Where several plaintiffs instituted separate suits against the same defendant in respect of the same subject-matter: *Held*, that the proper course was to consolidate the suits, and try them as one as the defendant requested, or to try each case separately on the merits; and that it was wrong to try only one case, and treat the others as governed by it—*Nehal Singh* vs. *Syud Alai*, 15 W. R., 110.

An Appellate Court, in Regular Appeal, had power under section 37, Act XXIII of 1861, to order separate trials—*Shoroop Chunder* vs. *Mothur Mohun*, 4 W. R., 109; and probably the same power is given under this Act. See section 582.

Return of Plaint.—When the Court of Appeal reverses a decree on the ground of mis-joinder, it may return the plaint for amendment—*Lingammal* vs. *Chinna*, I. L. R., 6 Mad., 239. In Calcutta, the practice has been to reject the plaint; if this has not been done and the objections are raised in the written statement, the Judge should raise an issue on the point and decide it—*Raja Ram Tewary* vs. *Luchman*, 8 W. R., 15; or in doubtful cases an issue for mis-joinder may be raised with other issues, evidence taken and the case dismissed for mis-joinder without recording a finding on the other issues—

Imrit Nath vs. *Roy Dunput*, 9 B. L. R., 241 ; or the plaintiff may be called on to elect against which defendant he will proceed—*Hurro Monee* vs. *Onookool*, 8 W. R., 461. See also *Kachar* vs. *Bai*, I. L. R., 7 Bom., 289; *Mahomed* vs. *Krishna*, I. L. R., 11 *Mad.*, 106, p. 111. In Allahabad the Appellate Court dismisses the suit—*Karau Singh* vs. *Muhammad*, I. L. R., 7 Alla., 860. See "Procedure on Objection," section 44, *ante*.

Stamps.—See section 17 of the Courts Fee Act, and *Mul Chand* vs. *Shib Charan Lal*, I. L. R., 2 Alla., 676; *Chedi Lal* vs. *Kerath Chand*, *id.*, 682; *Kishori Lal* vs. *Shurut Chunder*, 10 C. L. R., 859.

Defendant may apply to confine suit.

46. Any defendant alleging that the plaintiff has united in the same suit several causes of action which cannot be conveniently disposed of in one suit may at any time before the first hearing, or, where issues are settled, before any evidence is recorded, apply to the Court for an order confining the suit to such of the causes of action as may be conveniently disposed of in one suit.

Judicature Acts, Order 18, Rule 8.
This section applies to H. C. and P. S. C. C. See note clause (*b*), section 44, *ante*.

Application.—This section only applies where there are several causes of action against the same defendant. It does not justify a Judge striking out a party—*Khadar* vs. *Chotibibi*, I. L. R., 8 Bom., 616.

Before First Hearing.—These words are imperative—*Damodhar* vs. *Gokal*, I. L. R., 7 Alla., 79, p. 100.

In a suit to set aside a deed of partnership for misrepresentation, or in the alternative that the partnership created by it should be dissolved and accounts taken, and defendant moved for an order to amend, confining the statement to one of the alternative claims, the application was refused—*Bagot* vs. *Easton*, 7 C. D., 1. And see *Child* vs. *Stenning*, 7 C. D., 413; 11 C. D., 82.

Court on hearing application may exclude some causes and order amendment.

47. If, on the hearing of such application, it appears to the Court that the causes of action are such as cannot all be conveniently disposed of in one suit, the Court may order any of such causes of action to be excluded, and may direct the plaint to be amended accordingly, and may make such order as to costs, as may be just.

Every amendment made under this section shall be attested by the signature of the Judge.

Judicature Acts, Order 18, Rule 9. It applies to H. C. and P. S. C. C.

CHAPTER V.

OF THE INSTITUTION OF SUITS.

Suits to be commenced by plaint.

48. Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

This section applies to H. C. and P. S. C. C.

North-West.—Plaints should be first filed with the Clerk of the Court to report whether the necessary conditions as to the stamp, time, accompaniments and the like have been duly attended to; the petition should then be returned to the pleader or party to present to the Court for admission—2 Civ. L. (N.-W.), 1872.

Date.—Where a plaint was presented on the 29th, and the endorsement said it was accepted on the 31st, the 29th and not the 31st was considered the day of institution —*Young* vs. *MacCorkindale*, 19 W. R., 159.

Sunday.—A plaint may be received and admitted on Sunday or any other holiday —*Ununto Ram* vs. *Protab Chunder*, 16 W. R., 230; *Ram Dass* vs. *Official Liquidator* I. L. R., 9 Alla., 366, p. 380; but there is no necessity to do so; for under the Limitation Act, if the period of limitation expires when the Courts are closed, the suit may be admitted on the day that the Court re-opens; and so may any application—*Peary Mohun* vs. *Anunda*, I. L. R., 18 Cal., 631.

Court.—In the North-West a plaint must be presented in office; and where a suit was admitted by a Munsiff at his private residence after he had left office, it was considered as filed on the following day when the Court re-opened—*Jai Kuar* vs. *Heera Lal*, 7 Alla., 5; but in Lower Bengal plaint delivered at the private residence of the clerk of a Small Cause Court has been held to have been properly filed—*Mudden Mohun Chuckerbutty* vs. *Fakeer Biswas*, Suth., S. C. Ref., 36, and where a plaint, sent by post, was accepted, the institution was considered sufficient in Madras—*Sankaranarayana* vs. *Kunjappa*, I. L. R., 8 Mad., 411. The Nazir of a Small Cause Court is not authorized to receive plaints; they cannot be filed with him—*Raj Chunder Gope* vs. *Joogul Gope*, 18 W. R., 172.

When the Court of a Subordinate Judge is temporarily closed, the Court of the District Judge does not become the Court of first instance in which the original suit should be filed and the proceedings are void—*Ramaya Elapa* vs. *Muhamadbhai*, 10 Bom., 495; *Motilal Ramdas* vs. *Jamnadas Javerdas*, 2 Bom., 40; see also *Ledgard* vs. *Bull*, 13 Mad. Ind. App., 134.

Where a plaint under Act X, 1859, was presented to an Assistant Collector, and not to the Collector, all subsequent proceedings were declared invalid, and the plaint was returned to be properly filed—*Roopa* vs. *Anwar Ali*, 4 Alla., 35; in Bengal the proceedings are voidable at the option of the defendant only—*Mackintosh* vs. *Kashee Nath Biswas*, 21 W. R., 450. No plaint should ordinarily remain unregistered for more than one day, for it is the duty of every Judge to take up at latest on the day following their presentation all plaints filed in his Court—Sud. Civ. O. (N.-W.), 1865; 11 Civ. Cir (N.-W.), 1865.

Language of plaint.

49. The plaint must be distinctly written in the language of the Court; provided that, if such language is not English, the plaint may (with the permission of the Court) be written in English; but in such case, if the defendant so require, a translation of the plaint into the language of the Court shall be filed in Court.

Act VIII of 1859, section 26. This section applies to H. C. and P. S. C. C.

There is no rule which requires as much as possible of the substance of the plaint to be engrossed on stamped paper; and so long as the rule in Bengal Government Notification of 1st July 1872, against the use of a larger number of stamps than is absolutely necessary has been complied with, it is not material whether the plaint be taken to commence or end on the plain paper—*In the matter of the Land Mortgage Bank*, 18 W. R., 326.

A document referred to in the plaint is not necessarily a part of the plaint—*Foulton* vs. *Gwyther*, 1 Bourke, 273.

Particulars to be contained in plaint.

50. The plaint must contain the following particulars :—

(*a*) the name of the Court in which the suit is brought;

(*b*) the name, description and place of residence of the plaintiff;

(*c*) the name, description and place of residence of the defendant, so far as they can be ascertained;

(*d*) a plain and concise statement of the circumstances constituting the cause of action, and where and when it arose;

(*e*) a demand of the relief which the plaintiff claims; and (*f*) if the plantiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished.

In money-suits.

If the plaintiff seeks, the recovery of money, the plaint must state the precise amount, so far as the case admits.

In a suit for mesne profits, and in a suit for the amount which will be found due to the plaintiff on taking unsettled accounts between him and the defendant, the plaint need only state approximately the amount sued for.

Where plaintiff sues as representative.

When the plaintiff sues in a representative character, the plaint should show, not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute a suit concerning it.

Illustrations.

(*a*) A sues as B's executor. The plaint must state that A has proved B's will.

(*b*) A sues as C's administrator. The plaint must state that A has taken out administration to C's estate.

(*c*) A sues as guardian of D, a Muhammadan minor. A is not D's guardian according to Muhammadan law and usage. The plaint must state that A has been specially appointed D's guardian.

Defendant's interest and liability to be shown.

The plaint must show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Illustration.

A dies, leaving B his executor, C his legatee, and D a debtor to A's estate. C sues D to compel him to pay his debt in satisfaction of C's legacy. The plaint must show that B has causelessly refused to sue D, or that B and D have colluded for the purpose of defrauding C, or other such circumstances rendering D liable to C.

Grounds of exemption from limitation law.

If the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaint must show the ground upon which exemption from such law is claimed.

Act VIII of 1859, section 26. This section applies to H. C. and P. S. C. C. and in part to M. S. C. C.

SUITS AGAINST GOVERNMENT AND PUBLIC OFFICERS.—See Chapter XXVII, *post*.

SUITS BY AND AGAINST ALIENS AND FOREIGN NATIVE RULERS.—See Chapter XXVIII, *post*.

SUITS BY AND AGAINST CORPORATIONS AND COMPANIES.—See Chapter XXIX, *post*; "PLAINTIFF" and "DEFENDANT" under this section.

SUITS BY COMPANIES AGAINST MEMBERS.—See Act VI of 1882, section 94.

SUITS BY AND AGAINST TRUSTEES AND EXECUTORS.—See Chapter XXX, *post*, and "REPRESENTATIVE CAPACITY" under this section.

SUITS BY AND AGAINST MINORS.—See Chapter XXXI, *post*.

SUITS BY AND AGAINST MILITARY MEN.—See Chapter XXXII, *post*.

SUITS RELATING TO PUBLIC CHARITIES.—See Chapter XL, *post*.

INTERPLEADER SUITS.—See section 471, *infra*.

SUITS FOR INFRINGEMENT OF PATENT.—See Act LV of 1859, section 34.

SUITS UNDER THE RENT ACTS.—See Act 1 (B. C.,) 1879, sections 46—48; Chutia Nagpore Act XII of 1881, sections 104, 110 and 116 (North-West); Act XIX of 1868, section 110 (Oudh); Act VIII of 1865 (Mad.); Act VIII, 1885, section 148, clause (*b*) and section 1, *ante;* Act IX of 1883, section 67, Central Provinces.

FORMS OF PLAINTS.—See Schedule IV, Nos. 1—115

Plaintiff.—A Corporation should sue in its own name—*Ram Doss Sein* vs. *Stephenson*, 10 W. R, 366; an unregistered or unincorporated company must disclose the names of its members when suing—*Koylash Chunder* vs. *Ellis*, 8 W. R., 45; but such of the members of a partnership as are minors can neither sue, nor be joined as co-plaintiffs, in their own names—*Pitum Dass* and *Gouree Dutt* vs. *Ram Dhone Dass*, 1 Taylor, 279. See Lindley on Partnership, 74, 264, 280.

Description.—To describe the plaintiff as "A. B., an infant, residing in Chitpore Road in the Town of Calcutta," is not a sufficient description of his place of abode under section 50, of the Civil Procedure Code; nor is it sufficient under this section to describe the defendant as "formerly of Calcutta," without alleging that the plaintiff has been unable to ascertain his place of residence more definitely—*Bibee Soloman* vs. *Abdool Aziz*, 4 C. L. R., 366.

In a plaint the Manager of M. Bank began thus, "George Henry Webb., Manager of the above named plaintiff business, states as follows," and verified it thus." "For the M. Bank, Limited, G. H. Webb, Manager,": *Held*, the Bank, and not Webb was plaintiff—*The Mussoorie Bank* vs. *Barlow*, I. L. R., 9 Alla., 188.

Agent.—When a person sues on behalf of his principal under a power-of-attorney, the principal's name should appear as plaintiff—*Choonnee Sookul* vs. *Hur Pershad*, 1 Alla., 277. Under Act X of 1859, suburakars and teshildars can institute suits for rent, but the zemindar's name, and not their own names, must be entered as plaintiff—*Ladlee* vs. *Gunga*, 4 Alla., 59.

Benamidar.—Suits for property should be brought in the name of the real, and not in the name of the colourable owner—*Tamaoonnissa* vs. *Woojjulmonee*, 20 W. R., 72.

Assignee.—Where the plaintiff has sold his rights during the pendency of his suit, it is irregular to substitute for his name that of the purchaser, but it is an irregularity that can be cured by the consent of the defendant—*Beer Chunder* vs. *Tumeezooddeen*, 12 W. R., 87; 3 B. L. R., 214.

Special Appeal.—It should be borne in mind that incompetency to bring a suit may be urged for the first time orally in special appeal—*Radha Kishen* vs. *Bakhtawur Lall*, 1 Agra F. B., 175.

Defendants.—The description contemplated by the Code includes all the titles by which the party is generally known; and if a party from obstinacy, or pique, or anything in fact but a *bonâ fide* dispute as to the right to a title, persistently refuses to give his adversary that title by which he is generally recognized, the Court ought not to permit, nor sanction, that species of insult. Defendant objected that his titles were not set forth, and asked that he might be described as in the Government Gazette "The Honorable Maharajah Meerja Vijaya Rama Gujaputi Raz Mane Sultan Bahadur, Guru of Vizianagram," and plaintiff was granted a week to amend, but did not. It was held by the Privy Council, overruling the High Court, that, with the exception of the word "Honorable" which seemed less a matter of description than an honorary distinction, as it applied to the Members of Council, the Judge was right in insisting on the titles, and in rejecting the plaint on non-compliance, as the titles could not be rationally disputed—*Raja Seta Ram Krishna* vs. *Raja Vijaya Rama*, &c., 3 Mad., 31; 18 W. R., 301. In this case their Lordships disapproved of the case of *Kishen Chand* vs. *Meghraj*, 12 W. R., 450, in which the High Court at Calcutta refused to insist on the insertion of the words "Roy Bahadur."

Corporation.—A corporate body should be sued in its corporate name. A suit against "A B," agent of the corporation, is bad—*Nabeen Chunder* vs. *Stephenson*, 15 W. R., 534; *Mohendronath Mookerjee*, Overseer, 9 W. R., 206.

Unincorporated Company.—In the case of an unincorporated or unregistered company, the names of the persons composing it must be set forth as a rule; *Pulin Behari* vs. *Watson*, B. L. R., (F. B.) 904, p. 906; but if the plaintiff cannot find out the names, he may sue the company in the name in which they are carrying on business, stating his inability to give a better description—*Kaylash Chunder* vs. *Ellis*, 8 W. R., 45; *Cannan* vs. *Koylash Chunder*, 25 W. R., 117.

Agent.—In a suit against A B, proprietor of an estate, A B and not his karendah should be the defendant—*Madho Radpav* vs. *Thakoor Pershad*, 4 Agra, 127.

Cause of Action.—The plaint must include all the existing grounds on which the plaintiff can succeed—*Premanund* vs. *Ram Churn*, 20 W. R., 482; *Denobundhoo* vs. *Kristomonee*, I. L. R., 2 Cal., 152; it must not contain mere argument—*Bishen Sahaye* vs. *Beer Kishore*, 8 W. R., 296. The different titles should be set out in the alternative, otherwise the title which has been put forward will alone be put in issue, and if the

plaintiff is not successful, a second suit will be barred; *Kalidhun* vs. *Shiba Nath*, I. L. R., 8 Cal., 483, p. 501; but see *Becharji* vs. *Pujaji*, I. L. R., 14 Bom., 31; *Jibunti* vs. *Shib Nath*, I. L. R., 8 Cal., 819; *Amanat Bibi* vs. *Imdad Husain*, 15 Ind. App., 106. And when in an action in ejectment against a tenant holding over the owner failed to prove the lease, and he did not amend: *Held*, he could not fall back on his general title, and the suit was dismissed—*Ramchandra* vs. *Vasudev*, I. L. R., 10 Bom., 451.

In England a plaintiff can now plead material facts though not material to the cause of action—*Millington* vs. *Loring*, 6 Q. B. D., 190.

Facts not evidence should be stated even if the facts are admissions—*Davy* vs. *Garrett*, 7 C. D., 473.

Inconsistent Titles.—Alternative titles are allowed. Thus a person may base his suit on a mortgage and a deed of sale—*Ramgutty* vs. *Abdool*, 20 W. R., 73; or base a claim to land on a hereditary right and also a right of occupancy—*Woodit* vs. *Buldeo*, 21 W. R., 12; but a claim to property as the property of the plaintiff is inconsistent with his claiming it by prescription, and in such a case the Court should call on him to elect—*Bijoy Keshub* vs. *Obhoy Churn*, 16 W. R., 198; *contra*—*Ameeroonissa* vs. *Woomaroodden*, 14 W. R., 49; and see *Laksmibai* vs. *Hari*, 9 Bom., 1. But possibly the better rule is that he cannot make inconsistent statements of facts though he may plead inconsistent titles—*In re Morgan*, 39 C. D., 492: *Davy* vs. *Garrett*, 7 C. D., 473, p. 489; *Philipps* vs. *Philipps*, 4 Q. B. D., 127, p. 134.

Inconsistent Claims.—A claim in the plaint to set aside a document as a forgery cannot be combined with a subsequent claim to set it aside on the ground that no consideration passed or undue influence or fraud had been practised on the executant—*Mahomed Buksh* vs. *Hosseini*, 15 Ind. App., 86; *Iyappa* vs. *Ramalakshmamma*, I. L. R., 13 Mad., 550; and where an adoption was denied in the first Court, the plea that the adoption, if any, was only conditional was not allowed—*Narayanasami, vs. Ramasami*, I. L. R., 14 Mad., 172; but see *Oiven* vs. *Morgan*, 35 C. D., 492; *Howe* vs. *Smith*, 27 C. D., 89, p. 96 and the cases in the last paragraph.

Partition.—As to when it is not necessary to ask for partition of the whole family property, see *Subbarazu* vs. *Venkataratuam*, I. L. R., 15 Mad., 234.

Boundary.—A suit to fix a boundary should show that the boundary has been transgressed—*Ameeroonissa* vs. *Gopal*, 22 W. R., 134.

In suit for land in Bengal the boundaries need not be stated in the plaint if the description given is sufficient for its identification—*Aflaboodden* vs. *Shumsoodeen*, 18 W. R., 461; *contra*—*Mahomed Ismail* vs. *Lalla Dhundur*, 25 W. R., 39. In the North-West the fields are numbered and their position is given—*Fyz Ahmed Khan* vs. *Gunga*, S. D., N.-W., 1857, p. 112.

Damages.—In a suit for damages, the nature of the injury should be set out—*Mohesh Chunder* vs. *Ramdhun*, 13 W. R., 248.

Declaration.—In a suit for a declaratory decree, the title and the circumstances requiring the declaration should be set forth—*Khadim Ali* vs. *Nazeer Begum*, 3 Alla., 262.

Possession.—In suits to recover possession, the date of dispossession must be given as accurately as possible—*Boydonath* vs. *Ojan*, 11 W. R., 238.

Fraud.—General allegations however strong are insufficient to amount to an averment of fraud of which a Court will take notice—*Walingford* vs. *The Mutual Society*, 5 App. Cas., 697; the particulars must be set out—*Gunga Narain* vs. *Tiluckram*, 15 Ind. App., 119; as to concealed fraud, see *Rahmubhoy* vs. *Turner*, I. L. R., 14 Bom., 408, p. 427. There is no objection to the use of such general words as "fraud" or "collusion," but they are quite ineffectual to give a fraudulent colour to the particular statement of fact in the plaint unless these statements taken by themselves are such as to imply that fraud has been actually committed—*Gunga Narain* vs. *Tiluckram*, 15 Ind. App., 119. Thus a plaint to set aside an award must definitely state some fraud, or other malpractice of the opposite party—*Hurchurun Doss* vs. *Hazam Mull*, 1 Ind. Jur., O. S., 12.

See "FRAUD," section 11, *ante*, and section 53, *post*.

Where and When it Arose.—In the case of *Perhlad Sein* vs. *Rajendra Kishore Sing*, 12 Moore, 292; 12 W. R., 18; in which their Lordships of the Privy Council seemed to hold that a Court, under section 32, Act VIII of 1859, would be justified in compelling the plaintiff to satisfy it that his right of action was not barred; and in *Saluji Kesraji* vs. *Rajsangji*, 2 Bom., 162 (approved of in *Balava* vs. *Shidgouda*, 7 Bom., 101), Couch, C. J., said:—"Section 32 directs that if, on the face of the plaint..... it shall appear to the Court that the subject-matter of the suit does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. The words are imperative and appear to impose on the Court, before defendant is called upon to state his defence, the duty of taking any objection that may exist in point of law to the plaintiff's claim not merely apparent on the plaint, but which may be elicited by questioning the plaintiff." The words of cl. (*c*), section 54 are also

imperative, and the Courts are bound to dismiss a suit on the ground of limitation at any stage. Where a plaint discloses no cause of action, a Court is justified in examining the pleaders on both sides, and from their examination eliciting and fixing the real issue and determining the case on the trial of such issue—*Man Gobind* vs. *Umbika Monee*, 16 W. R., 218. See also *The Secretary of State* vs. *Vira Rayan*, I. L. R., 9 Mad., 175; *Moru* vs. *Gopal*, I. L. R., 2 Bom., 120; *Parmanand* vs. *Sahib Ali*, I. L. R., 11 Alla., 438; and see *Jafar Husain* vs. *Mashuq*, I. L. R., 14 Alla., 193; *Kashinath* vs. *Shridhar*, I. L. R., 16 Bom., 343.

Representative Capacity.—If a Hindu sues as representing a joint family, he should state it in his plaint—*Gan Savant* vs. *Narayan*, I. L. R., 7 Bom., 467. So if a widow is sued as representative of her deceased husband, she should be so described—*Girdharlal* vs. *Bai Shiv*, I. L. R., 8 Bom., 309; *Loki Mahto* vs. *Aghoree*, I. L. R., 5 Cal., 144, and this is the general rule where a person is sued as a representative—*Sankaran* vs. *Parvathi*, I. L. R., 12 Mad., p. 437; unless he is the manager, and the debt is a family debt—*Hari Vithal* vs. *Jairam*, I. L. R., 14 Bom., 597. Mahomedan executors need not take out probate before suing, unless there are several and one wishes to sue alone; and the same rule applies to executors of Hindu wills since the passing of Act V of 1881—*Krishna Kinkur* vs. *Rai Mohun*, I. L. R., 14 Cal., 37; otherwise with a Hindu executor under the Hindu Wills Act—*Moosa* vs. *Essa*, I. L. R., 8 Bom., 241. See also *Bhagvansang* vs. *Bechardas*, I. L. R., 6 Bom., 73.

Where the executors of a Hindu sued on a contract, and it was objected that the heirs should be added, the objection was overruled and the plaintiffs recovered in their representative character, *id.* See also *Brajanath* vs. *Anandamayi*, 8 B. L. R., 298; *Rajnarain* vs. *Universal Life Assurance Co.*, I. L. R., 7 Cal., 594.

After the death of a person to whom the Indian Succession Act, Act X of 1865, applied, plaintiff sued his brother and aunt in their representative capacity and obtaining a decree, sold some of the property of the deceased. Subsequently a third party obtained letters of administration of the estate of the deceased. It was held that the sale proceeds belonged to the latter and could not be paid to the plaintiff—*Sukh Nandan* vs. *Rennick*, I. L. R., 4 Alla., 192. See also *Basvantapa* vs. *Ranu*, I. L. R., 9 Bom., 86.

A suit against defendant described as Mrs. Sarah G. Barlow, Mussoorie, and stating in the body that she was executrix of the debtor, is a suit against her as executrix—*The Mussoorie Bank* vs. *Barlow*, I. L. R., 9 Alla., 188.

Hindu Widow.—A Hindu widow may represent a son adopted during the litigation but not brought on the record—*Hari Saran* v. *Bhubaneswari*, I. L. R., 16 Cal., 40; but on the death of one member of a joint Hindu family subject to Mitakshara law his widow cannot represent him so as to make the joint property liable for his debts—*Phoolbas Koonwar* vs. *Lalla Jogeshur*, I. L. R., 1 Cal., 226.

As to who represents property left by a widow see *Bai* vs. *Bhaishankar*, I. L. R., 16 Bom., 233, p. 237; *Ram Kishore* vs. *Kally Kanto*, I. L. R., 6 Cal., 479.

See "LEGAL REPRESENTATIVE," *ante*; "HINDU REPRESENTATIVE," section 206, *post*, and notes under sections 234, 244, 252, *post*. See also Illustrations (*a*), (*b*) & (*c*), *supra*.

Muhammadan—See note under section 206, *post*.

Effect of Statement in Plaint.—A statement in a plaint that the plaintiff is insane is not evidence that he was excluded from the inheritance by reason of insanity—*Ran Bijai* vs. *Jagatpal*, I. L. R., 18 Cal., 111; and see *Narappa* vs. *Gapaya*, 2 Bom., 341.

Objections to Description.—Objections for want of description should apparently be taken at the earliest opportunity and before first hearing—*Rajnarain* vs. *Universal Life Assurance Co.*, I. L. R., 7 Cal., 594, p. 602.

Clause (f).—This clause does not apply to the case where a plaint asks for mesne profits from date of suit to date of restoration of possession, in a suit for possession of land—*Ram Krishna* vs. *Bhimabai*, I. L. R., 15 Bom., 416.

General Prayer.—The general prayer will support an injunction—*Kristo Mohiney* vs. *Kally Prosonno*, I. L. R., 6 Cal., 485, or other relief consistent with the case made in the plaint, provided there is no surprise on the defendants, that they lose no evidence, and suffer no inconvenience by it—*Walpole* vs. *Lord Oxford*, 3 Ves., 402. See also *Serrao* vs. *Noel*, 15 Q. B. D., 549.

Plaints to be signed and verified.

51. The plaint shall be signed by the plaintiff and his pleader (if any), and shall be verified at the foot by the plaintiff or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case:

Provided that if the plaintiff is, by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorized by him in this behalf.

Act VIII of 1859, section 27. This section applies to H. C. and P. S. C. C.

Who should Verify.—The Courts are bound to see that plaints are verified by the plaintiffs, unless the latter are unable to do so by reason of absence or any good cause, when they may be allowed to be verified by competent persons—*Keenoo Singh* vs. *Eshan Chunder*, 6 W. R., 213; *Rajah Leelanund Singh*, petitioner, 7 W. R., 168; and if a plaintiff charges fraud on facts known to him he should verify—*Jardine, Skinner & Co.* vs. *Moharanee Shurno Moyee*, 24 W. R., 215; *Raja of Tomkuhi* vs. *Braidwood*, I. L. R., 9 Alla., 505. Generally if the plaint is filed by any person other than the plaintiff, the Courts see that the verification has been actually signed by the plaintiff—*Nursing Deb* vs. *Rammohun*, Marsh, 176.

As to the practice of the High Court when a suit is brought by a firm, see the case of *Ram Chunder* vs. *Chooneelal*, 12 B. L. R., 35. But "see" the *Englishman* of 9th March 1874.

A co-plaintiff added must verify the plaint, unless the facts are admitted—*Ray Mohan Lal* vs. *Bishnu Chundra*, 1 B. L. R., 100.

Where a plaint is subscribed and verified by a person other than the plaintiff, notice should be given to the defendant; nothing more formal need be done by way of notice to support an application for the admission of the plaint, if the person verifying it is in other respects qualified—*Puddomoney Dassee* vs. *Shama Churn Chuckerbutty*, 1 Ind. Jur., N. S., 226.

Appeal.—Under this Code an order rejecting a plaint is treated as a decree. See section 2, *ante;* orders returning plaints for amendment or presentation in the proper Court are not decrees, but are appealable under section 588, *post;* see note on section 54, *post;* an order under this section returning a petition is not a decree, and cannot be appealable twice—See the reasoning in *Joynath Roy* vs. *Lall Bahadoor Singh*, 10 C. L. R., 146; *Kishna Ram* vs. *Nar Singh*, I. L. R., 3 Alla., 855. But see *Bindeshri* vs. *Nandu*, I. L. R., 3 Alla., 456.

Refusing Amendment.—Orders refusing amendment of a plaint are not appealable—*Sarsuti* vs. *Kunj Behari*, I. L. R., 5 Alla., 345, p. 356.

Practice.—Applications in favour of persons unabled to verify should be pleaded, considered, and decided in each case—*Muhessur Buksh*, petitioner, 5 W. R., Mis., 33; *Nursing Deb* vs. *Rammohun*, Marsh., 176; *Muhessur Buksh* vs. *Sheo Narain*, 6 W. R., Mis. 59; notice of them should be given to the other side, but it is not absolutely necessary to do so—*Finlay Campbell & Co.* vs. *F. Steele*, 1 Ind. Jur., N. S., 39. Where a plaint has been verified by a person who has not shown the Court that he is competent to verify it, the Court has removed it from the file—*Overend Gurney & Co.* vs. *Steele*, 1 Ind. Jur., N. S., 39; but if once verification by an agent has been sanctioned, the Court, it seems, cannot of its own motion object to it afterwards—*Sutto Churn*, vs. *Suroop Chunder*, 12 W. R., 465; but the Appellate Court may require the omission to be supplied—*Gokul Chunder* vs. *Bureek Begum*, Marsh., 344; *Raja of Tomkuhi* vs. *Braidwood*, I. L. R., 9 Alla., 505.

Signed.—A plaint signed by an authorised agent—*Surnomoye* vs. *Poolin Behary*, 3 C. L. R., 15; *Roy Dhunput Singh* vs. *Jhoomuk*, 3 C. L. R., 579, or by a person holding a general power-of-attorney to sue on behalf of the plaintiff, is properly signed within the meaning of the proviso in this section—*Kastolino* vs. *Rustomji*, I. L. R., 4 Bom. 468.

As to *Corporations and Companies*, see section 435, *infra*.

Contents of verification.

52. The verification must be to the effect that the same is true to the knowledge of the person making it, except as to matters stated on information and belief, and that as to those matters he believes it to be true.

Verification to be signed.

The verification shall be signed by the person making it.

Act VIII of 1859, sections 27 and 28. This section applies to H. C. and P. S. C. C.

Form of Verification.—In all cases the person verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the observation of others—*In the matter of Upendro Lall Bose*, I. L. R., 9 Cal., 675.

When the plaint alleges matter which cannot be personally known to the person making the verification, and which is not stated to be on information and belief, a verification which does not distinguish how much is true to the knowledge of the person making it, and what is alleged to be true on information and belief does not fulfil the requirements of section 52—*Bibee Soloman* vs. *Abdool Aziz*, 4 C. L. R., 366.

Acquainted with the Facts.—When the plaint is verified by a person other than the plaintiff, the Court must be satisfied that he is acquainted with the facts of the case, but in the case of a person holding a general power-of-attorney, or of any other recognised agent, the Court will not insist on any extreme stringency of proof—*Kastolino* vs. *Rustomji*, I. L. R., 4 Bom., 468.

Where a plaintiff sets up a case of fraud resting merely on his personal knowledge, he should verify the plaint—*Protap Chunder* vs. *Krishto Keshore*, I. L. R., 8 Cal., 885; *Raja of Tomkuhi* vs. *Braidwood*, I. L. R., 9 Alla., 505.

Where Verified.—The section does not require the verification of a plaint to be made in the presence of an officer of the Court; but having regard to the necessity of satisfying the Court that the person, other than the plaintiff, who verifies the plaint is acquainted with the facts of the case, it is desirable that a verification by such a person should be made in the presence of the Court, unless the Court be satisfied that there is sufficient ground for dispensing with his attendance—*Kastolino* vs. *Rustomji*, I. L. R., 4 Bom., 468.

Objections when Taken.—Objections to verification should be taken before the settlement of issues, after that the case should be disposed of on the merits, and not dismissed for insufficient verification—*Shama Soondurse* vs. *Rohimooddeen*, 24 W. R., 71; section 53, cl. (*b*), *infra*; and if there be any informality in the verification, the case should not be dismissed, but should proceed on the written statement, provided it contain the same allegations as the plaint—*Manooram Shaw* vs. *Hurry Pershaud Roy*, Bourke, 162; if not, the Judge before dismissing should require the verification to be supplied—*Gokul Chunder* vs. *Bureek Begum*, Marsh., 344.

When plaint may be rejected, returned for amendment or amended.

53. The plaint may, at the discretion of the Court,—

(*a*) at, or at any time before, the settlement of issues be rejected if it does not disclose a cause of action;

(*b*) at, or at any time before, the settlement of issues be returned for amendment within a time to be fixed by the Court, and upon such terms as to the payment of costs occasioned by such amendment as the Court thinks fit, if it—

(i) is not signed and verified as hereinbefore required,

(ii) does not state correctly and without prolixity the several particulars hereinbefore required, or contains particulars other than those so required,

(iii) is wrongly framed by reason of non-joinder or mis-joinder of parties, or joins causes of action which ought not to be joined in the same suit, or,

(iv) is not framed in accordance with the provisions of section 42;

(*c*) at any time before judgment be amended by the Court upon such terms as to the payment of costs as the Court thinks fit:

Provided that a plaint shall not be amended either by the party to whom it is returned for amendment, or by the Court, so as to convert a suit of one character into a suit of another and inconsistent character.

When a plaint is amended under this section, the amendment shall be attested by the signature of the Judge.

When plaint shall be rejected.

This section has been substituted by Act VII of 1888, section 9, for section 53 of Act XIV of 1882.

It applies to H. C. and P. S. C. C.

The object of a plaint is to bring the matter in dispute between the parties before the Court, but upon settlement of issues the Judge is to ascertain what is the real question to be tried, and at the hearing, if he can, either upon the issues already framed or upon amended issues, determine that question, he ought to do so. So where in a plaint it was stated that the defendant entered into a contract with the plaintiffs for the purchase of seed, but, on examination of the plaintiff, it appeared that no such contract was entered into, but that the plaintiff agreed to buy for the defendant as his agent, it was held that the suit should not have been dismissed, but that it should have been tried on the merits—*Arbuthnot* vs. *Betts*, 6 B. L. R., 373; 14 W. R., 181.

Where the amount to which the plaintiff would be entitled on the evidence exceeds that specified in the plaint, plaintiff is restricted to the amount so specified—*Nathooram* vs. *Jardine, Skinner & Co.*, 1 Coryton, 118; see also 2 Moore, 113; except in the case of *mesne* profits. See "AMOUNT ALLOWED," section 212, *post*.

Prolixity—See *Bishen Sahaye* vs. *Beer Kishore*, 8 W. R., 296.

Rejected.—A Judge, in considering whether he should admit a plaint or reject it as showing no cause of action, should not refer to documents or facts not stated in or annexed to it, nor interrogate the plaintiff; but should confine himself to the plaint itself—*Girdharlal* vs. *Jagannath*, 10 Bom., 182.

No Cause of Action.—It has been held that a plaint should be rejected and not returned if it does not disclose a cause of action—*Nagar Mal* vs. *Macpherson*, I. L. R., 3 Alla., 766; but an Appellate Court cannot reverse a decree solely on this ground without being satisfied that no such cause of action was established by the evidence—*Shah Ahmed* vs. *Taree Rai*, I. L. R., 7 Cal., 343.

Under Act VIII of 1105 a plaint might be rejected if intentionally obscure—*Mahomed* vs. *Potun*, 20 W. R., 147; or if it joined causes of action against several defendants which accrued separately—*Ram Tewary* vs. *Luchmun*, 8 W. R., 15; 1 B. L. R. (F. B.), 731; or contained a prayer to prosecute the defendant for forgery—*Bishen Sahaye* vs. *Beer Kishore*, 8 W. R., 296; or if it consisted only of two counts, and the first did not shew the subject of the claim without reference to a schedule, and the second did not shew a right in the plaintiff—*Luckeymonee Dossee* vs. *Khetter Coomary Dossee*, 2 Ind. Jur., N. S., 117.

Where the subject-matter alleged raises a fair question for trial, the plaint should not be rejected on the ground that plaintiff is not likely to succeed—*Lakhsmi Ammal* vs. *Tikaram*, 1 Mad., 240. And where a plaint in a suit to establish a right to land and recover rent was filed in 1866 and did not allege any specific acts of ownership after 1845, but contained a statement general enough to let in evidence, it was held that the plaint should not have been rejected—*Udaya Varma* vs. *Nayar*, 1 Mad. 322, but see *Chetti Gaundun* vs. *Sundaram*, 2 Mad., 52.

In a suit for contribution, which was decreed by the first Court but dismissed by the Lower Appellate Court, on the ground that the plaint did not specify the amount each defendant was liable to contribute, *held*, that the Judge should have tried to ascertain that from the evidence before dismissing the suit—*Bhono Bibee* vs. *Pallan*, 11 W. R., 131.

Form of Order.—In the case of *Gunga Naraian* vs. *Tiluckram*, 15 Ind. App., 119 their Lordships held that where the plaint did not disclose a cause of action, the proper order to be passed in appeal was to reject and not to dismiss.

Within what Period.—See "CANNOT REJECT," section 54, *post*.

Time fixed by Court—Limitation.—Plaintiff presented his plaint improperly stamped on the 20th of September, and it was returned to him to make the deficiency good without any time being specified within which the order should be carried out. The deficiency was supplied and the plaint accepted on the 4th of November, although limitation had expired on the 5th of October—*Begee* vs. *Yusuf*, 6 Alla., 139; see also *Ismail* vs. *Chetti*, 1 Mad., 427; and see the order in *Bai* vs. *Mulchand*, I. L. R., 9 Bom., 357; *contra* it should not be returned if the error is in regard to valuation and the case is governed by the Court Fees Act—*Balkaran Rai* vs. *Gobind Nath*, I. L. R., 12 Alla., 129; not followed in *Chenappa* vs. *Raghunatha*, I. L. R., 15 Mad., 29, and see *Norendronath* vs. *Abinash*, I. L. R., 18 Cal., 445. Where a plaint is returned for amendment, the order should specify a certain time within which such amendment should by made—*Sheo Partab* vs. *Sheo Gholam*, I. L. R., 2 Alla., 875; *Ismail* vs. *Chetti*, 1 Mad., 427; and the date of first presentation, and not the date of carrying out the order, [is the date up to which

limitation should be counted—*Sheo Partab* vs. *Sheo Gholam*, I. L. R., 2 Alla., 875; *Khem Karan* vs. *Har Dayal*, I. L. R., 4 Alla., 37; *Ram Lal* vs. *Harrison*, I. L. R., 2 Alla., 832.

Minor.—Plaintiff sued a purchaser to enforce a right of pre-emption, and then discovering that he was a minor, obtained an order to appoint a guardian for the suit and amend his plaint: *Held*, the suit was legally instituted against him on the date of first presentation—*Khem Karan* vs. *Har Dyal*, I. L. R., 4 Alla., 37.

Amendment.—Meaning of the term, see *Chenbasaya* vs. *Rudrapa*, I. L. R., 14 Bom., 581.

Practice.—Application for amendment by substitution of parties should be supported by an affidavit shewing on what grounds the aplication is made—*Delhi and London Bank* vs. *Miller*, 7 B. L. R., App. 65; a petition is also usual, but not necessary —*Gobind Chundra* vs. *Ganga*, 7 B. L. R., 333.

Before Judgment: Amendment.—A plaint may be amended after the first hearing, provided the original character of the suit is not altered. Amendments have been allowed in regular appeal—*Joseph* vs. *Solano*, 18 W. R., 424; in special appeal—*Lingammal* vs. *Chinna*, I. L. R., 6 Mad., 239; *Shyam Chand* vs. *Land Mortgage Bank*, I. L. R., 9 Cal., 695; *Nara Simma* vs. *Suryanarayana*, I. L. R., 12 Mad., 481; and even in the most advanced stage before their Lordships of the Privy Council—*Mohummed Zahoor Ali Khan* vs. *Thakooranee*, 11 Moore, at p. 487.

Where claim would be Barred.—See *Weldon* vs. *Neal*, 19 Q. B. D., 394.

Changing the Character of the Suit.—The Courts of this country are to decide according to equity and good conscience, and the substance and merits of the case are to be kept in view, not merely the wording of the plaint but the issues settled for trial, —*Rup Sing* vs. *Baisni*, 11 Ind. App., 149, p. 155; the substance and not the mere literal wording of the issues is to be regarded; and if, from inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be by adjournment, for the decision of the real points in dispute—*Hunoomanpersaud* vs. *Babooee*, 6 Moore, 393; but the amendment must be either involved in the pleadings, or consistent with the case as originally laid, and the state of facts and the equities and ground of relief originally alleged and pleaded should not be departed from—*Eshenchunder* vs. *Shama Churn*, 11 Moore, 7; *Ameeronnissa* vs. *Abedoonissa*, 2 Ind. App., pp. 100,107; *Mylapore* vs. *Yeo Kay*, 14 Ind. App., 168; *Mukhoda Soondury* vs. *Ram Churn*, I. L. R., 8 Cal., 871; *Hari* vs. *Shapurji*, I. L. R., 10 Bom., 461; 13 Ind. App., 66; and acting on this principle, the Courts of this country have allowed the plaint and issues to be amended in special appeal—*Ram Doyal Khan* vs. *Ojoodhia Ram Khan*, 25 W. R., 425; and where, on the face of the plaint, no relevant case was made against certain defendants, as where the suit was on a *money* bond executed by A, and against A and B for combining to get A's estates illegally transferred, their Lordships of the Privy Council allowed the plaintiff to amend his plaint, so as to make the suit one for recovery of money due on the bond—*Mohummed Zahoor* vs. *Thakooranee*, 11 Moore, 468. See the cases mentioned under "**Before Judgment,**" *supra*.

Fraud.—The charge of fraud must be substantially proved as laid, and when one kind of fraud has been charged, another kind of fraud cannot be substituted for it—*Abdool Hossein* vs. *Turner*, L. R., 14 Ind. App., 111; *Kunhamed* vs. *Kutti*, I. L. R., 14 Mad., 167. See "**Fraud,**" sections 11 and 50, *ante*.

Specific Title.—The general rule is, that a party must be limited to the case which he puts forward in his plaint; he may, indeed, from the commencement of the suit, put forward in his plaint an alternative case, and the defendant will have notice that he has more than one case to meet, and will not be taken by surprise. Where the plaintiff has not put forward an alternative case, he may have leave to amend his plaint and to state his case therein correctly, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake or misconstruction of documents. The Court will then make such an order as may to it seem just regarding the adjournment of the hearing and costs; but, as a general rule, a plaintiff must abide by his plaint, and he cannot, after the parties have come to trial, abandon his own story, and adopting that of the defendant, ask relief on that policy—*Shibkristo* vs. *Abdool*, I. L. R., 5 Cal., 602; approved in *Ramchandra* vs. *Vasudev*, I. L. R., 10 Bom., 451; specially if in the plaint he speaks of his own personal knowledge—*Provabutty* vs. *Bose*, I. L. R., 7 Cal., p. 455. Thus where a specific title is alleged but not proved, the plaintiff in order to succeed on 12 years' adverse possession must raise it so clearly in the first Court, that his adversary knew he intended to rely on it—*Krishna Churn* vs. *Surma*, I. L. R., 7 Cal., 560; and where A sued for possession on a lease, he was not allowed to fall black on his general title and claim partition—*Ram Chandra* vs. *Vasudev*, I. L. R., 10 Bom., 451; but see *Sunduri* vs. *Mudhoo*, I. L. R., 14 Cal., 592; and the adoption by the Courts of a general principle other than this would encourage perjury and forgery—*Lakshmibai* vs. *Hari*, 9 Bom., 1; *Narainee Dossee* vs. *Nurrohurry*, Marsh. 70; adopted in *Girdhar* vs. *Dayabhai*

I. L. R., 8 Bom., 179; *Virasvami* vs. *Ayyasvami*, 1 Mad., 471. But this rule must not be construed very strictly, for in a case in which a plaintiff claimed an easement by prescription, their Lordships of the Privy Council dealing with the case as a special appeal, decreed the claim on the presumption of title arsing from a grant—*Rajrup* vs. *Abul*, I. L. R., 6 Cal., 394; see also *London and Country Co.* vs. *Ratcliffe*, 6 App. Cas., at p. 726; and this has been followed in other cases by the High Court—*Puna* vs. *Bai*, I. L. R., 6 Bom., 20; *Koylash Chunder* vs. *Sonaton*, I. L. R., 7 Cal., 132; and if a plaintiff claims possession generally under some alleged title, such as deed or debuttur, and also sets out 12 years' possession he is entitled to succeed—*Gossain Dass* vs. *Issur Chunder Nath*, I. L. R., 3 Cal., 224; *Goluck Chundar* vs. *Nundoo Coomar*, I. L. R., 4 Cal., 699; *Shiro Kamari* vs. *Gobind*, I. L. R., 2 Cal., 418; *Krishna Churn*, vs. *Protab*, I. L. R., 7 Cal., 560; even if this is done in the Court of first appeal—*Sunduri* vs. *Mudhoo*, I. L. R., 14 Cal., 592; and where plaintiff sued on custom and failed to prove it, he was allowed to succeed on the general law—*Rup Singh* vs. *Baisni*, I. L. R., 7 Alla., 1; 11 Ind. App., 155; and in Bombay a suit for partition as co-parcener can be amended by adding a claim on the general law to one on the basis of a compromise—*Seoharji* vs. *Pujaji*, I. L. R., 14 Bom., 31, p. 47. See also "**Changing the Nature of Suit**" under section 584, *post*.

Mode of Proof.—The doctrine that a party must prove the particular title he sets up, must not be confounded with the means of proving it. Thus, if a person claim to hold under a grant, such grant being evidenced by a sunnud, and fails to prove the sunnud, he may prove the grant by other means—*Rash Beharee* vs. *Nobaye*, 11 W. R., 465.

And changing the nature of the suit does not mean that the plaintiff cannot succeed unless he proves the allegations in his plaint or if some of them are untrue—*Lakshman* vs. *Hari*, I. L. R., 4 Bom., 584.

General Rule.—Amendment should not be allowed save when the plaintiff has an honest case, and, by some mistake or misapprehension has failed to put things properly before the Court—*Bhyro* vs. *Lekhranee*, 16 W. R., 123; *Mukhoda* vs. *Ram Churn*, I. L. R., 8 Cal., 871; *Reddington* vs. *Atlee*, 35 C. D., 317, p. 329; nor if it will affect the rights of third parties—*Rughoonundun* vs. *Gopal Chund*, 20 W. R., 17; nor allowed so that totally new causes of action are added—*Narayan* vs. *Hari*, I. L. R., 13 Bom., 664. So a suit to set aside a will as invalid cannot be amended by inserting a clause that even if the will were valid, it did not dispose of the whole of the testator's property—*Damodar* vs. *Purmandass*, I. L. R., 7 Bom., 155; and when the plaint in a suit for damages on account of malicious prosecution was filed on the last day but one, and was rejected as defective, it was held, amendment was properly refused—*Girdharlall* vs. *Jagannath*, 10 Bom., 182. And in the same way a defendant, will not be allowed to amend if the new defence places the plaintiff in a different position from that in which he would have been if the defendant had pleaded properly at first—*Steward* vs. *North Met. Tram. Co.*, 16 Q. B. D., 556.

Amendment Disallowed.—A claim for rent on contract cannot be changed into one for use and occupation of the land—*Luchmeput* vs. *Enaet Ali*, 22 W. R., 346; *Lukhee Kant* vs. *Sumeerooddi*, 21 W. R., 208; for hire of cargo boats, to suit for accounts as agent—*Shibkristo* vs. *Abdool*, I. L. R., 5 Cal., 602; 5 C. L. R., 455; to account as agent for money paid to B without authority to damages for negligence—*Hamilton* vs. *Land Mortgage Bank*, I. L. R., 5 Alla., 456; nor a claim to land as devisee under a will to a claim as heir, nor from a widow entitled to *den mohur* to a widow as heir—*Umbika Churn* vs. *Nadir*, 11 W. R., 133; nor a claim as adopted son to a claim as heir—*Gopee Lall* vs. *Chundraolee*, 19 W. R., 12 (P. C.); nor a claim to set aside an alienation on the ground of illegitimacy to a claim that it was made without the consent of the other heirs—*Sree Pershad* vs. *Raj Gooroo*, 14 W. R., 386, or, that a sale had been made to pay immoral debts, to a claim that a father could only alienate his own share under Mitakshara law—*Sheo Narain* vs. *Bhugwan*, 11 W. R., 10; *Jankee* vs. *Jhanjoo*, 2 Alla., 407. So a suit for a pottah on a special contract against 12-anna shares of an estate on the ground that they had taken a kaboolyat cannot be changed into one based on the ground that plaintiffs being occupancy-ryots, had a right to a pottah at a fair rent—*Uthur Hossein* vs. *Ramphal Roy*, 20 W. R., 75; and see *Bamasoondery* vs. *Radhika*, 13 Moore, 248, p. 268. Nor can a suit for dower on a written agreement be changed to a suit for dower on custom—*Khaja Mahomed* vs. *Manija*, I. L. R., 14 Cal., 420. See "*Specific Title*," *supra*.

Specific Performance.—A suit for specific performance cannot be changed into one to cancel the contract and retain deposit even if the defendant says he is unwilling to complete—*Stone* vs. *Smith*, 35 C. D., 188; otherwise if plaintiff had pleaded in the alternative—*Kingdon* vs. *Kirk*, 37 C. D., 141.

Possession of Land.—A claim to land as *mirasdar* cannot be turned into one as an occupancy-ryot (not in the alternative)—*Soorjo Koomar* vs. *Gungadhur Roy*, 12 W. R., 80, overruling the previous cases at 10 W. R., 361; 8 W. R., 374; nor as heir of A to heir of B—*Ishan Chunder* vs. *Sharoda Goopteah*, 12 W. R., 487; see also *Doorga*

Narain vs. *Brojo Kishore*, 23 W. R., 172. But as to the effect of setting up a specific title, see for an opposite opinion—*Kylash Kaminee Dossia* vs. *Judoo Bassinee Dossia*, 22 W. R., 390. A suit for possession and mesne profits cannot be changed into one for resumption—*Gobind Mohapattur* vs. *Madhub Persad*, 6 W. R., 211; B. L. R., F. B., 581; nor can a claim to demolish a building on one's own property be converted into a claim for demolition on joint property because erected without the co-owner's consent—*Nobin Chunder* vs. *Mohesh Chunder*, 12 W. R., 69; see, however, *Wahid Alam* vs. *Safat Alam*, I. L. R., 12 All., 556; nor a claim to khas possession to one for symbolical possession in whole or in part—*Nila* vs. *Sonai*, 21 W. R., 422; *Kishen Chunder* vs. *Kalesnath*, 18 W. R., 507. But see *Fukeer Dass* vs. *Gopal*, 12 W. R., 107. And generally though a person in a suit based on dispossession need not state his title (*id.*), yet if he does, he ought not to succeed on a perfectly different one—*Huro Soonduree* vs. *Unnopoorna*, 11 W. R., 550; and see *Gopee Lall* vs. *Chundraole*, 19 W. R., 13; Ind. App., Sup. Vol., 131; As where a man claims land as his own and afterwards claims an easement over it—*Lalji* vs. *Gungaram*, 2 Bom., 176; or claims as pre-emptor based on vicinage and separate ownership, and afterwards claims pre-emption as joint owner, or *vice versâ* —*Mahadeo* vs. *Zeenutoonissa*, 11 W. R., 169; *Gobind Row* vs. *Girdharee*, 24 W. R., 355. Nor can a claim to set aside a zur-i-peshgi be changed into one for a declaratory decree —*Doolhun* vs. *Lall Beharee*, 19 W. R., 32; nor a claim as whole owner by purhase from A, to one as heir or joint purchaser with him—*Doss* vs. *Mohendro Roy*, 18 W. R., 274; and in a suit for possession based on a kobala, the Privy Council refused to make the defendant repay advances, though the real transaction was a mortgage—*Perhlad Sein* vs. *Budhoo Singh*, 12 Moore, 275; and see *Murugaser* vs. *De Loysa*, App. Cas., 1891, p. 69; *Salig Ram* vs. *Har Charan*, I. L. R., 12 Alla., 548. Where A sued for property as devisee under a will, he could not set up a want of title in the testator to devise the estate—*Mylapore* vs. *Yeo Kay*, 14 Ind. App., 168; and where A sued as a mortgagee, asserting that she had advanced the money out of her own moneys, their Lordships declined to hear it urged that the money came from her reputed husband, and that the transaction was by way of gift or provision for her—*Bhowan Doss* vs. *Mahomed Hossein*, 13 Moore, p. 352, and a claim to redeem one mortgage cannot be changed into a claim to redeem another—*Gobindrav* vs. *Ragho*, I. L. R., 8 Bom., 543.

Wrong Parties.—Plaintiffs, stating that R, their husband, had been appointed shebait, but that they were doing the duties, sued for a declaration that certain property, mortgaged by their husband and sold by the mortgagee, belonged to the idol; they did not make their husband a party. *Held*, the plaint could not be so varied as to make him a party—*Biddia Soonduree* vs. *Doorganund*, 22 W. R., 97; and where plaintiff instead of suing a corporate body in its own name, sued it through its agent, the corporation could not be added—*Nubeen Chunder* vs. *Stephenson*, 15 W. R., 534; and so where a plantiff sued the Secretary of State and failed, it was held that his suit should have been dismissed and not amended by introducing another party—*Seth Dhunraj* vs. *Hankin*, 1 Alla., 204. See note on section 27, *ante*, and the cases under "**Amendments Allowed**," *infra*.

Amendments Allowed.—In an action on promissory notes brought under Act V. 1866, defendants got leave to appear and defend, and the suit was dismissed on the ground that part of the consideration for the notes was illegal: the plaint was amended in appeal so as to recover so much of the consideration as was not illegal—*Joseph* vs. *Solano*, 18 W. R., 424; following *Mohummud Zahoor* vs. *Rutta Koer*, 11 Moore, 468, and see *Proby* vs. *Bell*, 20 W. R., 6. A suit for khas possession of a one-third, share was allowed to be changed into one for joint possession—*Raj Kishore* vs. *Huree Mohun*, 19 W. R., 195 (disapproving of *Beejoynath* vs. *Luckhee Monee Debia*, 12 W. R., 248; but see *Nila* vs. *Sonai*, 21 W. R., 422 above); a claim of rent in kind to rent in money—*Bebee Jan* vs. *Bhajul*, 21 W. R., 438; and where A and B sued, and it appeared A alone was entitled, the name of B was ordered to be struck out and the suit proceeded—*Sreeram Hazra* vs. *Gayaram*, 11 W. R., 507; but in another case the whole suit was dismissed —*Sheo Nundun* vs. *Mukiloom*, 20 W. R., 364.

Relief.—Generally if the specified right and infraction of it are not altered, the Court is not wrong in giving a relief less than that claimed—*Pulamaula* vs. *Ravuthu*, I. L. R., 11 Mad., 94; but it cannot give relief of a different kind—*Ramchandra* vs. *Vasudev*, I. L. R., 10 Bom., 451 nor change the suit so that the question involved in it is irrelevant to the relief claimed—*Ram Singh* vs. *Depy. Commr. of Bara Banki*, 17 Ind. App., 54; I. L. R., 17 Cal., 444. And where a reversioner sued to have it declared that certain alienations made by a Hindu widow were not binding and pending appeal the widow died, it was held that he could not be allowed to claim possession—*Govinda* vs. *Perumdevi*, I. L. R., 12 Mad., 136. See "*Specific Performance*," *supra*.

In a suit for confirmation of possession and to set aside deeds, although the confirmation was refused, the deeds were set aside—*Tacoordeen* vs. *Ali Hossein*, 1 Ind. App., 192; and a plaintiff who has been dispossessed after filing a suit for confirmation of possession may add a prayer for possession—*Bishop Mellus* vs. *The Vicar of Malabar* I. L. R., 2 Mad., 295.

Agreement.—In a suit on settlement of account and an agreement to pay if the agreement is denied plaintiff can fall back on the current account—*Lalla Sheoparshad* vs. *Juggunath*, Ind. App., 74; and where in a suit for maintenance an agreement is put in and it is asserted that the suit must be on the agreement and stand or fall by it, otherwise it should not be used in evidence, the objection must be taken in the Court of first appeal—*Ahmed Hossein* vs. *Nihaluddin Khan*, P. C., March 16th 1883.

Confirmation of Possession.—A suit for confirmation of possession has been changed into one for recovery of possession—*Moulvie Abdoolah* vs. *Mujeesooddeen*, 16 W. R., 27; *Amir Hossein* vs. *Imambandi*, 11 C. L. R., 443; *Champu* vs. *Uma*, 11 C. L. R., 451; *Rash Dharee* vs. *Nuthoonee*, 24 W. R., 301; *Kashee Nath* vs. *Mohesh Chunder*, 25 W. R., 168; *Abdul Kadar* vs. *Mahomed*, I. L. R., 15 Mad., 15; not so in *Moulvie Abdoolah* vs. *Mujeesooddeen*, 15 W. R., 286, and *Sansar* vs. *Indrasun*, 25 W. R., 6; *Teristput* vs. *Sudersan*, I. 4 Cal., 46; *Narayan* vs. *Shankunni*, I. L. R., 15 Mad., 255.

Possession, Foreclosure, Redemption.—A suit for possession into a suit, for foreclosure—*Rupchand* vs. *Davlatrav*, I. L. R., 6 Bom., 495; *Kasimunnissa* vs. *Nitratna*, I. L. R., 8 Cal., 79; *Nilkant* vs. *Suresh*, I. L. R., 12 Cal., 414; 12 Ind. App., 171; *Dullabhdas* vs. *Lakshman Dass*, I. L. R., 10 Bom., 88, but see *Murugaser* vs. *DeLoysa*, App. Cas., 1891, p. 69; a suit for possession into one to redeem—*Sankana* vs. *Virupakshapa*, I. L. R., 7 Bom., 146; but see *Dirgopal* vs. *Bolakee*, I. L. R., 5 Cal., 269. As a rule, in a claim for confirmation of possession under a certain title, the title cannot be changed—otherwise when the claim is for possession when he can succeed on proof of adverse possession alone—*Man Gobind* vs. *Umbika*, 16 W. R., 218; *Gossain Dass* vs. *Issur Chunder*, I. L. R., 3 Cal., 224; *Jagrani* vs. *Ganeshi*, I. L. R., 3 Alla., 435, and the plaintiff is bound to prove the title set up affirmatively—*Sheik Torab Ali* vs. *Mahomed Tukee*, 19 W. R., 1; *Goluck Chunder* vs. *Nanto Coomar*, I. L. R., 4 Cal., 699, and his possession—*Tacoordeen* vs. *Ali Hossein*, 1 Ind. App., 192; *Teristput* vs. *Sudersan*, I. L. R., 4 Cal., 46; but 12 years' adverse possession is sufficient for a declaration to hold rent free—*Abhoy Churn* vs. *Kally Pershad*, I. L. R., 5 Cal., 949. See cases under "*Specific Title*," *supra*.

Wrong Parties.—Amendment should be allowed where the defendant is wrongly described—*Maharaja of Vizianagram* vs. *Challagh*, 12 B. L. R., 443; or parties are changed—*Kedarnauth* vs. *Protab Chunder*, I. L. R., 6 Cal., 626; *Delhi and London Bank* vs. *Miller*, 7 B. L. R., App., 65.

Rent-Suit.—A suit under Act VIII (B. C.), 1869, could be changed into an ordinary civil suit—*Gobind Chunder* vs. *Bykuntnath*, 19 W. R., 61.

Special Appeal.—Amendment is a matter within the discretion of the Court, and its refusal is no ground for special appeal—*Watson & Co.* vs. *Nidhoo Digwar*, 10 W. R., 87.

When plaint shall be rejected.

54. The plaint shall be rejected in the following cases:—

(*a*) if the relief sought is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

(*b*) if the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so:

(*c*) if the suit appears from the statement in the plaint to be barred by any positive rule of law:

(*d*) if the plaint, having been returned for amendment within a time fixed by the Court, is not amended within such time.

Act VIII of 1859, sections 31, 32. This section applies to P. S. C. C., and, with exception of clauses (*a*) and (*b*), to H. C.

Does not Apply.—Clauses (*a*) and (*b*) do not apply to the High Courts in the exercise of their Ordinary, Extraordinary, or Appellate Jurisdiction, nor do they affect section 28 of the Court Fees Act—*Balkaran* vs. *Gobind Nath*, I. L. R., 12 Alla., 129, p. 149.

Insufficient Stamp.—*Quære*, if this covers a case where there is no stamp at all on the document—*Bishnath* vs. *Jagarnath*, I. L. R., 13 Alla., 305.

Cannot Reject.—A Judge cannot reject a plaint under this section, after it has been registered—*Hubibul* vs. *Mahomed*, I. L. R., 8 Cal., 192; *Valiya* vs. *Suppannair*, I. L. R., 2 Mad., 308; not so, he can reject at any stage of the suit—*Kishore Singh* vs. *Sabdal Singh*, I. L. R., 12 Alla., 553; and see *Mahadei* vs. *Ram Kishen*, I. L. R., 7 Alla., 528.

Not Rejected.—A plaint should not be rejected because a wrong date is given for the cause of action, provided the action is not barred,—it should be amended—*Sheoraj Singh* vs. *Nur Khan*, 7 Alla., 354; nor for improper valuation without giving plaintiff time to supply the deficiency—*Patuck* vs. *Ramsoomrun*, 1 Alla., 16; nor if presented to the wrong Court,—it should be returned—*Khandu* vs. *Shirji*, 5 Bom., 212; *Prabhakarbhat* vs. *Vishwambhar*, I. L. R., 8 Bom., 313; nor in a suit for a kaboolyat, where the date of the commencement of the kaboolyat is not given it should be returned for amendment—*Golam Mahomed* vs. *Asmut Ali*, B. S. N. (2 B.), 974; nor if strictly accurate language has not been used—*Inglis* vs *Ram Singh*, W. R., F. B., 159; nor because costs in respect of a former suit have not been paid—*Luckeymonee Dossee* vs. *Khetter Coomary Dossee*, 2 Ind. Jur., N. S., 117; nor because the document on which plaintiff sues has not been filed with it—*Rayachand*, 2 Bom., 369.

Rejected.—If it asks for a money decree against a mortgagor, and the mortgaged property only is liable—*Umr Sundari* vs. *Umachurn*, 6 B. L. R., at p. 117; and if a person is added as a nominal defendant against whom no relief is claimed to give a certain Court jurisdiction, the Court should reject the plaint or call on the plaintiff to amend by striking out the name of the defendant, and then return it for presentation in the lowest Court competent to try it—*Shridhar Hari* vs. *Chima*, 10 Bom., 17. So if a plaint is presented by a person not authorised to do so, it should be rejected—*Venkatrav* vs. *Madhavrav*, I. L. R., 11 Bom., 53.

Form of Order.—Rejection, not dismissal, of the suit is the proper order to pass —*Muhammad* vs. *Muhammad*, I. L. R., 11 Alla., 91; *Balavantrao* vs. *Bhimashankar*, I. L. R., 13 Bom., 517; *Shridhar Hari* vs. *Chima*, *supra*, but see *Joynath* vs. *Lall*, I. L. R., 8 Cal., 126; and compare *Gunga Narain* vs. *Tilukram*, 15 Ind. App., 119. In a suit in a Munsif's Court, it was found, after issues were fixed and some evidence recorded, that the claim had been undervalued, and that if properly valued, it would be beyond jurisdiction; it was held that the proper order was to reject the plaint and return it, so that the plaintiff might add the additional stamps required and sue in the proper Court—*Ram Gutty* vs. *Goonomonee*, 11 W. R., 177.

Plaintiff brought a suit on account and valued it properly. The Judge held it was a suit to recover money and valuing it at higher directed plaintiff to make up the stamp. He refused, and the Judge dismissed the suit under clause (*b*). *Held* that the Judge was wrong, that when he found the suit was for money, he should have called on the plaintiff to value his relief, and then if he thought it was undervalued to reject the plaint under clause (*a*)—*Balvantrao* vs. *Bhimashankar*, I. L. R., 13 Bom., 517.

As to the difference between an order under this section, and under sections 5 and 12 of the Court Fees Act, see *Balkaran* vs. *Gobind Nath*, I. L. R., 12 Alla., 129, p. 154; *Muhammad* vs. *Muhammad*, I. L. R., 11 Alla., 91.

Appeal Under-Stamped.—The procedure of this section has been followed in appeals, and where an appeal unduly stamped was filed, it was held that the Judge should not have dismissed the suit at once, but should have allowed the appellant an opportunity of filing the proper stamp—*Nussurut Ali* vs. *Mahomed Kanoo*, 11 W. R., 541; *Parshotam Lal* vs. *Luchman*, I. L. R., 9 Alla., 252; *Chenappa* vs. *Raghunatha*, I. L. R., 15 Mad., 29; 29; *contra*—*Balkaran Rai* vs. *Gobind Nath*, I. L. R., 12 Alla., 129.

Time fixed by the Court.—If a plaint improperly stamped is given back to have a proper stamp affixed, the date of the suit is the date on which it was filed—*Beges* vs. *Yusuf*, 6 Alla., 139, see also *Khem Karan* vs. *Har Dayal*, I. L. R., 4 Alla., 37; *Ram Sahai* vs. *Maniran*, I. L. R., 5 Cal., 810, and in no case can the plaint be rejected without giving the plaintiff an opportunity of affixing the stamps—*Bai* vs. *Mulchand*, I. L. R., 9 Bom., 355 section; but see *Balkaran* vs. *Gobind Nath*, *supra*. See, "**Time fixed by the Court**," section 53, *ante*.

Extension.—The Court can extend the period, even after the time originally fixed has expired—*Bhugwandas* vs. *Haji Aku*, I. L. R., 16 Bom., 263.

Court Fees Act.—By section 12 of the Court Fees Act, every question relating to valuation for the purpose of determining the amount of fee chargeable on a plaint or memorandum of appeal shall be determined by the Court in which the document is filed and the decision is final subject to revision—*Vithal* vs. *Balkrishna*, I. L. R., 10 Bom., 610.

Appeal.—This does not prevent an appeal to determine the class of suits in which a particular suit ranks in Madras—*Annamali* vs. *Chetti*, I. L. R., 4 Mad., 204; *Kanaram* vs. *Komappan*, I. L. R., 14 Mad., 169; Calcutta—*Omrao* vs. *Jones*, 12 C. L. R., 148;

and North-West—*Chunia* vs. *Ram Dyal*, I. L. R., 1 Alla., 360; *Balkaran* vs. *Gobind Nath*, I. L. R., 12 Alla., 129; otherwise in Bombay—*Bai* vs. *Mulchand*, I. L. R., 9 Bom., 355. But see *Kashinath* vs. *Govinda*, I. L. R., 15 Bom., 82; *Balvantrao* vs. *Bhimashankar*, I. L. R., 13 Bom., 517.

Excess and Additional Stamps.—Where excess stamps have been filed in consequence of an over valuation, they should be returned—*In the matter of C. H. Grant*, 14 W. R., 47; and when a plaint is returned in order that it may be presented in the proper Court no additional Court fees are payable—*Prabhakarbhat* vs. *Vishwambhar*, I. L. R., 8 Bom., 313.

Appeal.—An appeal lies from orders passed under this section—*Omrao Mirza* vs. *Mary Jones*, 12 C. L. R., 148; *Muhammad* vs. *Muhammad*, I. L. R., 11 Alla., 91; *Balkaran* vs. *Gobind Nath*, I. L. R., 12 Alla., 129; "Decree," section 2, *ante*.

An error in valuation not affecting jurisdiction is not one on which to base an appeal —*Kaladdin* vs. *Raghogi*, 1 Bom., 63; but where it affects the jurisdiction of the first Court, the Appellate Court may dismiss the suit; and return the plaint—*Joynath* vs. *Lall Bahadour*, I. L. R., 8 Cal., 126; and see note on section 57, *post*, as to returning plaint.

As to the difference between this clause and section 10 of the Court Fees Act, see the case of *Valiya Kesava* vs. *Suppannair*, I. L. R., 2 Mad., 308.

Limitation.—See "WHERE AND WHEN IT AROSE," section 50, *ante*, *Dawkins* vs. *Penrhyn*, 6 C. D., 318; 4 App. Cas., 51.

Procedure on rejecting plaint.

55 When a plaint is rejected, the Judge shall record with his own hand an order to that effect with the reason for such order.

Calcutta High Court Circular Order, July 1859. This section applies to H. C. and P. S. C. C.

An officer of the Court cannot reject a plaint; it must be done by the Court.

When rejection of plaint does not preclude presentation of fresh plaint.

56. The rejection of the plaint on any of grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Act VIII of 1859, section 36. This section applies to H. C. and P. S. C. C.

Kadambinee Dassee vs. *Unnopoorna*, 14 W. R., 289.

Where a plaint is rejected under section 13, Act III. 1876 (Bom.), the rule of *res judicata* applies—*Ramchandra* vs. *Bhikibai*, I. L. R., 6 Bom., 477.

When plaint shall be returned to be presented to proper Court.

57. The plaint shall be returned to be presented to the proper Court in the following cases :—

(*a*) If a suit has been instituted in a Court whose grade is lower or higher than that of the Court competent to try it, where such Court exists, or where no option as to the selection of the Court is allowed by law:

(*b*) If, in a suit relating to immoveable property, but not coming under the proviso to section 16, it appears that no part of such property is situate within the local limits of the jurisdiction of the Court to which the plaint is presented :

(*c*) If, in any other case, it appears that the case of action did not arise, and that none of the defendants are

dwelling or carrying on business, or personally working for gain, within such local limits.

Procedure on returning plaint.

On returning a plaint, the Judge shall, with his own hand, endorse thereon the date of its presentation and return the name of the party presenting it, and a brief statement of the reason for returning it.

Act VIII of 1859, section 50. This section applies to P. S. C. C.

At or before First Hearing.—The words "at or before first hearing" are not in this section—*Nidhi Lal* vs. *Mazhar*, I. L. R., 7 Alla., 230, p. 445.

Appeal.—When a District Judge returned a petition of appeal to have it presented to the High Court, it was held that as the order was not a decree the proper remedy was not by second appeal or revision, but appeal from the order under section 588, cl. (*c*), *post*—*Kunhikutti* vs. *Achotti*, I. L. R., 14 Mad., 462.

Appellate Court.—The order of an Appellate Court returning a plaint is appealable—*Joynath* vs. *Lall Bahadour*, I. L. R., 8 Cal., 126; *Bindeshri* vs. *Nandu*, I. L. R., 3 Alla., 456.

Limitation.—The date of suit must be taken to be that on which the plaint was orginally filed—*Khellat Chunder* vs. *Nusseebunnissa*, 16 W. R., 47.

Revision.—The order of a Munsif returning a plaint, on the ground that the subject-matter of the suit is beyond his jurisdiction, is liable to revision under section 622, *post*—*Badami Kuer* vs. *Dinu Rai*, I. L R., 8 Alla., 112; it is not a decree—*Mahabir Singh* vs. *Behari Lal*, I. L. R., 13 Alla., 320; and a second appeal does not lie — *Krishna Ram* vs. *Narsingh*, I. L. R., 3 Alla., 855.

Reference.—See section 646A, *infra*.

Form of Order—The practice under Act VIII, was not uniform. In *Muzhur Ali* vs. *Mussamut Basoo*, 8 W. R., 47, Macpherson and Seton-Karr, JJ., held:—"The question as to the valuation did not arise upon the face of the plaint. It therefore was not raised at the time of filing the plaint nor until the first hearing which came on in due course upon the return of the summons. Consequently, the provisions of sections 30, 31, 32 of Act VIII of 1859, all of which are sections relating to the first presenting and filing of the plaint, do not apply to the present case at all. And the Munsif, finding at the hearing that he had no jurisdiction on account of the real value of the claim, ought, in strictness, as it seems to us, to have at once dismissed the suit on the ground of jurisdiction. But the Munsif, not in the first instance adopting this course, followed the directions, or rather the spirit of section 31 of Act VIII of 1859, and gave the plaintiff an opportunity of correcting her error. Of this opportunity the plaintiff did not avail herself, and the Munsif then dismissed the suit. Under these circumstances we are at a loss to conceive what other decree the Munsif could have made." In *Saluji Kesraji* v. *Rajsangji Jalmsangji*, 2 Bom., 162, Couch, C. J., considered that section 32, Act VIII of 1859, applied only to a cause "before the defendant is called on to state his defence." But it was often held that the plaint should be returned and the suit not dismissed after evidence in the first Court—*Ram Gutly* vs. *Goonomones Debia*, 11 W. R., 177; *Kartick Nath Panday* vs. *Roy Nundeyut Mahatab*, 23 W. R., 263; either after trial in the first Appellate Court or even in the High Court itself—*Edoo* vs. *Hefazut Hossein*, 13 W. R., 358.

In Bombay, the practice is not settled. On the Appellate Side and in the Mofussil the plaint is returned, if the Court has not jurisdiction, even after the trial has been concluded—*Prabhakarbhat* vs. *Vishwambhar*, I. L. R., 8 Bom., 313, even in second appeal—*Babaji* vs. *Lakshmibai*, I. L. R., 9 Bom., 267; but otherwise on the Original Side—*Bai Amrit* vs. *Huribhai*, I. L. R., 8 Bom., 380. In Madras, the practice is the same as that in the Bombay Mofussil Courts—*Kheruji* vs. *Sa Purshotam*, I. L. R., 7 Mad., 171; *Kandu* vs. *Konda*, I. L. R., 8 Mad., 63; *Chandu* vs. *Kombi*, I. L. R., 9 Mad., 208; *Naghurm* vs. *Subra*, I. L. R., 11 Mad., 197; even if the Court of proper presentation is a Revenue Court—*Muttirulandi* vs. *Kottarjav*, I. L. R., 10 Mad., 211. The decisions in Calcutta are to the same effect—*Prosad Dass Mullick* vs. *Russick Lall*, I. L. R., 7 Cal., 157; *Bhadeshwar* vs. *Gaurikant*, I. L. R., 8 Cal., 834; *Moshingan* vs. *Mozari*, I. L. R., 12 Cal., 271; *Joynath* vs. *Lall Bahadour*, I. L. R., 8 Cal., 126; 10 I. L. R., 146. This seems also to be the practice in the North-West Provinces—*Abdul Samad* vs. *Rajindro*, I. L. R., 2 Alla., 357.

58. The plaintiff shall endorse on the plaint, or annex thereto, a memorandum of the documents (if any) which he has produced along with it; and, if the plaint be admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief or remedy required, in the suit, in which case he shall present such statements.

Procedure on admitting plaint.

Concise statements.

If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

The chief ministerial officer of the Court shall sign such memorandum and copies or statements if, on examination, he finds them to be correct.

The Court shall also cause the particulars mentioned in section 50 to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaint is admitted.

Register of suits.

Act VIII of 1859, section 38; Judicature Acts, Order 2, Rule 1. This section applies to H. C. and P. S. C. C.

A plaintiff should enter in his plaint and concise statement a claim for an injunction and receiver where the obtaining either is a substantial portion of the action—*Coleborne* vs. *Coleborne*, 1 C. D, 690.

FORM OF CONCISE STATEMENTS—See schedule IV, No. 114, *infra*.

FORM OF REGISTER—See schedule IV, No. 116, and section 644, *infra*. As to further entries in it, see sections 245, 426, 562, 581.

59. If a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Production of document on which plaintiff sues.

Delivery of document or copy.

If he rely on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents.

Act VIII of 1859, section 39, clause 1. This section applies to H. C. and P. S. C. C. The Courts were not agreed as to the construction of the corresponding section of Act VIII of 1859. In *Promsook Chunder* vs. *Rajkristo Mitter*, Hyde, 145, Well, J., held, that it prevented a plaintiff from using any document which he did not produce "or enter in the list" at the time the plaint was filed; but in *S. M. Kameenee Dossee* vs. *S. M. Hurromoney Dossee*, Coryton, 151, Phear, J., held that the section only applied to

such documents as are in their nature the essence of the case, and on which the plaint is founded. In the case of *Roshun Jehan* vs. *Inayut Hossein*, Marsh., 127, p. 135, Peacock, C. J., said: "By section 39, Act VII, 159, a plaintiff must file with his plaint *all* documents upon which he relies as evidence in support of his claim; and that no document not presented with the plaint can be received at later stage of the case without the sanction of the Court. The Judge is not accountable for the number of the documents produced by a plaintiff in support of his claim. All documents put on by the parties *must be received;* but under section 129 of the Code the Court is competent to reject such documents and rid the record of their presence." See note on section 63, *post.*

Pottahs.—*Ataoola Mundle* vs. *Saheeooddeen Tarafdar*, W. R., 1864, p. 271, and title deeds sued on are within the section—*Lekhraj* vs. *Mutty*, 14 W. R., 95.

Statement in case of documents not in his possession or power.

60. In the case of any such document not in his possession or power, he shall, if possible, state in whose possession or power it is

This section applies to H. C. and P. S. C. C.

Suits on lost negotiable instruments.

61. In case of any suit founded upon a negotiable instrument, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may make such decree as it would have made if the plaintiff had produced the instrument in Court when the plaint was presented and had at the same time delivered a copy of the instrument to be filed with the plaint.

Act V of 1866, section 14. This section applies to H. C. and P. S. C. C.

A suit will lie on the ground that the indorser refused to give a new cheque for one lost, or to refund the money paid for it. The drawer should be made a party—*Baldeo Prasad* vs. *Grish Chandar*, I. L. R., 2 Alla., 754.

Production of shop-book.

62. If the document on which the plaintiff sues be an entry in a shop-book or other book in his possession or power, the plaintiff shall produce the book at the time of filing the plaint, together with a copy of the entry on which he relies.

Original entry to be marked and returned.

The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original and attesting the copy if found correct, shall return the book to the plaintiff and cause the copy to be filed.

Act VIII of 1859, section 39. This section applies to H. C. and P. S. C. C.

This section does not require the Court to inspect the document, but only that the Judge or officer should mark it for identification—*Atmaram* vs. *Amir Chund*, 3 Bom., 92.

Suit on a lost cheque—*Baldeo Prasad* vs. *Grish Chandar*, I. L. R., 2 Alla., 754.

Inadmissibility of document not produced when plaint filed.

63. A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which

is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

Nothing in this section applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant, or handed to a witness merely to refresh his memory.

Act VIII of 1859, section 39. This section applies to H. C. and P. S. C. C.

Under section 39, Act VIII of 1859, the Court had no power to allow a plaintiff to file his documents at the settlement of the issues or the first hearing and not with his plaint—*Campbell* vs. *Keith*, 1 Hyde, 287.

Shall Not.—The words of the law are imperative—*Ritchie, Stuart & Co.* vs. *Gladstone, Wyllie & Co.*, 1 Ind. Jur., O. S., 125; and prohibit a plaintiff from using any document which he did not produce or enter in the list when the plaint was filed—*Promsook Chunder* vs. *Rajkristo Mitter*, 1 Hyde, 145, unless the Court exercises the discretion given to it under this section—*Lopez* vs. *Driberg*, W. R., 1864, Act X, 67.

Not Produced with Plaint—But the omission to produce a document when instituting a suit is no ground for rejecting the plaint—*Ex-parte Rayachand*, 2 Bom., 369.

Received in Evidence.—Merely giving a document to a witness to refresh his memory is not receiving it in evidence—*Ramji* vs. *Rangayya*, 1 Mad., 168.

To what Documents Applies—Where khusrah papers, which formed the very essence of the action, were not filed or produced with the plaint within the prescribed time, the Court of first instance was held to have been justified in rejecting them when subsequently tendered as evidence—*Amur Chand* vs. *Ram Rutun*, 18 W. R., 515.

In the case at 1 Hyde, 145, referred to above, Wells, J., held that the section covered every document used in evidence, but in the case of *S. M. Kameenee Dossee* vs. *S. M. Hurromoney Dossee*, Cryton, 151, it was decided that the prohibition only extended to promissory notes and bills of exchange which are in their nature the essence of the action, and on which the plaint is founded. In that case, which was to recover certain jewels, the defendant objected to the admission of a list of the jewels on the ground that it should have been filed with the plaint; the objection was overruled. See note under section 59, *ante*.

Leave of the Court.—In section 39, Act VIII, 1859, the words were "Sanction of the Court," and where documents were referred to an Ameen to inspect, and ultimately acted upon by the Court, this was held to be abundant proof of sanction—*Goshain Tota Ram* vs. *Rickmunee*, 13 Moore, 77, p. 83.

It is sufficient for the admission of a document under this section that the plaintiff was in ignorance of its existence when the plaint was filed—*Ritchie, Stuart & Co.* vs. *Gladstone, Wyllie & Co.*, 1 Ind. Jur., O.S., 125; or that Court is satisfied of its *bonâ fide* nature and reliableness—*Attaoollah Mundle* vs. *Sukesooddeen Tarafdar*, W. R., 1864, p. 271; and if there is no doubt of the existence of the documents at the date of suit it should be admitted—*Devidas* vs. *Pirjada*, I. L. R., 8 Bom., 377.

Appeal.—The reception of evidence afterwards with leave of the Court is not a ground of appeal—*Goshain Tota Ram* vs. *Rickmunee*, 3 B. L. R. (P. C.), 346; 13 Moore, 77; it does not affect the merits of the case—*Ram Chunder* vs. *Chunder Coomar*, 13 Moore, 181, p. 198; *Minakshi* vs. *Velu*, I. L. R., 8 Mad., 373, see notes or sections 138—145, *post*; but the refusal to receive it may be a good ground—*Mahadevappa* vs. *Srinivasa*, I. L. R., 4 Mad., 417; *Devidas* vs. *Pirjada*, I.L.R., 8 Bom., 377.

CHAPTER VI.

OF THE ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

Summons.

64. When the plaint has been registered, and the copies or concise statements required by section 58 have been filed, a summons may be

issued to each defendant to appear and answer the claim on a day to be therein specified,—

(*a*) in person, or

(*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(*c*) by a pleader accompanied by some other person able to answer all such questions.

Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court :

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

Act VIII of 1859, section 41. This section applies to H. C. and P. S. C. C.

If the defendant dies before the filing of the plaint, the case cannot proceed—*Mohun Chunder Koondoo* vs. *Azeem Gazee*, 12 W. R , 45.

After a plaint has been filed, the first duty of a Judge is to summon the defendant whether he be a minor or not—*Suresh Chunder* vs. *Jugut Chunder*, I. L. R., 14 Cal., 204.

Summonses.—Summonses to defendants must issue under the signature of the Judge, or such officer as he appoints, and the seal of the Court—1 C. O. (N.-W.), 1871.

FORM OF SUMMONS.—See schedule IV, Nos. 117, 118, 119, *infra*.

To Appear.—This refers to appearance under section 100, *post*—*Hira Dai* vs. *Hira Lal*, I. L. R., 7 Alla., 538.

Fresh Summons.—An application for fresh summons to appear should not be made until the first summons has been returned into Court—*Dowlut* vs. *Omrao*, 14 W.R., 336; *Issur Chunder Sein* vs. *Aushotosh Chatterjee*, 1 Ind. Jur., N. S., 283; and should be supported by a petition shewing that a fruitless endeavour has been made on the part of the plaintiff to serve the first summons, and that it was not by any default of his that he had failed—*Urquhart* vs. *Gilbert*, 1 Ind. Jur., N. S., 224. But see the case of *Hanlon* vs. *East India Branch Railway*, 1 Hyde, 197, where a new summons was granted on an objection raised to the sufficiency of service, without any petition. Where a party had failed for 12 months to serve notice of appeal on the respondent, a second notice was refused —*Doolee* vs. *Nirban*, 20 W. R., 62.

Summons not to Issue.—If the defendant voluntarily appears there seems no reason to issue a summons. Thus an insolvent defendant appeared at the filing of the plaint and confessed judgment at the suit of one his creditors; it was held that the Judge had no other course than to give judgment for the plaintiff; provided he was satisfied of the identity of the defendants, or that the advocate who appeared for them was duly instructed—*Bank of Bengal* vs. *Currie & Co.*, 3 B. L. R., 396, p. 403.

65. Every such summons shall be accompanied with one of the copies or concise statements mentioned in section 58.

Copy or statement annexed to summons.

This section is new. It applies to H. C. and P. S. C. C.

66. If the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

Court may order defendant or plaintiff to appear in person.

If the Court sees reason to require the personal appearance of the plaintiff on the same day, it may make an order for such appearance.

Act VIII of 1859, section 42. This section applies to H. C. and P. S. C. C.

An order passed for the personal attendance of the plaintiff after his appearance by a pleader on the day fixed for the settlement of issues, and after their settlement, was not deemed an order passed under section 42, Act VIII of 1859, or one to which the provisions of section 117, Act VIII, were applicable, although it might have been passed under section 127 or 166 of that Act. Further, looking at the severe penalties attached by the law to the non-attendance of parties ordered to attend, great caution and discretion should be used in ordering their personal attendance—*Juggernath Pershad* vs. *Bundeh Ali*, S. D., N.-W., 1865, p. 371.

As to the result of non-appearance, see section 107, *post*.

67. No party shall be ordered to appear in person unless he resides—

(*a*) within the local limits of the Court's ordinary original jurisdiction, or

(*b*) without such limits and at a place less than fifty or, where there is railway-communication for five-sixths of the distance between the place where he resides and the place where the Court is situate, two hundred miles from the Court-house.

No party to be ordered to appear in person unless resident within 50 or, where there is railway, 200 miles.

Act VIII of 1859, section 42. This section applies to H. C. and P. S. C. C.

The prohibition under this section to summon parties beyond the distance stated in it applies to rent-suits under Act X of 1859. If a plaintiff improperly summoned fails to attend, and his suit is struck off, he should apply for revival, showing cause why he should not have been summoned, and that the Court's order is defective—*Golam Bukshee* vs. *Pulton*, 3 W. R., Act X, 162.

As to the present rent law in Bengal, see Act VIII of 1885, section 148, cl. (*c*), and section 1, *ante*.

68. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Summons to be either to settle issues or for final disposal.

Provided that, in every suit heard by Courts of Small Causes, the summons shall be for the final disposal of the suit.

Act VIII of 1859, section 41. This section applies to H. C. and P. S. C. C.

In Courts, other than Courts of Small Causes, the summons should always state whether the day fixed shall be for the settlement of issues or final disposal—*Alberoodeen* vs. *Mahomed Abusen*, Marsh., 307.

69. The day for the appearance of the defendant shall be fixed by the Court with reference to its current business, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Fixing day for appearance of defendant.

What shall be deemed "sufficient time" must be determined with reference to the circumstances of the case.

Act VIII of 1859, section 45. This section applies to H. C. and P. S. C. C.

The Day Fixed.—The Courts themselves should see that sufficient time is given to a defendant to appear and file his written statement—*Lokhenath* vs. *Sobanath*, 5 W. R., Act X, 39, and if the time allowed is unreasonably short, under the circumstances of the case the Appellate Court can interfere. What will be sufficient time in one case may in another be altogether insufficient. The nature of the rights involved, the importance of the claim, the distance of the parties from the Courts, and often various other circumstances, will be elements essential to the determination of what time is reasonably allowable. Two days have been held insufficient in a claim for six thousand rupees involving questions of Mahomedan law- *Khadar* vs. *Rahiman*, 3 Mad., 167. And when a summons was served on the 17th by affixing a copy, and the hearing of the suit was fixed for the 19th, and defendants were absent in Puna, it was held that the Subordinate Judge was bound, under section 113 of Act VIII, to postpone the hearing of the suit- *Chanbasappa* vs. *Mainaba*, 7 Bom, 138.

Exempted.—A person exempted from attendance on the Civil Court cannot be summoned under this section —*Juggud Inder Bunewaree* vs. *Soorjooroomar Chowdhree*, Marsh., 627.

Summons to order defendant to produce documents required by plaintiff or relied on by defendant.

70. The summons to appear and answer shall order the defendant to produce any document in his possession or power, containing evidence relating to the merits of the plaintiff's case, or upon which the defendant intends to rely in support of his case.

Act VIII of 1859, section 43. This section applies to H. C. and P. S. C. C. See note under section 63.

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

71. When the summons is for the final disposal of the suit, it shall direct the defendant to produce, on the day fixed for his appearance, the witnesses upon whose evidence he intends to rely in support of his case.

This section is new. It applies to H. C. and P. S. C. C.

The defendant can apply for summonses to his witnesses under section 159 any time after the summons against the defendant has been delivered or sent.

Service of Summons.

Delivery or transmission of summons for service.

72. (1) If the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall ordinarily be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of another Court than that in which the suit is instituted, and, where he is such an officer, the summons may, subject to any rules which the High Court may make in this behalf, be sent to him by post or in such other manner as the Court may direct.

This section applies to H. C. and P. S. C. C. It has been substituted by Act VII of 1888, section 10.

In the case of *Sagore Dutt* vs. *Ram Chunder Mitter*, 1 Hyde, 136, Wells, J, held,—The whole spirit and intention of Act VIII, 1859 proceeds upon the assumption that every Court has a jurisdiction within certain limits, separate and distinct from every other Court, and its provisions are applicable only to Courts possessing such a

jurisdiction, and acting on this he decided the High Court, in its Original Civil Jurisdiction, could not serve its own process outside the local limits of its jurisdiction.

Foreign Territory.—A special bailiff of any Court cannot be sent to execute a civil process in a foreign territory—*Casim Azim Duplay* vs. *Casim Mahomed*, 10 W. R., 349; 2 B. L. R., 59.

Proper Officer—The Nazir is the proper officer in Mofussil Courts—*Parsotam* vs. *Abdul*, I. L. R., 13 Bom., 500.

Irregularity.—The employment of a special bailiff to serve a summons outside jurisdiction, instead of serving in the manner described in section 85, *post*, would not vitiate the service—*Mackintosh* vs. *Kally Doss*, 11 B. L. R., 1.

Mode of service.

73. Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Act VIII of 1859, section 48. This section applies to H. C. and P S. C. C.

From the similarity of this section to section 154, Act X, 1872, it would appear that merely showing the summons to the accused, without tendering or delivering a copy, is not good service—*Reg.* vs. *Karsanlal*, 5 Bom., Cr., 20.

Companies—See section 436, *infra*.

Rent-suits, Bengal.—The Court can direct service by registered letter—Act VIII of 1885, section 14, cl. (*d*), and section 1, *ante*.

Service on several defendants.

74. When there are more defendants than one, service of the summons shall be made on each defendant:

Provided that, if the defendants are partners, and the suit relates to a partnership transaction or to an actionable wrong in respect of which relief is claimable from the firm, the service may be made unless the Court directs otherwise either (*a*) on one defendant for himself and for the other defendants, or (*b*) on any person having the management of the business of the partnership at the principal place, within the local limits of the Court's ordinary original civil jurisdiction, of such business.

Act VIII of 1859, section 48. Judicature Acts, Order 9, Rule 6. This section applies to H. C. and P. S C. C.

A partner or manager of the partnership business is an agent for absent partners or principals in suits connected with the partnership, but none else. See the conflicting decisions on this point—*Lurhmeput Dogare* vs. *Sibnarain*, 1 Hyde, 97; and *Ramchandra* vs. *Sneud*, 7 B. L. R., App. 58. See also the note under section 37, *supra*. In order that the service on one partner should be good as against the other partners, service must be made at the place where the partnership carry on business—*Kustoor* vs. *Jookeeram*, 11 B. L. R., App. 26. As to service, see *Leese* vs. *Martin*, L. R., 13 Eq., 77.

Quære.—Whether this section applies not only to a partnership existing at the time the plaint is filed, but also to a partnership dissolved before filing the plaint in respect of cause of action arising during its existence—*Ex-parte Young*, 19 C. D., 124. See also *Davis* vs. *Morris*, 10 Q. B. D., 436. As to the effect of obtaining a decree against R. & Co., see *Munster* vs. *Railton & Co.*, 10 Q. B. D., 475.

Service to be on defendant in person, when practicable, or on his agent.

75. Whenever it may be practicable, the service shall be made on the defendant in person, unless he have an agent empowered to accept the service, in which case service on such agent shall be sufficient.

Act VIII of 1859, section 49. This section applies to H. C. and P. S. C. C.

Agent Empowered.—Gomashtas and ammooktears looking after the affairs of the defendant are not ordinarily empowered—*Ram Soondurее* vs. *Ranee Surut*, 17 W. R., 33. See also the note under section 37, *supra*.

Service on agent by whom defendant carries on business.

76. In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons issues, service on any manager or agent, who at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

For the purpose of this section, the master of a ship is the agent of his owner or charterer.

This section applies to H. C. and P. S. C. C.

To satisfy the conditions of this section as to service of summons on an agent, there must be a person residing without the local jurisdiction, but carrying on such business or work within these limits by a manager or agent, and sued on account of such work, that is, business either actually itself carried on by the agent or manager or forming part of the business in the sense of a connected course of transactions to the management of which he has been duly appointed—*Goculdass* vs. *Ganeshlal*, I L. R., 4 Bom., 416.

Formerly, service on a ship's agent, to whom the ship was consigned, was good service on the owner in respect of matters connected with the ship—*Rajahram* vs. *Brown*, 7 Bom., 97.

In case of an agent refusing to accept service it is not necessary to affix a copy under section 80—*Issen Chunder Chatterjee* vs. *d'Agostino*, 18th of August 1887.

Service on agent in charge, in suits for immoveable property.

77. In a suit to obtain relief respecting, or compensation for wrong to, immoveable property, if the service cannot be made on the defendant in person, and the defendant have no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

Act VIII of 1859, section 61. This section applies to H. C.

In a suit for foreclosure against the mortgagor and two trustees to whom the property had been conveyed, service on the agent of the trustees in charge of the property is sufficient—*Michael* vs. *Amsena*, 13 C. L. R., 161; I. L. R., 9 Cal., 733.

When service may be on male member of defendant's family.

78. If in any suit the defendant cannot be found, and if he have no agent empowered to accept the service of the summons on his behalf, the service may be made on any adult male member of the family of the defendant who is residing with him.

Explanation.—A servant is not a member of the family within the meaning of this section.

Act VII of 1859, section 53. This section applies to H. C. and P. S. C. C.

Person served to sign acknowledgment.

79. When the serving-officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom

the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

Act VIII of 1859, section 54. This section applies to H. C. and P. S. C. C.
Merely shewing a summons is apparently not sufficient -*Quseu* vs. *Karsanlal Danatram*, 5 Bom. Cr. Cas., 20. See also *Maruti* vs. *Vithu*, I. L. R., 16 Bom., 117.

Procedure when defendant refuses to accept service,

80. If the defendant or other person refuses to sign the acknowledgment,

or cannot be found.

or if the serving-officer cannot find the defendant, and there is no agent empowered to accept the service of the summons on his behalf, nor any other person on whom the service can be made,

the serving-officer shall affix a copy of the summons on the outer door of the house in which the defendant ordinarily resides and then return the original to the Court from which it issued, with a return endorsed thereon or annexed thereto stating that he has so affixed the copy and the circumstances under which he did so.

Act VIII of 1859, section 55. This section applies to H. C. and P. S. C. C.
A copy of every summons not acknowledged by the party, or not actually served on him, must be affixed on the outer door of the house in which he ordinarily resides. On return of the summons the Court must proceed under section 82, and decide whether the summons has been duly served or not: and if not, whether a new summons shall issue or substituted service be directed—*Gopaul* vs. *Greedharee*, 6 W. R., 13; *Nusur Mahomed* vs. *Kazbai*, I. L. R., 10 Bom., 202; *Maruti* vs. *Vithu*, I. L. R., 16 Bom., 117; but a second summons cannot issue till the first one is returned to Court—*Issur Chunder Sein* vs. *Aushotosh Chatterjee*, 1 Ind. Jur., N. S., 283; *Dowlut* vs. *Omrao* 14 W. R., 336; and see section 140, clause (*b*), *infra*.

Cannot find the Defendant: Service.—If the serving officer finds the defendant is from home, but knows where he is, it is not good service if he affixes the summons to the outer door—*Dolee* vs. *Nirban*, 20 W. R., 62; and it must be shown that proper efforts have been made to serve him personally—*Cohen* vs. *Nursing*, I L. R., 19 Cal., 201, and that he is keeping out of the way—*Rama Rai* vs. *Sridur*, 4 C. L. R., 397; and see note under section 83, *post*.

Ordinarily Resides.—The defendant should reside in the house in such a manner as to make it probable that knowledge of the summons will reach him—*Anantha* vs. *Periyana*, 5 Mad., 101. It is not sufficient to affix a copy of the summons to the door of the defendant's place of business—*Chasbasappa* vs. *Mainaba*, 7 Bom., 138; nor on his house if he has left it and the village two years before—*Anantha* vs. *Periyana*, 5 Mad., 101.

Return.—The return should be made in the words of the section, "the house in which he ordinarily resides." In Act VIII, 1859, the words were "the house in which the defendant is dwelling," and it was held that a return, that a copy of the summons had been affixed to the "bati" or "house," was not sufficient, since the defendant might, for anything to the contrary before the Court, have any number of "houses"—*Buddoo Badoo* vs. *Ramlodar Mullick*, 1 Hyde, 132: but in *Ramcoomar* vs. *Ramsoondur Singh*, 17 W. R., 362, the word "bati" was held to mean a dwelling-house.

Railway Company.—A Railway Company was, for the purposes of summons, held under Act VIII, to reside at its principal office—*Hanlon* vs. *The India Branch Railway*, 1 Hyde, 197, but now see section 17, *Explanation* 2, *supra*.

Endorsement of time and manner of service.

81. The serving-officer shall, in all cases in which the summons has been served under section 79 endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating

the time when and the manner in which the summons was served.

Act VIII of 1859, section 56. The section applies to H. C. and M. S. C. C.

The return of the Nazir is not sufficient proof of service—*Okhoy Chunder Dutt* vs. *Erskin & Co.*, 3 W. R., Mis., 11; *Raj Kishore* vs. *Bydonath*, 12 W. R., 365; *Mugh Lall* vs. *Shib Pershad*, I. L. R., 7 Cal., 35, and compare *Mahomed Abdul Kadir* vs. *Amtal Karem*, I. L. R., 16 Cal., 161 p. 171.

Examination of serving-officer.

82. When a summons is returned under section 80, the Court shall, if the return under that section has not been verified by the affidavit of the serving-officer, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Substituted service.

Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding the service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided, or in such other manner as the Court thinks fit.

Act VIII of 1859, section 57. This section applies to H. C. and P. S. C. C.

The words in the first paragraph from "where" to "may make" have been substituted by Act III of 1888, section 11.

The procedure laid down in this section and section 80 has been applied to the service of an appeal notice on the respondent, where the appellant was unable to find the respondent at the place which he described as his place of residence when he brought the suit—*Bedhoo* vs. *Bonomalee*, 11 W. R., 496.

Declare the Summons Duly Served—Where a return has been made that the affixing required by section 80 has been made, service is insufficient until confirmed under this section—*Nusur Mahomed* vs. *Kazbai*, I. L. R., 10 Bom., 203.

Court is Satisfied.—No order for substituted service should issue until the Court should record that it is satisfied, and the grounds on which it is satisfied, that the defendant is keeping out of the way in order to avoid service—*Rama Rai* vs. *Sridhur Sahai*, 4 C. L R., 397, following P. C., 16 W. R., 356 see note under section 83, *post*. Merely recording that the defendant cannot be found, instead of that the Court is satisfied he was keeping out of the way for the purpose of avoiding service, would not be sufficient —*Shewdyal Singh*, vs. *Griban Singh*, 6 W. R., Cr., 73, 79.

Evidence.—As a rule the return by a competent Court that the summons has been duly served or substituted service effected raises a presumption in favour of service—*Nusur Mahomed* vs. *Kazbai*, I. L. R., 10 Bom., 202.

Any other reason the Summons cannot be Served in the Ordinary Way.—In the case of *ex-parte Warburg*, 24 C. D., 364, the Court of Appeal granted substituted service, although there was no express provision for them in the rules of Court, on evidence that it was impossible to serve the debtor personally, and the same procedure was adopted by their Lordships of the Privy Council under simular circumstances —*Clark* vs. *Mullick* 2 Moore, 263, p. 268.

Last Resided.—The Articles of an Association often provide that service on a member at his registered address shall be good service. This convention cannot override

the law and make service of legal proceedings at that address good unless it is also his last residence—*Ex-parte Chatteris*, L. R., 10 Ch. App., 229.

Effect of substituted service.

83. The service substituted by order of the Court shall be as effectual as if it has been made on the defendant personally.

This section is new. Applies to H. C. and P. S. C. C.

Substituted service is as good as if the defendant had been served in person. Substituted service having been effected on a defendant, he applied to set aside the decree on the ground of having no notice, and that he had a good defence on the merits; it was held that it could not be set aside—*Kessur Chand* vs. *Bhoobunessur Chunder*, Bourke, 27.

The object of such service is to enable plaintiffs to have relief more promptly, not to relieve them of any difficulty in pleading. Plaintiff, treating a Colonial Government as a corporation, sued it as "The Government of New Zealand," and attempted to proceed upon substituted service on the solicitor for the colony, although the latter stated he had no authority to appear. *Held*, that substituted service only applied to cases in which there could be (if there were no difficulties in the way) personal service, and was never intended to be allowed where personal service could not be effected, because the plaintiff did not know how to describe the parties he sought to sue—*Stoman* vs. *Government of New Zealand*, I. C. P. D., 563.

Endorsement.—An endorsement is required only where personal service has been made, or the summons returned under section 80; no endorsement is necessary apparently, in cases of substituted service—*Dymond* vs. *Croft*, 3 C. D., 512.

When service substituted, time for appearance to be fixed.

84. Whenever service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Act VII of 1859, section 58. This section applies to H. C., and P. S. C. C.

A sufficient time ought to be given for notice of the substituted service to reach the defendant wherever he may be—*Mirza Ally* vs. *Syed Hyder*, I. L. R., 2 Bom., 449.

Service of summons when defendant resides within jurisdiction of another Court, and has no agent to accept service.

85. If the defendant resides within the jurisdiction of any Court other than the Court in which the suit is instituted, and has no agent resident within the local limits of the jurisdiction of the latter Court empowered to accept the service of the summons, such Court shall send the summons, either by one of its officers or by post, to any Court, not being a High Court, having jurisdiction at the place where the defendant resides, by which it can be conveniently re-served, and shall fix such time for the appearance of the defendant as the case may require.

The Court to which the summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court, and shall then return the summons to the Court from which it originally issued, together with the record (if any) made under this paragraph.

Act VIII of 1859, section 59. This section applies to H. C. and P. S. C. C.

See note on section 72, *ante*.

The transmitting Court should not act as a revising Court in regard to service, and where the Court serving the process summons returns that *service has been duly effected*, it may be presumed that either personal service has been made or substituted service

under sections 80 and 82, or section 80, *ante*. This presumption may be rebutted by the return. Thus where the return was as follows :—"Read bailiff's endorsement on the back of the process, stating that the summons has been affixed to the defendant's house on the 22nd of December 1884 at 9 A.M., and proof of the same having been duly taken by me, it is ordered that the summons be returned." *Held* insufficient, inasmuch as the Judge had not stated service was *duly effected* or that the affixing under section 80, had been sanctioned under section 82, *ante*.—*Nusur Mahomed* vs. *Kazbai*, I. L. R., 10 Bom., 202.

Service within presidency towns and Rangoon of process issued by Provincial Courts.

86. Whenever any process issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such town, it shall be sent to the Court of Small Causes within whose jurisdiction the process is to be served,

and such Court of Small Causes shall deal with such process in the same manner as if the process had been issued by itself,

and shall then return the process to the Court from which it issued.

This section applies to H. C. and P. S. C. C.

Service on defendant in jail.

87. If the defendant be in jail, the summons shall be delivered to the officer in charge of the jail in which the defendant is confined, and such officer shall cause the summons to be served upon the defendant.

The summons shall be returned to the Court from which it issued, with a statement of the service endorsed thereon and signed by the officer in charge of the jail and by the defendant.

Act XV of 1860, section 15. This section applies to H. C. and P. S. C. C.

Wilson, J., held, that the endorsement under this section is evidence of the service of summons it ranks higher than a Nazir's return. See *Bland* vs. *Bland*, L. R., 3 P. & D., 233.

In India, a life-convict is not civilly dead—*Sheonarain Singh* vs. *Sheobuggun Koor*, S. D., N.-W., 1853, p. 759.

Procedure if jail be in different district.

88. If the jail in which the defendant is confined is not in the district in which the suit is instituted, the summons may be sent by post or otherwise to the officer in charge of such jail, and such officer shall cause the summons to be served upon the defendant, and shall return the summons to the Court from which it issued, with a statement of the service endorsed thereon, and signed as provided in section 87.

This section applies to H. C. and P. S. C. C.

Service when defendant resides out of British India and has no agent to accept service.

89. If the defendant resides out of British India, and has no agent in British India empowered to accept the service, the summons shall be addressed to the defendant at the place where he is residing, and forwarded to him by post if there be postal communication between such place and the place where the Court is situate.

Act VIII of 1859, section 60. This section applies to H. C. and P. S. C. C.

It was held under Act VIII, 1859, that a summons could not be sent by post to any place for which letters are not registered by a Post Office; but the decision there turned on the interpretation to be put on section 66, Act VIII of 1859, which has been excluded from this Code, and the words in the text, "if there be postal communication between such place and the place where Court is situate," have been added. See *Cassim Azim* vs. *Cassim Mahomed*, 2 B. L. R., 59; 10 W. R., 349. But see section 95, *infra*.

In practice the summons is forwarded under a registered cover, and if the party does not appear, a verified statement should be put in to show that he is or has recently been residing in the place to which the summons was sent—*Sonatum Bukshee* vs. *Gopal Chunder Shamunto*, 15 W. R., 31. A person refusing a registered letter sent by post cannot plead ignorance of its contents—*Loolf Ali Meah* vs. *Pearee Mohun Roy*, 16 W. R., 223.

Summonses and processes for service in the Terai should be forwarded direct to the Subah of the Terai and not to Katmandhu—9 C. L. (N.-W)., 1871.

Service in foreign territory through British Resident or Court.

90. If there is a British Resident or Agent, or a Superintendent appointed by the British Government, or a Court established or continued by the authority of the Governor-General in Council, in or for the territory in which the defendant resides; the summons may be sent to such Resident, Agent, Superintendent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Resident, Agent or Superintendent or the Judge of the Court returns the summons with an endorsement under his hand that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be evidence of the service.

This section applies to H. C. and P. S. C. C. It has been substituted by Act VII of 1888, section 12 for section 90, Act XIV of 1882.

"Shall be Evidence."—Under the repealed section the endorsement was "conclusive evidence" of the service.

Substitution of letter for summons.

91. The Court may, notwithstanding anything hereinbefore contained, substitute for the summons a letter signed by the Judge or such officer as he appoints in this behalf when the defendant is, in the opinion of the Court, of a rank which entitles him to such mark of consideration.

The letter shall contain all the particulars required to be stated in the summons, and, subject to the provisions

contained in section 92, shall be treated in all respects as a summons.

Act VIII of 1859, section 64. This section applies to H. C. and P. S. C. C.

Mode of sending such letter.

92. When a letter is so substituted for a summons, it may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; unless the defendant has an agent empowered to accept service of summons, in which case the letter may be delivered or sent to such agent.

Act VIII of 1859, section 65. This section applies to H. C. and P. S. C. C.
A special messenger cannot be sent to serve a civil process in a foreign territory—*Kasim Azim Duplay* vs. *Kasim Mahomed Baracha*, 2 B. L. R., 59; 10 W. R., 349.

Service of Process.

Process to be served at expense of party issuing.

93. Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Costs of service.

The Court-fee leviable for such service shall be levied within a time to be fixed by the Court before the process is issued.

Act XXIII of 1864, section 2. This section applies to H. C. and M. S. C. C.
The words "within a period to be fixed by the Court issuing this process" have been omitted and replaced by "within a time" to issue. Under Act XXIII of 1861, the Courts should, on receipt and registration of a plaint or memorandum of appeal, and when fixing the date for the hearing of the case, also fix the period within which the costs of the service of the summons or notice on defendant or respondent should be paid. A reasonable period should be fixed, and, if necessary, the Courts should inflict the penalty prescribed by section 5 on failure to deposit the cost—10 Civ. L. (N.-W.), 1868. Where no period was fixed, and the processes were not served for four months, and the Court dismissed the suit because the plaintiff produced no evidence in support of his claim, the case was remanded—*Lala Parsadi* vs. *Lala Ambika*, 3 B. L. R., App. 25; 11 W. R., 290; and see *Mohun Mundur* vs. *Brij Bhookun*, 9 W. R., 128.

Notices and orders in writing how served.

94. All notices and orders required by this Code to be given to or served on any person shall be in writing, and shall be served in the manner hereinbefore provided for the service of summons.

This section applies to H. C. and P. S. C. C.
As to service on a person out of British India. See *Ghamshamlal* vs. *Bhansali*, I. L. R., 5 Bom., 249.

Postage.

Postage.

95. Postage, where chargeable on any notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed by the Court before the communication is forwarded:

Provided that the Local Government, with the previous sanction of the Governor-General in Council, may remit such postage, or fee, or both, or may prescribe a scale of Court-fees to be levied in lieu thereof.

This section applies to H. C. and P. S. C. C.

CHAPTER VII.

OF THE APPEARANCE OF THE PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

Parties to appear on day fixed in summons for defendant to appear and answer.

96. On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard, unless the hearing be adjourned to a future day fixed by the Court.

Day Fixed.—This refers to the day fixed for the first hearing of the suit—*Zainulabdin* vs. *Ahmad Raza*, I. L. R., 2 Alla., 67; 5 Ind. App., 233.

Act VIII of 1859, section 109. This section applies to H. C. and P. S. C. C.

In Person or by their respective Pleaders—Plaintiffs must be represented by the same pleader or set of pleaders, and cannot be generally represented by different pleaders—*Jankibai* vs. *Atmaram*, 8 Bom., 241. See note under section 179, *post*; and see note on "Ex-parte," under section 100, *post*.

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay fee for issuing.

97. If, on the days so fixed for the defendant to appear and answer, it be found that the summons has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, the Court may order that the suit be dismissed:

Proviso.

Provided that no such order shall be passed, although the summons has not been served upon the defendant, if, on the day fixed for him to appear and answer, he attends in person or by agent, when he is allowed to appear by agent.

Act XXIII of 1861, section 5. This section applies to H. C. and P. S. C. C.

This section applies to proceedings in execution of decree—*Bissesur* vs. *Murli*, I. L. R., 9 Cal., 163; 11 C. L. R., 409.

The proper course for a Judge to adopt, when the original defendant, or a person added as a co-defendant, has not been served with summons and does not appear, is to dismiss the suit under this section, leaving the plaintiff if he has omitted to pay the costs through accident, &c., to apply to the Court for a fresh summons, or file a new suit (section 99)—*Shek Abas* vs. *Ibrahimji*, 5 Bom., 118; but in no case should the case be disposed of before the date fixed for hearing—*Golab Dai* vs. *Jiwan Ram*, I. L. R., 2 Alla., 318.

In the High Court if defendant enters appearance before the time fixed in the summons, the Court has power to order a case to be set down in the General Cause List, and the Registrar should do so or ask the Judge in Chambers whether he should do so or not—*Cumming* vs. *Green*, 4 B. L. R., App. 75.

An appeal admitted on the 8th of March was set down for hearing on the 9th of April. It was not taken up that day, and on the 19th appellant applied to pay the costs of serving the respondent, but his application was refused. The Court dismissed the case, remarking on the defence raised (that the mistake had occurred through the fault of an ignorant karpardaz), that the party should have employed a vakil, and that such a mistake should not be allowed to pass, unless it was clear that it had been committed in good faith—*Pran Chunder* vs. *Juggessur*, 11 W. R., 417.

Arrest.—If a defendant is arrested, he has a right to appear, though not summoned—*Syed Ali* vs. *Adib*, I. L. R., 15 Bom., 160.

Appeal.—The order is not appealable—*Lucky Churn* vs. *Budurunnissa*, I. L. R., 9 Cal., 627; 12 C. L. R., 484.

If neither party appears, suit to be dismissed.

98. If on the day fixed for the defendant to appear and answer, or on any other subsequent day to which the hearing of the suit is adjourned, neither party appears, the suit shall be dismissed, unless the Judge, for reasons to be recorded under his hand, otherwise directs.

Act VIII of 1859, section 110. This section applies to H. C. and P. S. C. C,

This section only refers to cases in which both parties are absent on the date fixed for the hearing. It does not apply where a party is present, but has omitted to serve a notice as required by the Court—*Haradhun* vs. *Protap Narain*, 14 W. R., 401; *Alwar* vs. *Seshammal*, I. L. R., 10 Mad., 270. It applies to miscellaneous proceedings —*Rajpal* vs. *Chooramun*, 4 Alla., 10, and proceedings in execution—*Gaur Mohun* vs. *Tarachand*, 3 B. L. R. App., 17. As to remanded cases, see 14 W. R., 81; 14 W. R., 401.

In the case of *Camalammal* vs. *Rungaswamy*, 4 Mad., 56, the High Court said, with reference to section 110, Act VIII of 1859—"It might appear at first sight that section 147 is unnecessary, because section 110 itself provides for the case of non-appearance of the parties on the day fixed for defendant to appear and answer, or on any other day subsequent thereto to which the hearing of the suit may be adjourned; but it appears to us that this section and sections 111 to 114 have reference only to the first hearing of the suit, which may be either on the day named in the summons, or on a subsequent day to which the first hearing may have been adjourned." And in the case of *Zainalbadin* vs. *Ahmad Raza*, I. L. R., 2 Alla., 67, their Lordships of the Privy Council inclined to that opinion.

This section applies to an order passed under section 549, *post*—*Lakhmichand* vs. *Gatto Bay*, I. L. R., 7 Alla., 542.

Form of Order.—The order should be an order of dismissal. Ordering the case to be struck off the file is improper—*Alwar* vs. *Seshammal*, I. L. R., 10 Mad., 270.

Appeal.—There is no appeal from an order under this section—*Alwar* vs. *Seshammal*, I. L. R., 10 Mad., 270; but compare the case of *Alwar* vs. *Seshammal*, I. L. R., 13 Mad., 290.

In such case plaintiff may bring fresh suit,

or Court may restore the suit to its file.

99. Whenever a suit is dismissed under section 97 or section 98, the plaintiff may (subject to the law of limitation) bring a fresh suit; or if, within the period of thirty days from the date of the order dismissing the suit, he satisfies the Court that there was a sufficient excuse for his not paying the Court-fee required within the time allowed for the service of the summons, or for his non-appearance, as the case may be, the Court shall pass an order to set aside the dismissal and appoint a day for proceeding with the suit.

Act VIII of 1859, section 110; Act XXIII of 1861, section 7. This section applies to H. C. and P. S. C. C.

This section applies to miscellaneous proceedings in execution—*Rajpal* vs. *Chooramun*, 4 Alla., 10; *Gaur Mohun* vs. *Tarachand*, 3 B. L. R., App. 17; see also section 647, *infra*.

In order to satisfy the Court "that the plaintiff was prevented by any sufficient cause from appearing," it is enough that he should shew that there has been a *bonâ fide* mistake which is not unreasonable—*Hardatrai* vs. *Bullion Association*, 3 Bom., 60.

If a suit is dismissed before the day fixed for hearing on failure to deposit *tolabana*, this irregularity on the part of the Judge does not deprive the plaintiff of his right to bring a new suit under this section—*Gulab Dai* vs. *Jiwan Ram*, I. L. R., 2 Alla., 318.

Appeal.—No appeal lies from an order to restore—*Alwar* vs. *Seshammal*, I. L. R., 10 Mad., 270; *id.*, 290.

Dismissal of suit where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons.

99A. If, after a summons has, whether before or after the first day of June 1882, been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from such return to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may dismiss the suit as against such defendant.

In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

The issue of a second summons ought not to be ordered after the lapse of the limitation period for such a suit from the previous summons, unless the plaintiff has in the meantime done what he could to prosecute his suit with proper diligence—*Ramkissen* vs. *Lukheynarain*, I. L. R., 3 Cal., 312. See *Gerender* vs. *Juggadumba*, I. L. R., 5 Cal., 126; and compare *Smalpage* vs. *Tonge*, 17 Q. B. D., 644.

From such Return—Time runs from the date of the return by the Nazir—*Parsotam* vs. *Abdul*, I. L. R., 13 Bom., 500.

Dismiss the Suit.—This does not discharge the defendant, and plaintiff may bring a new suit—*Sheik Ali* vs. *Mahomed*, I. L. R., 14 Bom., 267.

Procedure if only plaintiff appears.

100. If the plaintiff appears and the defendant does not appear, the procedure shall be as follows:—

When summons duly served.

(*a*) if it is proved that the summons was duly served, the Court may proceed *ex-parte*.

when summons not duly served:

(*b*) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant:—

when summons served, but not in due time.

(*c*) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed

by the Court, and shall direct notice of such day to be given to the defendant.

If it is owing to the plaintiff's default that the summons was not served in sufficient time, the Court shall order him to pay the cost occasioned by such postponement.

Act VIII of 1859, sections 111, 112, 113. This section applies to H. C. and P. S. C. C.

First Hearing.—Quære, is this section limited, to the day fixed for first hearing? See *Doyal Mistree* vs. *Kupoor Chund*, I. L. R., 4 Cal., 318; *Hira Dai* vs. *Hira*, I. L. R., 7 Alla., 548; and compare *Sheo Churn* vs. *Heera Lall*, 11 C. L. R., 537.

When the plaintiff appears and the defendant does not appear, this section must be followed whether the defendant has been summoned only to appear and answer the claim or has in addition been summoned to attend and give evidence—*Taruck Nath* vs. *Jeamat*, I. L. R., 5 Cal., 353.

The cause should not be tried *ex-parte* unless service of summons has been satisfactorily proved—23 W. R., Civ. Cir., 4; *Suresh Chunder* vs. *Jugut*, I. L. R., 14 Cal., 204; but it is not necessary that all the processes for procuring the attendance of the defendant as a witness should be exhausted. Proof of service of summons is sufficient, and if this was given, the Judge should follow one or other of the courses laid down in clauses (*b*) and (*c*)—*Taruck Nath* vs. *Jeamat*, I. L. R., 5 Cal., 353; but unless there is a decision or some evidence of service of summons on the record, a decree, *ex-parte*, has no legal effect—*Ram Lochun* vs. *Nittya Kalee*, 12 W. R., 211. The mere absence of the defendant does not justify the presumption that the suit is true; the Court is bound to see that at least a *primâ facie* case is made out—*Amrit Nath* vs. *Roy Dhunput*, 15 W. R., 503.

Ex-parte.—Where a party failed to appear in person in obedience to a personal summons but appeared by pleader—*Krishna Ram* vs. *Gobind Prasad*, I. L. R, 8 Alla., 20; or appeared by pleader duly appointed, but the pleader was not instructed to to answer or instructed not to answer at all—*Bhimacharya* vs. *Fukirappa*, 4 Bom., 206, (not followed in Bengal—*Dhan Bhagut* vs *Ramessur*, 20 W. R., 53,) or by counsel who moved for an adjournment, and on being refused did not appear for want of instructions, such party has not appeared under this section—*The Administrator-General of Bengal* vs. *Lala*, 6 B. L R., 688; followed in *Doyal Mistree* vs. *Kupoor*, I. L. R., 4 Cal., 319; but see *Sheo Churn* vs *Heera Lal*, 11 C. L. R., 537; and *Ramchandra* v. *Madhav*, I. L. R., 16 Bom., 23. And merely filing a vakalutnama, and when the case comes on not appearing in person or by pleader, is not an appearance—*Bibee Haloo* vs. *Atwaro*, 7 W. R., 81; *Sheo Churn* vs. *Heera Lal*, 11 C. L. R., 537; nor is putting in a written statement under similar circumstances—*Purus Ram* vs. *Juyuntee Pershad*, 1 Alla., 154, and see the argument in *Zainulabdin* vs. *Ahmed*, 5 Ind. App., p. 235, I. L. R., 2 Alla., p. 69. So where defendant had filed a vakalutnama, and objected to attachment issuing before judgment, but did not appear as directed by the summons, nor on a further date when the case was decided, the decision was held to be *ex-parte*—*Hira Dai* vs. *Hira Lall*, 1 L. R., 7 Alla., 538. Nor will the appearance in Court on an adjourned date of a vakil who previously filed a vakalutnama, be sufficient if he has no further instructions—*Ramtahal* vs *Ram*, I. L. R., 8 Alla., 140. And where one of several defendants duly served did not appear until nearly a month after the date fixed for first hearing, and then applied by vakil to be heard in answer (under the last part of section 3 of Act VIII of 1859) and his application was rejected and judgment given against him: *Held*, the conduct of the defendant did not amount to an appearance, and that the suit was decided *ex-parte*—*Mahomed Hossein* vs. *Muntozul Huq*, 18 W. R., 400; but see *Raghapa*, vs. *Parapa*, I. L. R., 1 Bom., 217.

See note under section 118, *post*.

Not Ex-parte—The case is not *ex-parte* if the defendant has appeared in person or by pleader, though he may have neither filed a written statement—*Goluckbur* vs. *Bishonath*, Marsh., 32; nor made a verbal one—*Jankee Ram* vs. *Chundrabully*, 7 W. R., 295. Where a person was added as co-defendant, and appeared though protesting that he had not time to prepare his defence—*Koomara Opendra* vs. *Nobin Krishna*, 17 W. R., 370 *note*, it was held that the decision was not *ex-parte*. A decree was obtained on a solenamah. One of the defendants appeared and said she had no notice of the suit, that the solenamah was a forgery, and asked for an enquiry and relief: *Held* the decree was not an *ex-parte* decree—*Hemmo Moyee* vs. *Watson and Co.*, 14 W. R., 299. See "DOES NOT APPLY," section 103, *post*.

Clause. (*b*)—The first summons should be returned before a second should issue. A Judge has, under Rule 12 of the Calcutta High Court, dated May 1875, a discretion as to granting a second summons, and is bound to enquire into the circumstances under which it is applied for, and where there has been great and unexplained delay, he should refuse it—*Gourchurn* vs. *Peary Lall*, 15 B. L. R., App. 12. And see section 99A, *ante*.

Clause. (*c.*)—If the summons has not been served in sufficient time to enable the defendant to appear, the Court is bound to postpone the hearing to a future date, and on this principle it has been held, in a case in which the defendant was served at 10 o'clock in the morning to appear at 12 o'clock on the same day, and did appear, that he should have been granted an adjournment—*Awlad* vs. *Abdool Kureem*, 18 W. R., 141. A defendant did not appear; it was alleged that he was insane, and the Judge struck off the case. It was held that the Judge was wrong, and ought to have made the inquiry contemplated in Act XXXV of 1858—*Moorut Koomwar* vs. *Dhurm Narain*, 2 W. R., Mis., 7.

Remedies.—The defendant can apply under section 108, *infra*, within the period of limitation, if the circumstances are such as will bring the case within it or for a review under the general law—*Mewa Lall* vs. *Bhujhun*, 22 W. R., 213; *Bishen Perkash* vs. *Ruttun Geer*, 20 W. R., 3 and the technical word "review" will not prevent the Courts from looking on the order as one passed under this section, if the circumstances clearly point that way—*Khoob Lall* vs. *Shaik Kadir*, 15 W. R., 431; or he may appeal from the *ex-parte* decree. See "APPEAL," under section 102, *post*; and see section 540, *post*, as amended by Act VII of 1888.

The Dekkhan Ryots Act (XVII of 1879).—This section is affected by Act XVII of 1879—*Dulichand* vs. *Dhondi*, I. L. R., 5 Bom., 184.

Procedure where defendant appears on day of adjourned hearing, and assigns good cause for previous non-appearance.

101. If the Court has adjourned the hearing of the suit *ex-parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit, as if he had appeared on the day fixed for his appearance.

Act VIII of 1859, section 111. This section applies to H. C. and P. S. C. C.

Defendant did not attend for nearly a month after the date fixed for first hearing, and then he applied through his pleader to be heard in answer. He failed to show any good or sufficient cause for his previous non-appearance, and judgment was given against him: *Held*, that (1) the judgment was *ex-parte*, that (2) the only remedy was re-hearing by the original Court, and that (3) no appeal lay from the order—*Mohammed Hossein* vs. *Muntozul Huq*, 18 W. R., 400; but see *Raghapa* vs. *Parapa*, I. L. R., 1 Bom., 217. Under the Code no appeal lies from an order under this section (section 588).

Procedure where defendant only appears.

102. If the defendant appears and the plaintiff does not appear, the Court shall dismiss the suit, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Act VIII of 1859, section 114. This section applies to H. C. and P. S. C. C.

Application of Section.—This section applied to execution-proceedings—*Gaur Mohan* vs. *Tarachand*, 3 B. L. R. App., 17; *Nigappa* vs. *Gungawa*, I. L. R., 10 Bom., 433; but see the change lately made in 647, *post*. Where judgment-debtors appearing raised objections to the execution of a decree, and the Court, after investigation, passed judgment in the absence of the decree-holder, it was held that, if aggrieved, he might apply for a re-hearing under section 119, Act VIII of 1859 (section 103, *infra*)—*Kalee Kristo Thakoor* vs. *Mahomed Kader*, 12 W. R., 428. See "*Suit*," section 103, *infra*.

Local Investigation.—Where a commission has issued for a local inquiry, and the Commissioner requires the attendance of the parties, should the defendant appear and the plaintiff make default in appearing on the day appointed, the proper course is for the Commissioner to dismiss the suit under this section—*Eshanchunder* vs. *Soorjo Lall*, Marsh., 139.

Where plaintiff failed to pay in Commissioner's fees—no time being granted—and the suit was dismissed, the order was not considered as passed under this section—*Shaik Saheb* vs. *Mahomed*, I. L. R., 13 Mad., 510.

Non-attendance of Witnesses—A suit cannot be dismissed under this section for non-attendance of witnesses—*Mahomed Azeemoollah* vs. *Ali Buksh*, 5 Alla., 74. And if a suit is dismissed for want of evidence, the decision is a decision on the merits, and not under this section—*Kartick Chandra* vs. *Sridhar*, I. L. R., 12 Cal., 563.

Judgment—The suit should be either dismissed or decreed; "struck off" is not a proper mode of disposing of the case, and has no legal effect. Thus, where defendant pleaded that a previous suit on the same cause of action had been dismissed under this section, and the final order was "number kharij," it was held that no judgment had been passed, and the plea of *res judicata* must fail—*Khoob Lall* vs. *Toolsee*, 17 W. R., 219; but where an Appellate Court "struck off" a case instead of using the correct expression, the Court held that, practically as regards procedure, the case had been decided *ex-parte*—*Bejoy Gobind* vs. *Radha Benode*, 10 W. R., 348, and see *Ganesh Rai* vs. *Kalka*, I L. R., 5 Alla., 595; *Kudrat* v. *Dinu*, I. L. R., 9 Alla., 55; *Alwar* vs. *Seshammal*, I. L. R., 10 Mad., 270.

Res Judicata.—The dismissal of a suit under this section does not amount to a *res judicata*—*Chand Kour* vs. *Partab Singh*, 15 Ind. App., 156; I. L. R., 16 Cal., 98; *Shankar* vs. *Dya*, 15 Ind. App., 66; *Shaik Saheb* vs. *Mahomed*, I. L. R., 13 Mad., 510.

Appeal—A plaintiff cannot only appeal but take advantage of the procedure allowed under section 103—*Ashruffunnissa* vs. *Lshureaux*, I. L. R., 8 Cal., 272; *Luckmidas* vs. *Ebrahim*, I L. R., 2 Bom., 644; *Karuppan* vs. *Ayyathorai*, I. L. R., 9 Mad., 445, ; *Ablakh* vs. *Bhagirathi*, I. L R., 9 Alla., 427; and see section 540, *post*, as amended by Act VII of 1888.

Where a suit was improperly decided under section 114, Act VIII, 1859 (this section), and was remanded on appeal that it might be decided under section 148, it was held that fresh evidence could not be taken, but that the case should have been decided on the record—*Padma Lochan* vs. *Sirdar Khan*, 3 B. L. R., App. 91.

Decree against plaintiff by default bars fresh suit.

103. When a suit is wholly or partially dismissed under section 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside; and, if it be proved that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall set aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

No order shall be made under this section unless the plaintiff has served the defendant with notice in writing of his application.

Act VIII of 1859, section 119. This section applies to H. C. and P. S. C. C.

Same Cause of Action.—The cause of action has no relation to the defence set up, nor does it depend on the relief prayed for by the plaintiff. It refers to the grounds set forth in the plaint as the cause of action, or in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour—*Chand Kour* vs. *Partab Singh*, 15 Ind. App., 156; I. L. R., 16 Cal., 98, and when the plaintiff prayed that he might on payment of a mortgage be put in possession as under proprietor, and subsequently sued to be put in as superior proprietor, it was held that the cause of action were the same as the claim to be put in as proprietor or sub-proprietor only referred to the manner in which the mortgage should be redeemed—*Shankar* vs. *Dya*, 15 Ind. App., 66; I. L. R., 15 Cal., 422.

A suit brought to recover rent and dismissed for default, does not bar a suit for possession—*Gobind Chunder* vs. *Afzul*, 12 C. L. R., 29. A sued as purchaser of the equity of redemption, to redeem the mortgagee in possession. His suit was dismissed under section 102, *ante*. Subsequently A sued mortgagor and mortgagee for possession of the land on the ground that the mortgagor had agreed to sell the equity of redemption and

to redeem the mortgagee, and the latter had afterwards purchased the mortgagor's interest with notice: *Held*, they were different causes of action—*Ramchandra* vs. *Khatal*, I. L. R., 10 Bom., 28.

Application of Section—This section applies to miscellaneous proceedings—*Seetul Pershad* vs. *Mahomed*, 5 Alla., 164; *Kalee Kristo* vs. *Mahomed Kader*, 12 W. R., 428, to rent cases under Act VIII of 1869 (B. C.)—*Oodwunt Mahtoon* vs. *Bidhee Chund*, 18 W. R., 207; to proceedings under section 9 of the Specific Relief Act—*Anthony* vs. *Duponi*, I. L. R., 4 Mad., 217; *Sheo Prasad* vs. *Kasturu*, I. L. R., 10 Alla., 119; and in execution of decree—*Ningappa* vs. *Gangawa*, I. L. R., 10 Bom., 433, but only to original cases—*Ram Lall Chowdhry* vs. *Giridharee Jha*, W. R., 1864, Mis., 21; and not to cases in appeal—*Anonymous Case*, 1 Ind. Jur., O. S., 68; *Omda Bibee* vs. *Acowrie Singh*, 7 W. R., 425, followed in *Kali Kishore* vs. *Dhununjoy*, I. L. R., 3 Cal., 228, see the special procedure on hearing appeals laid down in Chapter XLI, section 555, *et seq.*

In the case of *Eshanchunder* vs. *Soorjo Lall*, Marsh., 139, the suit was dismissed for plaintiff's default in appearing before a Commissioner sent to make a local investigation. It was urged in appeal that section 114, Act VIII of 1859 (corresponding to section 102) did not apply, as the parties were present in the Judge's Court by means of their vakils; the Court (Peacock, C. J., Bayley, J., and Kemp, J.) overruled the objection, and decided that that section applied. By section 157, *infra*, the present procedure applies to any day to which the hearing of the suit may be adjourned, but not to the case of a person obtaining time to do some act and making default. That falls under section 158—*Sriraja* vs. *Anumukonda*, I. L. R., 7 Mad., 41. See "*Suit*," *infra*.

Does not Apply.—This section does not apply to suits dismissed for any other reason than non-appearance and includes acts dealt with under section 157, *post*, but not those disposed of under section 158, *post*. When the first hearing of the case took place on the 16th of November, and the final hearing was fixed for the 22nd of January, and on the 23rd plaintiff's vakil stated that since his witnesses had not appeared, he could not go on with the case, and it was dismissed: *Held*, the dismissal was not under section 119, Act VIII of 1859, but section 148 (correspoding to section 158, *infra*)—*Comalammal* vs. *Rungasawamy*, 4 Mad., 56; *Furzana* vs. *Ali Buksh*, 5 Alla., 74; *Kashi Parshad* vs. *Debi Das*, 7 Alla., 77, and generally if time is given to do an act and it is not performed, section 158 applies, otherwise 157. See notes under sections 157 and 178, *post*. And where a case was dismissed in "default of prosecution" on the ground that the plaintiff fail to deposit talabana, the order was not considered to be an order passed under this section—*Ram Sundar* vs. *Ram Bandhan*, 7 Alla., 126; and see *Shaik Saheb* vs. *Mahomed*, I. L. R., 13 Mad., 510. So also where it was dismissed, because neither plaintiff nor his pleader appeared on the day fixed for hearing the arguments, it was held this section did not apply—*Rai Chand* vs. *Mathura Prasad*, I. L. R., 3 Alla., 292.

Review.—In such cases no review can be granted under this section, but only under the ordinary law for review of judgment—*Ram Sundar* vs. *Ram Bandhan*, 7 Alla., 126.

Sufficient Cause.—As to sufficient cause, see *Manelil* vs. *Ghulam*, I. L. R., 13 Bom., 12.

Appeal—An appeal lies from an order refusing to set aside the dismissal of a suit which is itself open to appeal (section 588), but no appeal lies against an order directing a suit to be re-admitted—*Hirdhamun Sha* vs. *Jinghoor Sha*, I. L. R., 5 Cal., 711; an appeal will also lie against the decree—*Ashruffunnissa* vs. *Lehareaux*, I. L. R., 8 Cal., 272; *Ablakh* vs. *Bhagirakhi*, I. L. R., 9 Alla., 427.

Suit.—It has, however, been held that although this section applies to execution-proceedings, still section 588, cl. 8, is confined to suits and does not give an appeal when an application under section 311 *post*, is rejected—*Ningappa* vs. *Gangawa*, I. L. R., 10 Bom., 433; *Raja* vs. *Srinivasa*, I. L. R., 11 Mad., 319. But see the meaning of suit in *Bhoopendro*, vs. *Baroda* I. L. R., 18 Cal., 500; *Re Wallis*, 23 L. R., Ir., 7. See the cases cited under "APPEAL," section 102.

Procedure where defendant residing out of British India does not appear.

104. If, on the day fixed for the hearing of a suit against a defendant residing out of British India, who has no agent empowered to accept service of summons, or on any day to which the hearing has been adjourned, the defendant does not appear, the plaintiff may apply to the Court for permission to proceed with his suit, and the Court may direct that the plaintiff be at liberty to proceed with his

suit in such manner and subject to such conditions as the Court thinks fit.

Act VIII of 1859, section 50. This section applies to H. C. and P. S. C. C.

Procedure in case of non-attendance of one or more of several plaintiffs.

105. If there be more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, and pass such order as it thinks fit.

Act VIII of 1859, section 116. This section applies to H. C. and P. S. C. C.

Procedure in case of non-attendance of one or more of several defendants.

106. If there be more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of passing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Act VIII of 1859, section 116. This section applies to H. C. and P. S. C. C.

Where all the defendants did not appear, and, the case proceeding an ordinary decree was given against them on a ground common to them all, it was held that the decree was not an *ex-parte* decree against the absent defendants—*Doorga Churn* vs. *Shamanund*, 12 W. R., 376.

Consequence of non-attendance, without sufficient cause shewn of party ordered to appear in person.

107. If a plaintiff or defendant, who has been ordered to appear in person under the provisions of section 66 or section 436, does not appear in person, or shew sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing sections applicable to plaintiffs and defendants, respectively, who do not appear.

Act VIII of 1859, section 117. This section applies to H. C. and P. S. C. C.

A person failing to appear in person in obedience to a personal summons may have the case decided *ex-parte* against him, notwithstanding his pleader be present—*Baboo Mones Laul* vs. *Baboo Gopal Singh*, S. D., N.-W., 1863, p. 37; *Kistodhone Dutt* vs. *Rajah Nilmoney Singh*, Coryton, 3.

Appeal.—Where a suit was dismissed for default by plaintiff under this section, no appeal lay from the decree in the North-West, and the only remedy was by way of appeal under section 588 (8) from the order refusing to set the dismissal aside—*Krishna Ram* vs. *Gobind*, I. L. R., 8 Alla., 20. But now see section 540, *infra*, as amended by Act VII of 1888.

Of setting aside Decrees ex-parte.

Setting aside decree *ex-parte* against a defendant.

108. In any case in which a decree is passed *ex-parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside;

and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause

from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

Act VIII of 1859, section 119. This section applies to H. C. and P. S. C. C.

Appeal —When an application made under this section is rejected, an appeal lies against the order of rejection—Section 588 (9) *post*; but not a second appeal—*Aubinash Chunder* vs. *Martin*, I. L. R., 8 Cal., 832. No appeal lies from an order setting aside the decree—*Shama* vs. *Hurbuns*, I. L. R., 16 Cal., 426.

Review.—An *ex-parte* decree is liable to review—*Bibi Mutto* vs. *Ilahi Begum*, I. L. R., 6 Alla., 65; *Harihur* vs. *Buddu*, 13 C. L. R., 254. See "REMEDIES," section 100, *ante*, and "APPEAL," section 101, *ante*.

For defendant's remedy where the suit has been decided *ex parte* under section 157, *post*, see *Ramtahal* v. *Rameshar*, I. L. R., 8 Alla., 140.

Appellate Court.—Quære, if this section applies to the case of a respondent failing to appear in the Court of Appeal—*Kali Kishore* vs. *Dhununjoy*, I. L. R., 3 Cal., 228.

Probate.—As to revoking a grant in common form, see *Nistariny* vs. *Brahomoyi*, I. L. R., 18 Cal., 45.

No decree to be set aside without notice to opposite party.

109. No decree shall be set aside on any such application as aforesaid, unless notice thereof in writing has been served on the opposite party.

This section applies to H. C. and P. S. C. C.

Ex-parte.—See note under section 100.

Execution.—This section applies to excution proceedings—*Gour Mohun* vs. *Tarachand*, 3 B. L R., App. 17; *Ram Kristo* vs. *Tara Dass*, 12 C. L. R., 449.

Change from Act X of 1877.—In section 108, Act X of 1877 the words were "in any case in which a decree is passed *ex-parte* against a defendant under section 100," and it was not clear whether that section applied to cases where the decree was passed on a day to which the case has been adjourned, or whether its effect was confined to the first hearing. The corresponding section of Act VIII of 1859 was held to refer only to the first hearing in *Comalammal* vs. *Rungasawmy*, 4 Mad., 56; but the point did not arise in the case. A decision to the same effect was passed in the case of *Gorachand* vs. *Raghu*, 3 B. L. R., App. 121. And see *Zeinulabdin* vs. *Ahmed Raza*, 5 Ind. App., 233; *Sheo Churn* vs. *Heera*, 11 C. L. R., 537. On the other hand, it was decided in *Kalee Churn* vs. *Modhoo*, 6 W. R., 86, that the corresponding section of Act VIII of 1859 applied to all cases decided *ex-parte* on certain grounds; but at the same time the defendant was not debarred from appealing by the express words of that section (now omitted in Act X, 1877) if the default by non-appearance had taken place at an adjourned hearing—*Kalee Churn* vs. *Modhoo*, 6 W. R., 86; and in *Denoo Paroye* vs. *Chinta Monee*, 18 W. R., 457, it was held that, where a defendant was prevented from appearing on the last day through the fraud of his adversary, the decision was an *ex parte* decision within this section, although he had been present at the first hearing. The omission of the words "under section 100" in the present Act removes all doubt as to the proper interpretation of these sections.

But this section will not apply where the case has been dismissed, not for default by non-appearance, but for something else. Thus, on the day fixed for hearing, defendant's pleader obtained an adjournment to procure certain documents and put in written statements. He failed to do either, and on the day fixed the case was decreed in favour of the plaintiff. It was held that the decree was, under section 148, Act VIII of 1859 section 158, *infra*), and not under section 119, Act VIII of 1859 (this and the previous section)—*Rungasawmy* vs. *Strangan*, 4 Mad., 254; and see *Anantharama* vs. *Madhava*, I. L. R., 3 Mad., 264. See cases under sections 157 and 158, *post*.

Court —The Court remains the same though the presiding officers may be different, and a Judge can revive a suit tried by his predecessor—*Rughoo Mohinee* vs. *Kasee Nath Roy*, 10 W. R., 156.

Sufficient Cause.—A *bonâ fide* mistake which is not unreasonable is sufficient to have the case restored; such as supposing a month to mean a calendar month—*Haradatrai* vs. *Victoria Finance Association*, 3 Bom., 60. Where it was the duty of an attorney's

clerk to examine every evening the board for next day and inform his master, and, the former neglecting his duty, no one appeared, and the case was disposed of in default, it was restored on payment of the costs of the hearing—*The Oriental Corporation* vs. *The Mercantile Corporation*, 2 Bom., 267; and where defendant was not represented at the trial, because his solicitor was ignorant of the fact that the suit had been transferred to another Judge, the *ex-parte* judgment was set aside on payment of the costs of the day—*Burgoine* vs. *Taylor*, 9 C. D., 1.

It is sufficient for an infant to show that his guardian was negligent—*Kesho Pershad* vs. *Hirday Narain*, 6 C. L. R., 69; but the fact that the counsel or pleader may have been engaged elsewhere is not sufficient—*Raj Narain* vs. *Akroor Chunder*, 24 W. R., 141. Where the absence was due to an understanding which had been come to between the parties for an adjournment on account of the illness of an absent witness, the suit was restored on an affidavit to that effect—*Damodur Dass* vs. *Choonee Bebee*, 2 Hyde, 216; so where the absent party has had no intimation when the case would come on *ex-parte*—*Manishankar*, 2 Bom., 381; and so if the defendant proves that he has not been served with summons at all—*Anund Moyee* vs. *Anund Soondur*, 13 W.R., 237, or not in sufficient time to appear—*Awlad* vs. *Abdool*, 18 W. R., 141, or has been improperly served—*Chanbasappa* vs. *Mainaba*, 7 Bom., A. C., 138, it is sufficient; and where it was shown that there was only one summons, and that the serving-officer had merely posted it on the door of one of the defendants, without attempting to serve him personally, it was held that all the defendants were entitled to have the suit restored—*Shiboo Roy* vs. *Kashee*, 25 W. R., 394; otherwise as regards the one defendant if he had been properly served—*Ewing* vs. *Gosaidas*, 3 B. L. R., App., 7.

A suit was remanded for trial by an order dated the 28th December. It was dismissed for default on the 8th of January: *Held*, that the date was such as precluded the party most interested from appearing, and that an application made soon after by petitioner as representative of a former party, to have his name substituted and the case revived should have been acceded to—*Haradhun* vs. *Protap Narain*, 14 W. R., 401.

Proof of.—Sufficient cause is proved either by the oath of the petitioner, or by petition supported by an affidavit—*Damodur Doss* vs. *Choonee Bebee*, 2 Hyde, 226; *Haradatrai* vs. *Victoria Finance Association*, 3 Bom., 60; *Anund Moyee* vs. *Anund Soondur*, 13 W. R., 237; and if the requirements of the section are carried out, the application cannot be refused on other grounds, such as that the ancestors of the applicants were parties to the original proceedings out of which the case arose—*Doorgaranee* vs. *Jadub Chunder*, 5 W. R., Mis., 11.

The onus of proof lies on the applicant—*Torab Ali* vs. *Chooramun*, 24 W. R., 262; but if he makes out a *primâ facie* case, the other party must rebut it—*Jhutoo Kooer* vs. *Lulita*, 22 W. R., 423.

Divorce.—As to how a decree *nisi* granted *ex-parte* may be attacked, see *Stephen* vs. *Stephen*, I. L. R., 17 Cal., 570.

Limitation.—Under Art. 164, Sched. II of the Limitation Act, the application should be made within 30 days from the date of executing any process for enforcing judgment. This thirty days begins to run from the first actual and complete execution of any process—*Gholam Ahyah* vs. *Sham Soondur*, 7 W. R., 375; *Bhaobunessury* vs. *Judobendra*, I. L. R., 9 Cal., 869; *Sunraj* vs. *Ambika*, I. L. R., 6 Alla., 144. Whether against the person or property of the defendant—*Shib Chunder* vs. *Luckhee Debia*, 6 W. R., Mis., 51; and process against the person of the debtor is not necessary—*Baba Bruhm Purgash* vs. *Dumree Lall*, 1 Alla., 133. Thus attachment, irrespective of the sale under it is sufficient—*Bhaobunessury* vs. *Judobendra*, I. L. R., 9 Cal., 869; *Radha Binode* vs. *Digamburee Dassee*, B. L. R., (F.B.) 947; nor is notice of the process on the debtor necessary—*Shumboo Chunder* vs. *Ram Lall*, 13 W. R., 436; for if the process has been duly executed the law presumes that the judgment-debtor must know of it—*Boro Khosiah* vs. *Jata Sirdar*, 15 W. R., 315. But mere notice of execution is not a process, and is insufficient—*Poorno Chunder* vs. *Prosonno Coomar*, I. L. R., 2 Cal., 123; and see *Sunraj* vs. *Ambika*, I. L. R., 6 Alla., 144.

Before a Judge can enter into an enquiry whether notice has or has not been served on the applicant in first instance, when the suit was commenced, he must first determine if the application for re-hearing has been made in proper time—*In the matter of Pearee Mohun Dutt*, 11 W. R., 310.

Not Debtor's Property.—The limit is within 30 days from the process for enforcing judgment, and this means process against the person or property of the judgment-debtor; and if the process is not personal, time does not begin to run until his property has been affected. So a judgment-debtor is not debarred from coming in more than 30 days after attachment, provided he shows the property attached is not his—*Shib Chunder* vs. *Luckhee Debia*, 6 W. R., Mis., 51; *Sookh Moyee* vs. *Normooda*, 15 W. R., 210; but nothing less than this amount of proof will suffice. Where defendant petitioned that he had been obliged to leave his village and settle in a place 24 miles distant, and that he was not in possession of the lands against which the process issued, the petition was rejected—*Kalee Prosad* vs. *Digambur*, 25 W. R., 72.

Revision.—Under section 119, Act VIII of 1859, an order setting aside a judgment was final, and under the present procedure no appeal is allowed. This was held to mean an order passed within jurisdiction, under the conditions specified by law; if it were otherwise, as if it were passed on an application made after 30 days, the Court exercised a jurisdiction it did not possess, and, though no appeal would lie, the order could be set aside on motion under the Charter—*Luckhee Moneee* vs. *Bhoobun Mohun*, 23 W. R., 147; or on application in the nature of a review to the Judge who passed the order—*Sheo Prosunno* vs. *Buldharee*, 13 W. R., 232.

How Contested.—And though a proper order is so far final that it is not open to appeal, its propriety may be contested in appeal from the final decree. Thus, where an application for re-hearing was admitted after 30 days, all proceedings subsequent to the order of admission were set aside in appeal from the final decree—*Rung Lall* vs. *Tokhun*, 25 W. R., 304; *Bimola* vs. *Kalee Kishen*, 22 W. R., 5; but in another case the Judges seemed to look upon such an order as not affecting jurisdiction, but as a mere irregularity, such as the admission of evidence in appeal without recording the reason, and to hold that the Courts are bound to decide on the whole evidence in the cause - *Boro Khosiah* vs. *Jata Sirdar*, 15 W. R., 315; 8 B. L. R., 78. And therefore it was held that. if the objection is not raised in the first Appellate Court, it is too late to raise it in second appeal. (*Id.*)

Where one of several defendants got the case re-opened, and another who did not appear in time was allowed the benefit of the dismissal which ensued, it was held that the Appellate Court was wrong in setting aside the judgment of the Lower Court, as regards the latter defendant, on the ground that he had not appeared in time—*Koroona Moyee* vs. *Nubo Kishen*, 11 W. R., 18.

Effect of Revival.—An application by one co-defendant re-opens the case against all the defendants where the objection is a ground common to all; otherwise not—*Dookhee* vs. *Rajessuree*, 15 W. R., 371; and the Court has no power to impose terms—*The Administrator-General of Bengal* vs. *Lala*, 6 B. L. R., 688. In a suit for rent against A, B and C, which was decided *ex-parte*, C applied under Act X of 1859 for a review, and proved that he had no connection with the property; the decree remained in force against A and B—*Doorga Persaud* vs. *Greeshchunder*, 1 W. R., 222. And so, where B and C were held liable as principal and surety, and the latter applying for a re-hearing, the case was set down and ultimately dismissed on default by non-attendance of both parties, the decree continued against B, but not against C—*Gudadhur Chatterjee* vs. *Nund Lall*, 12 W. R., 406.

When an *ex-parte* decree is set aside by admitting a re-hearing all processes issued in execution under the decree are also set aside. Thus, A obtained, a decree *ex-parte* against B, and attached his property. Afterwards B sold it to C, and then applied for and obtained an order for re-hearing under this section; it was held that the sale was not void, for that the effect of the revival was to set aside the attachment as having been invalidly made—*Lala Jagat* vs. *Tulsiram*, 1 B. L. R., 71, and see *Joobraj* vs. *Buhooria*, 7 C. L. R., 424. But in a case in which A obtained an *ex-parte* decree against R and others, and in execution sold R's interest in certain landed property and bought by A, and R succeeded in reviving the suit, it was held that the sale could not be set aside as void—*Gowree Boyjo Nath* vs. *Jodha*, 19 W. R., 416, which would seem to show that the decree and attachment were not invalid, but the distinction between purchase by a stranger and purchase by the decree-holder was not adverted to—*Zainalabdin* vs. *Ashgar Ali*, 15 Ind. App., 12.

Defendant applied under section 119, Act VIII of 1859, and his application was rejected. He appealed, the suit was remanded, and the first Court admitted the application. Plaintiff then appealed, the order was reversed, and both parties went back to the Munsiff, who recorded that his original order should stand. In the meantime the second order of the Appellate Court was set aside in special appeal. It was held, the effect of this decision was to set aside all the proceedings subsequent to the order appealed against, and to confirm the order of the first Court admitting the defendant to contest the suit—*Nubo Kristo* vs. *Nudiar Chand*, 12 W. R., 374.

Practice after Revival.—When a case is restored, the Court should allow the plaintiff to recall his witnesses or to call other witnesses, and to permit the defendant to cross-examine them; the evidence taken in the absence of the defendant cannot be used against him—*Ram [illegible]h* vs. *Kishoree Mohun*, 12 W. R., 130; though it is doubtful if all the expenses of obtaining and serving fresh summonses on the witnesses should be thrown on the plaintiff—*Bishen Perkash* vs. *Ruttun Geer*, 20 W. R., 3.

Affidavits not Allowed.—In an appeal from an order of rejection under section 119, Act VIII of 1859, the appellant then tendered an affidavit, explaining conduct in the Lower Court, as evidence under section 355, Act VIII of 1859, but it was rejected —*Leslie* vs. *Allender*, 17 W. R., 390.

CHAPTER VIII.

OF WRITTEN STATEMENTS AND SET-OFF.

Written statements.

110. The parties may, at any time before or at the first hearing of the suit, tender written statements of their respective cases, and the Court shall receive such statements and place them on the record.

Act VIII of 1859, section 120. This section applies to H. C.

Parties.—A third party will not be allowed to file a statement for a plaintiff or defendant who has neglected to do so himself—*Sreemutty Denomoyee Dassee* vs. *Tara Churn Coonloo*, Bourke, 153; on the other hand, if the parties are present in person or by pleader, the mere fact that defendant has not filed a written statement does not warrant trying the suit *ex-parte*—*Sivarajadhani* vs. *Kuppagantulu*, 2 Mad., 311.

First Hearing.—Written statements filed at or before first hearing need not be stamped—*Nagu* vs. *Yeknath*, I. L. R., 5 Bom., 400; *Cherag Ali* vs. *Kadir*, 12 C. L. R., 367. They should not be received after the first hearing (which should be fixed so as to give the parties due and reasonable time to prepare them)—*Lokhenath* vs. *Sobanath*, 5 W. R., Act X, 39; *Munchershaw* vs. *The New Dhurumsey Co.*, I. L. R., 4 Bom., 576, except under the circumstances described in sections 111 and 112, and in answer to written statements required by the Court.

Under the old procedure the words were "at the first hearing of the suit," and it was held that the admission of written statements on several dates was wrong—*Mirza Ali* vs. *Mirza Toraß*, W. R., 1864, p. 44.

In a suit for wrongful dismissal if a defendant wishes to give evidence of a specific transaction in justification for dismissing the plaintiff, which he becomes aware of after he has filed his written statement, he should (before first hearing) file a supplementary written statement setting it forth—*Munchershaw* vs. *The New Dhurumsey Co.*, I. L. R., 4 Bom., 576.

Appellate Court.—A Court of Appeal cannot call for a written statement—*Juggessur* vs. *Gopee Kishen*, 5 W. R., 50.

Particulars of set-off to be given in written statement.

111. If in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, and if in such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set-off.

Inquiry.

The Court shall thereupon inquire into the same, and if it finds that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set-off does not exceed the pecuniary limits of its jurisdiction, the Court shall set-off the one debt against the other.

Effect of set-off.

Such set-off shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but it shall not

affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Illustrations.

(*a*) A bequeaths Rs. 2,000 to B, and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D. Then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of Rs. 1,000.

(*b*) A dies intestate and in debt to B. C takes out administration to A's effects, and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters—one as the vendor to B, in which he sues B, and the other as representative to A. [See 17 Beav., 542.]

(*c*) A sues B on a bill-of-exchange. B alleges that A has wrongfully neglected to insure B's goods, and is liable to him in compensation, which he claims to set-off. The amount not being ascertained cannot be set-off.

(*d*) A sues B on a bill of-exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set-off.

(*e*) A sues B for compensation on account of a trespass. B holds a promissory note for Rs. 1,000 from A, and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for as soon as A recovers, both sums are definite pecuniary demands.

(*f*) A and B sue C for Rs. 1,000. C cannot set-off a debt due to him by A alone.

(*g*) A sues B and C for Rs. 1,000. B cannot set-off a debt due to him alone by A.

(*h*) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

Act VIII of 1859, section 121. This section applies to H. C. and P. S. C. C.

Set-off, at Law.—Set-off, at law, is founded on Statute, and to prevent cross-actions. It was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which were already enforceable in an action; and it has always been accordingly held, that a set-off can only be successfully pleaded when an action could have been maintained for the same debt—*Rawley* vs. *Rawley*, 1 Q. B. D., 469; and see *Winterfield* v. *Bradnum*, 3 Q. B. D., 324, p. 326.

Time of Pleading—Where defendant did not raise an issue in regard to set-off in the first Court, their Lordships of the Privy Council declined to entertain it—*Nan Karay* vs. *Ko Htaw*, L. R., 13 Ind. App., 48, p. 56; I. L. R., 13 Cal., 124.,

Written Statement: Presumption of Authenticity.—*Primâ facie* credit must be given that a pleading proceeds from a person properly qualified to represent the person on whose behalf it is filed—*Soorendronath Roy* vs. *Heeroomonee*, 10 W. R. (P.C.), 35; and the mention of a person in pleadings purporting to be filed by him is evidence that he was a party to the suit—*Radha Parshad* vs. *Lal Sahab*, 17 Ind. App., 150; I.L.R., 13 Alla., 53.

Equitable Set-off.- The Madras High Court, in referring to the corresponding sections of Act VIII, 1859, said.—"These are provisions of a Code regulating procedure only, and whilst we think that the language used has not the effect of enlarging the right of set-off, we ought at the same time to say that, according to our present opinion, the Procedure Code was not intended to take away any right of set-off, whether legal or equitable, which parties would have independently of its provisions. It seems to us that the right of set-off will be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit"—*Clark* vs. *Ruthnavaloo*, 2 Mad., 296 (followed in *Bhagbat* vs. *Bamdeb*, I. L. R., 11 Cal., 557, and *Chtsholm* vs. *Gopal Chunder*, I. L. R., 16 Cal., 711; *Kishorchand* vs. *Madhowji*, I. L. R., 4 Bom., 407; *Pragi Lal* vs. *Maxwell*, I. L. R., 7 Alla., 284); it is not opposed to the *intention* of the parties—*Kistnasamy* vs. *Municipal Commissioners for Madras*, 4 Mad., 120. And when A sued on a contract to recover the price of wood supplied, a set-off of damages for breach was allowed, on the ground that the contract contained a clause indemnifying the defendants against loss arising from failure to fulfil—*Pragi Lal* vs. *Maxwell*, I. L. R., 7 Alla., 284; and see I. L. R., 4 Bom., 407. And so it has been held that where the right of set-off arises out of one and the same transaction, it would not be equitable to drive a party to a regular suit where the claim could be dealt with in execution of a decree—*Radha Ram* vs. *James*, 20 W. R., 410. See also, on equitable set-off—*Middleton* vs. *Pollock*, L. R., 20 Eq., 515; *Vulliamy* vs. *Noble*, 3 Mer., 593; *Ex-parte Stephens*, 11 Ves., 24; *Ex-parte Blaquire*, 19 Ves., 464; *Ex-parte Toogood*, 11 Ves., 516; *Aldis* vs. *Knight*, 2 Mer., 121; *Lord Lanesborough* vs. *Jones*, 1 P. Wms., 326; *Ex-parte Flint*, 1 Sim., 33;

and as to mutual credit, see *Young* vs *Bank of Bengal*, 1 Moore, 87; *Ex-parte Morier*, 12 C. D., 491; *In re Whitehouse*, 9 C. D., 597; *Peat* vs. *Jones*, 8 Q. B. D., 147; *Narrandas* vs. *Vissandas*, I. L. R., 6 Bom., 134; *Hajee Syud* vs. *Ashrufoonnissa*, I. L. R., 5 Cal., 759; *Miller* vs. *Beer*, 6 L. R., 294; *Lakshmayya* v. *Jagannatham*, I. L. R., 10 Mad., 199; *Sitayya* v *Rangareddi*, I. L. R., 10 Mad , 259. A sued B for compensation for wrongful dismissal, B denied wrongful dismissal, and claimed to set-off a sum of Rs. 36,000 as due from A to B in balance of account of certain transactions entered into by A and B in co-partnership while A was in B's service. A disputed the accuracy of the account. The Court found in favour of A's claim, ordered an account to be taken of the co-partnership transaction between A and B, and directed that the sum which on the taking of the account might be found due from A to B should be set-off against the amount decreed to A—*Bradley* vs. *Smallwood*, High Court, Calcutta, May 1, 1884. See also *The Secretary of State* vs. *Madari Lal*, I. L. R., 13 Alla., 296.

In a suit for account by a mortgagor against a mortgagee in possession under a *Zurpeshgi lease*, the rents unpaid by the mortgagee, though barred by limitation were set-off against the mortgage debt—*Nurshingh Narain* vs. *Lukputty*, I. L. R., 5 Cal., 333. And as to set-off of arrears of rent against improvements on redemption even if the right of the person making them has been pledged, see *Achuta* vs. *Kali*, I. L. R., 7 Mad., 545.

Not Payment—A claim to set-off a cross demand should not be confounded with a plea of payment. A sued B for arrears of rent. B stated that his tenure had been managed for some time by the Collector, who, in addition to other demands, had realised the rent. It was held a plea of payment and not of set-off—*Koonjo Behary* vs. *Nilmoney*, 4 C. L. R., 296.

For Money.—Under Act VIII, 1859, the suit must have been for a debt—*Rotee Rumun* vs. *Greeja*, 5 W. R., 160; it is not so under the present law—See *Illustration* (*e*), though the result of the claim and set-off must be a pecuniary liability—See the *Eberle's Company* vs. *Jonas*, 18 Q. B. D., 459; *Miller* vs. *The National Bank*, I. L. R., 19 Cal., 146. *Quære*, if a suit for an account falls within the section—*Nan Karay* vs. *Ko Htaw*, 13 Ind. App., 48, p. 56; I. L. R., 13 Cal., 124; but a suit for dissolution of partnership with a prayer that the balance due should be paid is within the section—*Ramjiwan* vs. *Chand*, I. L. R., 10 Alla., 587.

The same Character.—In a suit by a Hindu widow for a debt, the defendant can set-off a debt due to her deceased husband—*Watson & Co.* vs. *Brojoo Soondures*, 16 W. R., 224; *Grish Chunder* vs. *Koomaree*, 1 W. R., Mis., 23. And in a suit by the son of a deceased Hindu as his heir on a promissory note, a set-off was allowed of debts due by the deceased to the defendant—*Chennappa* vs. *Raghunatha*, I. L. R., 15 Mad., 29. But an amount due as manager cannot be set-off against a personal liability—*Abdul Hassan* vs. *Zohra*, I. L. R., 5 Alla., 299.

A took a loan from C under a bond pledging the shares of himself, his minor brother and cousin, and, covenanting that the interest should be credited to the rent of the shares pledged, let in farm to C. In a suit for rent by A and the others C pleaded a set-off of the interest. The Court found the bond proved as against A only and allowed a set-off as regards him, but not as regards the others—*Futteh Narain* vs. *Deen Dyal*, 15 W. R., 37; see *Lalit Mohan* vs. *Srinibas*, I. L. R., 13 Cal., 331. But A cannot set-off against a claim made by B in respect of separate dealings between him and A, a debt due from a firm consisting of a father and two sons, one of whom is B—*Dhunpat Singh* vs. *Forbes*, 1 Ind. Jur., N. S., 354; unless B was the sole beneficial owner of the assets of the firm and could compel his father and brother to transfer them into his name alone—*Ex-parte Morier*, 12 C. D., 491; and in action against A for money he cannot set-off his share of a debt due him and others—*Bowyear* vs. *Pawson*, 6 Q. B. D., 540.

Plaintiff, one of several co-sharers, sued a lessee of a portion of an estate for his share of the rent; the claim was admitted. But the defendant pleaded as a set-off that he had paid money on account of the plaintiff's share of arrears of the Government revenue for the same period: *Held*, that this was not admissible as a set-off under section 121 of Act VIII of 1859, but was the subject of a separate suit in which other sharers should be joined. It was never the intention of section 121 that two suits entirely different in character should be tried together—*Hossena* vs. *Smith*, 22 W. R., 15; 13 B. L. R., 440.

Assignees.—Purchasers and assignees with notice represent their vendors and assignors. Thus where A by a deed of *Zurpeshgi* lets certain lands to B to secure a debt, and B covenanted to pay a certain sum annually; on failure by B, A obtained a decree for the amount due. Subsequently C, in execution of a decree, bought B's interest in the sum lent, and sued A to recover the same: *Held*, A was entitled to set-off his decree against C—*Bhagawani* vs. *Lala*, 2 B. L. R., 84. But there is no set-off on the ground of mutual credit against an equitable assignee—*Lee and Chapman's Case*, 30 C. D., 216; nor at all if the assignee gives notice to the fund holder, and the latter has not a lien, but only a right of retainer—*Webb* vs. *Smith*, 30 C. D., 192, p. 199.

Rent.—In a suit for rent by a putnidar, purchaser, against a darputnidar, the latter can set-off money paid by him to prevent the sale of the patni tenure for its own arrears,

although the arrears may have been for a period previous to the putnidar's purchase—*Lalit Mohan* vs. *Srinibas*, I. L. R., 13 Cal., 331; but the claims must be between the same parties—*Bhoirub Chunder* vs. *Hafezunnissa*, 2 C. L. R., 414, and *Illustration* (*g*), *supra*.

Insolvent.—Where a debt is due by an insolvent prior to insolvency to a person who owes a debt to the former, they may be set-off in a suit by the Official Assignee—*Miller* vs. *Beer*, 6 C. L. R., 294.

Legally Recoverable—The sum must be legally recoverable—*Kumar Rukhini* vs. *Mulk Jamania*, 12 C. L. R., 534; I. L. R., 9 Cal., 914. A defendant cannot claim to set-off a sum expended in repairing a house without authority—*Zumeerunnissa* vs. *Gayer*, 6 W. R., Ref., 26; or in respect of a demand already dismissed—*Abdoollah* vs. *Sreekunto*, 15 W. R., 252; or barred by limitation—*Heeralal* vs. *Bishen Suhaye*, 2 W. R., 296; or an infant's debt—*Rawley* vs. *Rawley*, 12 Q. B. D. 461; or based on a decree incapable of being enforced—*Huro Pershad* vs. *Fool Kishoree*, 16 W. R., 308.

"Recoverable by him from the Plaintiff."—Where a promissory note has been endorsed when overdue, and a suit is brought by the endorsee against the maker, the latter cannot set-off a debt due him by the payee of the note—*Ex-parte Swan*, L. R., 6 Eq., 359.

A contributory cannot set-off a debt due to him from the company against calls made in winding-up—*In re Whitehouse*, 9 C. D., 595; *In re General Works Company*, 12 C. D., 755. See also Seton on Decrees, p. 782, *et seq.*

Ascertained Sums.—The sum sought to be set-off under this section must be a sum ascertained, that is liquidated and not damages undetermined—*Pragi Lal* vs. *Maxwell*, I. L. R., 7 Alla., 284; something in the nature of a debt, see paragraph 2 of this section, *supra*. Such as a liquidated amount due under a bond—*Watson & Co.*, vs. *Brojo Soondures*, 16 W. R., 224; but not a claim for contribution, the amount of which remains to be determined—*Hossena* vs. *Smith*, 22 W. R., 15; nor for costs not awarded—*Huro Pershad* vs. *Fool Kishoree*, 16 W. R., 308; but this limitation does not apply to equitable set-off, or where it has been also agreed upon—*Kistnasamy* vs. *Municipal Commissioners for Madras*, 4 Mad., 120; *Kishorchand* vs. *Madhowji*, I. L. R., 4 Bom., 407.

In a suit on bills-of-exchange, a set-off arising from a claim to damages sustained by reason of the plaintiff's failing to insure goods unconnected with the hoondees was not allowed—*Clark* vs. *Ruthnavaloo*, 2 Mad., 296; nor even a claim for damages by reason of the goods pledged to secure the bills have been sold in violation of an agreement between the parties—*Ram Dyal* vs. *Ram Dhun Dass*, 3 Agra, 43; nor in a suit for money lent on a usufructuary mortgage will a claim for damages on account of waste of the mortgaged property be allowed—*Ragu Nath* vs. *Ashraf Hussein*, I. L. R., 2 Alla., 252; *contra*—*Shiva Devi* vs. *Jaru*, I. L. R., 15 Mad., 200.

In a suit for money claimed on account of the carriage of goods, a set-off on account of damage caused to the goods was not allowed—*Scanlan* vs. *Harrold*, 10 W. R., 295; in a suit on an arbitration-award defendant pleaded a set-off on account of certain debts, payable jointly according to the award, which he had paid,—it was held that a set-off was admissible, but the Court must enquire into each disputed item of the demand—*Gouri Sahai* vs. *Ram Sakai*, 7 Alla., 157; but otherwise where the claim was not for debts ascertained, but for the balance of a separate account as yet undetermined—*Kalee Coomar* vs. *Huro Chunder*, 17 W. R., 177. In this last case some stress seems to have been laid on the fact that the claims were altogether of another nature; but looking at *Illustration* (*e*), that by itself would hardly be a valid objection under this Code. See, however, *Abul Hasan* vs. *Zohra*, I. L. R., 5 Alla., 299, p. 301.

Jurisdiction.—The nature of the set-off, and the amount of it, must be within the cognizance of the Court—*Ram Lal* vs. *Lancaster*, 3 Alla., 114; *Heeralal* vs. *Bishen Suhaye*, 1 W. R., 297. But where a suit was brought under the Small Cause Court Jurisdiction of a Subordinate Judge and the defendant claimed a set-off above that; but within his ordinary jurisdiction: *Held*, he could under the law then in force try the set-off—*Rampratap* vs. *Ganesh*, I. L. R., 12 Bom., 31; but this is not the present law —*Barote Gaga* v. *Sepoy Panju*, I. L. R., 14 Bom., 371.

By sections 89, 90 of the Judicature Act, 1873, a Court of limited jurisdiction can entertain a claim by way of counter-claim, although it is in respect of matters which arise beyond its local jurisdiction and which could not be put forward in an original action—*Davies* vs. *Flag Staff Silver Co.*, 3 C. P. D., 228. No such power is given under this Code and see section 6, *ante*. But it is no defence to a claim of set-off that it will not amount to the plaintiff's claim—*Mostyn* vs. *West Mostyn Co.*, 1 C. P. D., 496, or that the claim did not arise before the date of the plaint—*Ellis* vs. *Manson*, 35 L. J., 586; but see 5 C. D., 713.

Plaint in a Cross-Suit.—The claim is to be treated as a plaint in a cross-suit, and is chargeable with a Court fee payable on a plaint of that nature—*Bai* vs. *Narotam*, I. L. R., 13 Bom., 672; *Amir Zamu* vs. *Nathu*, I. L. R., 8 Alla., 396; *Chennappa* vs. *Raghunatha*, I. L. R., 15 Mad., 29. Thus, a defendant may deny plaintiff's claim, plead a set-off and get a decree for it, though no sum has been found due to the plaintiff—*Hayatkha* vs. *Abdula*, 6 Bom., 151; but see *Huro Soondures* vs. *Bungshee*,

5 W. R., Mis., 32. And the appeal will lie to the same Court as if the sum had been demanded in a separate suit (section 216)—*Ram Lal* vs. *Lancaster*, 3 Alla., 114; overruling *Masooma Beebee* vs. *Nuzar Fatma*, 1 Alla., 203. The final judgment should determine both the original and the cross-claim; but the decree shall only be for the recovery of the balance—section 216, *post*, 4 C. P. D., 72.

Appeal.—If the memorandum of appeal is not sufficiently stamped, the Court can levy the stamp-duty.—*Chennappa* vs. *Raghunatha*, I. L. R., 15 Mad., 29.

Costs.—The parties should get costs as on independent actions—*Shrapnel* vs. *Laing*, 20 Q. B. D., 334.

Attorney's Lien.—Plaintiff in a resumption suit, is entitled to set-off the amount of his taxed costs against the mortgage-money (notwithstanding any claim which the defendant's attorney may have against the defendant in respect of the costs of the suit)—*Brijnath* vs. *Juggernath*, I. L. R., 4 Cal., 742; and the general rule is that the right of set-off is not affected by the solicitor's ordinary lien for costs—*Pringle* vs. *Cloag*, 10 C. D., 676. But see *Edwards* vs. *Hope*, 14 Q. B. D., 922.

Where a solicitor is discharged by his client he holds papers entrusted to him subject to his lien for costs, and he has the same lien upon translations made by the Court interpreter (at the solicitor's expense) as upon other documents, and he will not be compelled to produce them—*Bai* vs. *Narranji*, I. L. R., 4 Bom., 353.

Execution of Decree.—As to set-off of decree against purchase-money—See *Gopal Singh* vs. *Roy Bunwaree*, 5 C. L. R., 181; against mortgage-money—See *Brijnath* vs. *Juggernath* I. L. R, 4 Cal., 742; in favour of a pre-emptor—*Ishri* vs. *Gopal*, I. L. R., 6 Alla., 351.

Purchaser for Value.—As to what is sufficient to raise the question of a *bonâ fide* purchaser for value—See *Kishori Mohun* vs. *Mahomed*, I. L. R., 18 Cal., 188.

No written statement to be received after first hearing.

112. Except as provided in the last preceding section no written statement shall be received after the first hearing of the suit:

Provisos.

Provided that the Court may at any time require a written statement, or additional written statement, from any of the parties, and fix a time for presenting the same:

Provided also that a written statement, or an additional written statement, may, with the permission of the Court, be received at any time for the purpose of answering written statements so required and presented.

Act VIII of 1859, section 122. This section applies to H. C.

Additional Written Statement.—In a suit for wrongful dismissal defendant is not allowed to give evidence of a transaction, involving instances of misconduct not set forth in defendant's written statement. He should file a supplemental written statement, and this must be done before the first hearing—*Munchershaw* vs. *The New Dhurumsey Co.*, I. L. R., 4 Bom., 576.

The object of an additional written statement is to supply what may have been omitted in the first and not to contradict it—*Douglas* vs. *The Collector of Benares*, 5 Moore 271, p. 290.

Within a Fixed Time.—If a written statement is filed after the time fixed by the Court, it will not be struck out of the record unless the other side applies quickly—*The New Fleming Co.* vs. *Kessowji*, I. L. R., 9 Bom., 373, p. 381.

At any Time.—The words of Act VIII, 1859, section 122, were "any time *before final judgment*," and these were held to mean that written statements could be called for only by the first Court and before judgment—*Juggessur Mookerjee* vs. *Gopee Kishen*, 5 W. R., 50. But unless they are called for by the Court or filed under section 111, they cannot be received after first hearing—*Huza Ali Nuckee* vs. *Mirza Emdad Ali*, W. R., 1864, p. 44.

Court may Require.—The practice in the Calcutta High Court is when one of the parties neglects to file a written statement, to examine him as the grounds of his defence and confine him to that statement unless a written statement seems desirable, when the case will be adjourned for that purpose at his expense—*Ramrutton* vs. *The Oriental Steam Navigation Co.*, 2 Hyde, 89.

The word "require," does not prevent a Court from allowing an additional written statement being filed on motion made. In the case of *Dasmani Dasee* vs. *Srinath Ghose*, 3 B. L. R., App., 11, on an application by the defendant to be allowed to file an additional written statement, two objections were raised—(1) it was not called for by the Court, and (2) it was inconsistent with the original written statement. The Court admitted it on payment of the costs of the application, at the same time intimating that such an additional statement would not have been accepted from the plaintiff.

A Court should not require a written statement inconsistent with the plaint, but it is justified in calling for one, not with the object of adding to or varying plaintiff's claim, but to supply omissions in the plaint—*Jahangeer* vs. *Bhickaree Lall*, 11 W. R., 71; and where a plaintiff claimed land under an amicable arrangement subsequent to a deed of sale, and the defendant denied the sale and the arrangement, an additional statement was taken with the deed of sale, as plaintiff asserted he could not anticipate that the defendant would deny his right altogether—*Lall Mahomed* vs. *Dhoolee Ram*, 22 W. R., 377.

The mere irregularity of the Court calling for a written statement without any sufficient cause is not a good ground of special appeal; the appellant must also be prejudiced thereby—*Lall Mahomed* vs. *Dhoolee Ram*, 22 W. R., 377.

Procedure when party fails to present written statement called for by Court.

113. If any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pass a decree against him, or make such order in relation to the suit as it thinks fit.

Act VIII of 1859, section 106. This section applies to H. C.

Where the defendants, after ample opportunity, neglected to put in a written statement, the Court, per Peterson, J., stated, that in future he should put the defendant into the box and examine him as to the grounds of his defence; and if on examination it should appear that a written statement is desirable, the case would be adjourned for that purpose at the expense of the defaulting party—*Ramrutton Dass* vs. *The Oriental Inland Steam Navigation Co.*, 2 Hyde, 89. Defendant remained in Calcutta one month after it was ordered he should put in a written statement, and then went on a pilgrimage. His son applied for leave to file a written statement, and his application was refused, as no cause was shewn why his father had not filed it before he left Calcutta—*Sreemutty Denomoye Dossee* vs. *Harachurn Coondoo*, 1 Bourke, 153.

Frame of written statements.

114. Written statements shall be as brief as the nature of the case admits, and shall not be argumentative, but shall be confined as much as possible to a simple narrative of the facts which the party by whom or on whose behalf the written statement is made believes to be material to the case, and which he either admits or believes he will be able to prove.

Every such statement shall be divided into paragraphs, numbered consecutively, and each paragraph containing as nearly as may be a separate allegation.

Act VIII of 1859, section 123. This section applies to H. C.

A written statement is not in the nature of a pleading and should not be written after inspecting that of the opposite party, nor by way of rejoinder to it—*Jadub Ram* vs. *Ram Lochun*, 5 W. R., 56; *Jahirooddeen* vs. *Nasirooddeen*, 3 Wy., 265. It should contain nothing more than a *bonâ fide* statement of the facts of the case—*Kanublall* vs. *Tremearne*, 3 B. L. R., App., 12. Anything in the shape of argument or evidence or conclusions of law to be drawn from the facts pleaded is inadmissible—*Williamson* vs. *London and N. W. Ry. Co.*, 12 C. D., 787. In a suit to set aside a deed of sale as false, it was stated among other things: "It appears from a copy of the fraudulent and fabricated deed of sale that the defendant No. 1 has made the plaintiffs declare in it the fact that out of the consideration-money amounting to Rs. 6,500, the putowa (or mortgage) money due to H. and Co. amounting to Rs. 548-4, is kept in deposit, and Rs. 5,951-12 were received in cash to meet the demand of Mussamut Anarkoli Koer, and defray other necessary expenses; but this clause is the result of the foulest device.

If the putowa-money, Rs. 548-4, due to H., were payable out of the usufruct of putowa property, then what was the use in selling the property? It would be absurd to suppose that any one would sell his estate to satisfy by putowa-debt. As for the debt due to Mussamut Anarkoli Koer, it was paid by the plaintiffs out of their own money: the said clause in the deed of sale is the result of the foulest device, and has been introduced into it, to carry out a fraudulent design." All this should have been struck out—*Bishen Sahaye* vs. *Beer Kishore*, 8 W. R., 296. See this case for other examples of bad pleading.

Object of Statement.—The object of written statements being to find out the real points in dispute between the parties, and thus prevent fabrication of false evidence, or the unnecessary production of evidence, they should be framed with the greatest care and deliberation so as to dispense with parol statements at the settlement of issues—*Anund Chunder* vs. *Woomes Chunder*, 1 Hyde, 147; the narrative should be complete. In the case of *Sreenath Mullick* vs. *Brojolall Pyne* and *Doorgaprasad Seal*, 1 Hyde, 33, plaintiff sued on a promissory note. In cross-examination of the principal witness for the plaintiff it came out that defendant had signed a receipt as well as a promissory note. No mention of this had been made in the written statement. In his judgment, Wells, J., said—"Though an important document, no mention is made of it in the written statement .....A written statement under Act VIII, 1859, is required to set forth a full and true narrative of the facts of the case, and a party cannot be allowed any discretion as to whether he will state or withhold a fact of such importance as the execution of a receipt for the money sued for."—See note under section 147.

Effect of Written Statement: Evidence.—A written statement cannot be read against any party save him by whom it has been made or those who are bound by his admission—*Joggessur Mookerjee* vs. *Gopee Kishen*, 5 W. R., 50. But pleadings in India must not be construed strictly and an admission of some notice is not an admission that a statutory notice has been properly given—*Madho Persad* vs. *Gajadhar*, 11 Ind. App., 186, p. 192; and what is not denied cannot be looked upon as admitted—*Natha Singh* vs. *Jodha*, I. L. R., 6 Alla., 406.

In a suit for possession of land the written statement of one co-sharer cannot be used against the others—*Mookta Keshee* vs. *Koylash Chunder*, 7 W. R., 493; *Ujjutoollah Khan* vs. *Ram Churn*, 12 W. R., 39. So where A sued B and C for real property and B disclaimed in favor of A: *Held*, that this was no evidence against C—*Lachman* vs. *Tansukh*, I. L. R., 6 Alla., 395; and see *Azizullah* vs. *Ahmad*, I. L. R., 7 Alla., 353.

Nature of: How Construed.—Even as against the party making it, it is not looked upon as a plea by way of confession and avoidance of which the opposite party can take advantage as regards the admission, leaving him to prove the remainder. It is like an answer in Chancery, and if put in evidence the whole must be read together, though the Court need not believe the whole of it—*Poolin Beharee* vs. *Watson & Co.*, 9 W. R., 190. See, however, *Brijokishore* vs. *Bishonath Dutt*, W. R., 1864, p. 305. In a suit for enhancement of rent the defendant admitted that the productiveness of the land had increased but not otherwise than by his own agency; it was held that, as the statement was qualified, the first portion of it could not be used without the qualification for the purpose of throwing the proof of the latter portion on the defendant (*id.*); overruling *Nobeen Kishen* vs. *Shafatoolah*, 1 W. R., 24. So where plaintiff sued to set aside a kherajee bromutur tenure and the defendant admitted he held as tenant at a yearly quit-rent, it was held that the statement must be taken with the qualification, and that the plaintiff could not use the statement as an admission that the defendant held as tenant, and throw on him the onus of proving that he held at a yearly rent, although the Court was not bound to believe the whole of the statement—*Nilmoney Singh* vs. *Ramanoograh*, 7 W. R., 29.

The rule in short is this, that where a statement is made subject to a qualification, the whole must be put in evidence; and the Court may attach to it or any portion of it as much value as it deems fit—*Radha Churn* vs. *Chunder Monee*, 9 W. R., 290.

But if a party makes a series of independent and unqualified statements, they may be used against him; the rule above-mentioned as regards qualified statements goes no further than to lay down that an unfair use cannot be made of a man's statement by trying to convert into and admission by him what he never intended to be an admission. In a suit for land the defendant made two distinct assertions—(1) that the plaintiff's ancestor was in possession up to a certain date, and (2) that at that date he relinquished the lands, and they were settled with the defendant; the first was taken as an admission against the defendant, but he was called on to prove the second—*Baikanthanath* vs. *Chandra Mohan*, 1 B. L. R., 133. And in a suit on a bond containing a recital of payment. if the defendant admits execution but denies payment, the onus to prove the latter lies on him—*Maniklal* vs. *Ramdas*, 1 B. L. R., 92.

A defendant cannot treat a written statement as evidence in his own favour. This was attempted in *Shaikh Shurfuraz* vs. *Dhunnoo*, 16 W. R., 257. Ainslie, J., said:—"Under that Act (VIII of 1859) it is the duty of the Court to examine the written statements in order to see on what points the parties are at issue, and to lay down the issue, and to receive and consider the evidence adduced on the points in dispute; but the Court

will not allow the parties to waste its time by producing evidence to establish that which has never been contradicted; and therefore to lay down that, when a defendant admits any one fact contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof, he is entitled to say that the plaintiff has relied on his statement as evidence, and that he (defendant) is in consequence in a position to claim that the whole of it may be read as evidence in his own favour, is a proposition that cannot be maintained." Subject to the distinction referred to in the cases above, which were not cited, this seems a very clear exposition of the doctrine.

As regards Matters not Set Forth.—By sections 23 and 34 of the Patent Act, no evidence shall be admitted at a trial for infringing a patent in regard to the validity of the patentee's exclusive privilege, unless on the particular grounds set forth in written statements of the parties—*Sheen* vs. *Johnson*, I. L. R., 2 Alla., 368; and see *Ledgard* vs. *Bull*, 13 Ind. App., 134. And in a case of wrongful dismissal, defendant was not allowed to go into evidence of a specific transaction as an instance of misconduct on the part of the plaintiff, not set forth in his written statement, but which he became aware of before first hearing. It was held that he should have filed a supplemental written statement—*Munchershaw* vs. *The New Dhurumsey Co.*, I. L. R., 4 Bom., 576.

Written statements to be signed and verified.

115. Written statements shall be signed and verified in the manner hereinbefore provided for signing and verifying plaints, and no written statement shall be received unless it be so signed and verified.

Act VIII of 1859, section 123. This section applies to H. C.

Persons exempted from attendance in the Civil Courts are not exempted from subscribing and verifying their written statements, except for good cause, and even then care should be taken that the party verifying has a knowledge of the case, and is not an ignorant servant who can have no acquaintance with the facts he pretends to verify—*Kinoosing Roy* vs. *Eshan Chunder Roy*, 2 Wym., 253.

When an application is made that a written statement be verified by an attorney of a party, it is desirable, but not absolutely necessary, that notice should have been given to the other side—*Finlay, Campbell & Co.* vs. *Steele*, 1 Ind. Jur., N. S., 39. It is very doubtful if an attorney, as such, can verify written statements under the Code.

If an unverified statement is admitted on the record without objection, the allegations contained in it should be noticed and issues framed accordingly—*Radha Churn* vs. *Moran & Co.*, 13 W. R., 342.

Power of Court as to argumentative, prolix, or irrelevant written statement.

116. If it appears to the Court that any written statement, whether called for by the Court or spontaneously tendered, is argumentative or prolix, or contains matter irrelevant to the suit, the Court may amend it then and there, or may, by an order to be endorsed thereon, reject the same, or return it to the party by whom it was made for amendment within a time to be fixed by the Court, imposing such terms as to costs or otherwise as the Court thinks fit.

Attestation of amendments.

When any amendment is made under this section, the Judge shall attest it by his signature.

Effect of rejection.

When a statement has been rejected under this section, the party making it shall not present another written statement, unless it be expressly called for or allowed by the Court.

Act VIII of 1859, section 124. This section applies to H. C.

Practice—The practice in the High Court is to make an application to have the statement taken off the file on the ground that it is malicious, argumentative, or

irrelevant, and if the applicant succeeds, the order is that the written statement be taken off the file with leave to file a new written statement within a given time, usually a week, and the unsuccessful party pay the costs of the application—*Kasublal* vs. *Tremearne*, 3 B. L. R., App., 12; an order fining the pleader one rupee who filed the written statement, and directing a large portion of it to be struck out, is bad—*Boolee Singh* vs. *Hurobuns*, 7 W. R., 212. And compare *Ranee Roshan Jehan* vs. *Inmayat Hossein*, 1 Marsh., 127.

Applications to take the statement off the file should be made as soon as possible after the written statement has been filed—*The New Fleming Spinning Co.* vs. *Kessowji*, I. L. R., 9 Bom., 373, p. 381. In the High Court, Calcutta, on its Original Side if a written statement has been four clear days upon the file in compliance with Rule 28, it cannot be taken off when the suit is ripe for hearing—*Smallwood* vs. *Parry*, 1 Coryton, 39; referring to *Nawab Nizam of Bengal* vs. *Rajah Prosonnonarain Deb*, "*Hurkaru*," 7th of May 1864. And if evidence has been taken, the applicant would be bound to show that he had been in some way prejudiced—*Lall Mahomed* vs. *Dhoolee Ram Dass*, 22 W. R., 377.

In Bombay the rule is that a Court has power to take a written statement off the file for irrelevancy, before it is produced at the hearing of the suit. The filing of a written statement does not necessarily make it a part of the record, but is merely for the purpose of notice to the plaintiff of the nature of the defence—*Keshabji* vs. *Nasarranji*, 10 Bom., 425, but see *The Fleming Co.* vs. *Kessowji*, I. L. R., 9 Bom., 373, p. 381.

As to cases in which written statements were rejected, see note on section 114, *ante*.

CHAPTER IX.

OF THE EXAMINATION OF THE PARTIES BY THE COURT.

Ascertainment whether allegations in plaint and written statements admitted or denied.

117. At the first hearing of the suit the Court shall ascertain from the defendant or his pleader whether he admits or denies the allegations of fact made in the plaint, and shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

This section applies to H. C. and P. S. C. C.

Oral examination party, or companion of himself or his pleader.

118. At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court: and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

Act VIII of 1859, section 125. This section applies to H. C and P. S. C. C.

Appearing.—This section contemplates the case where a party has appeared in proper time. Thus, where defendants were summoned to appear, and they did not, but put forward excuses for their non-attendance which were deemed insufficient, and on a subsequent day the suit was decided *ex-parte*, although their pleaders were present, it was held that the decision was right—*Joy Prokash* vs. *Meghraj*, 12 W. R., 207; on the other hand, if the parties appear properly, it is the duty of the Court to examine them, and frame the issues: not putting in a written statement does not justify the trial of a suit *ex-parte*—*Sivarajadham* vs. *Kuppagantulu*, 2 Mad., 311. As to "*Ex-parte*," see note to section 100. The parties have no right to put questions to each other.

119. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Substance of examination to be written.

This section does not apply to H. C. Punjab Cf. C., nor to P. S. C. C.

The words in section 125, Act VIII of 1859, "such examination shall (unless the pleader be the person examined) be upon oath or affirmation or otherwise according to the provisions of the law for the time being in force relating to the examination of witnesses," have been omitted, so that the examination would appear to be capable of being made without any oath or affirmation.

Construction.—Statements made by a pleader must not be construed too strictly and should be taken as a whole and omission to deny a matter pleaded, does not amount to an admission.—*Natha Singh* vs. *Jodha*, I. L. R., 6 Alla., 406.

120. If the pleader of any party who appears by a pleader refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

Consequence of refusal or inability of pleader to answer.

If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pass a decree against him, or make such order in relation to the suit as it thinks fit.

Act VIII of 1859, section 127. This section applies to H. C. and P. S. C. C.

The object of this examination is not to take evidence or to ascertain what is to be evidence in the case, but see what are the matters in dispute, and if necessary to allow the plaint to be amended—*Gunga Narian* vs. *Tiluckram*, 15 Ind. App., 119.

Material.—Before acting under this section the Judge should be satisfied that the question is material—*Gopal Chunder* vs. *Mohesh Chunder*, 21 W. R., 44; and he should record the grounds of his satisfaction and the question asked — *Makoond Adit* vs. *Rajah Suttoorghun*, 17 W. R., 507. Where a case was dismissed under section 126 of Act VIII, 1859, the decision was set aside, as there was nothing on the record to show that the party "refused to answer any material question"—*Kishnaji Nimkar* vs. *Kishnu Nimkar*, 2 Bom., 340.

Lawful Excuse.—Whether an excuse is lawful or not will depend on the nature of the particular case—*Doorga Dutt* vs. *Jheengoor*, 18 W. R., 63; and before passing a decree against a person for non-attendance, the Judge should hear what he has to say, and adjudicate on the sufficiency of the excuse—*Mahomed Hamidoolla* vs. *Durbesh*, 24 W. R., 314; *Bhally Mahomed* vs. *Nobin Chunder*, 15 W. R., 269.

It may be a lawful excuse if the party objects to appear and give evidence on the ground that he lives beyond the limits mentioned in section 176 — *Golam Bukshee* vs. *Pulton Singh*, 3 W. R., Act X, 162; or is exempted under this Code — *Juggut Inder* vs. *Soorjo Coomar*, Marsh., 627; or has not had sufficient time to appear—*Khadar* vs. *Rahiman*, 3 Mad., 167; or was of necessity absent on Government service on the date fixed — *Cowell* vs. *Ishen Chunder*, 18 W. R., 17. But where plaintiff's mookhtear was unable to answer certain questions necessary for fixing the proper issues, and the plaintiff, who was exempt from attendance in the Civil Court, was called on to appear or send some one who could answer, and he did neither—*Nilmonee Singh Deo* vs. *Ram Huree*, 2 W. R., 161; or he promised to appear, but did not, and gave no reason why he could not—*Doorga Dutt* vs. *Jheengoor*, 18 W. R., 63; or refused to appear on social grounds, namely, that persons of his position had a prejudice against appearing in Court—*Kulee Chunder* vs. *Surut Soondures*, 18 W. R., 45; *Nursing Deb* vs. *Rammohun*, Marsh., 176; it was held that his case was properly decided against him.

Or make such Order.—The Court is not bound to decree the case against the party who has not appeared, and may pass any order it deems fit—*Kadar Bhi* vs. *Raheman*

Bhi, 3 Mad., 167; *Roop Narain* vs. *Kashi Ram*, 2 Alla., 67. It might proceed for instance, to hear the case—*Shazada Pakaktra* vs. *Jakriram*, 11 W. R., 5. Under section 170, Act VIII, 1859, no case could be dismissed or decreed on default, unless some evidence had been given by the other party—*Ishan Chunder* vs. *Hurish Chunder*, 12 W. R., 369; *Damoodhur Bhoushan* vs. *Raghoonath*, 12 W. R, 242; *Thakoor Lall* vs. *Brohmo Moyee*, 15 W. R., 233; and on the same principle unless the plaintiff shewed a fair cause of action or the defendant a defence, the suit should not be decreed or dismissed under this section. The true rule appears to be that a suit should not be dismissed for non-attendance, unless there is a distinct order to attend, that it has been served upon the plaintiff or brought to his knowledge, that he has wilfully disobeyed it, and the evidence he has been required to give is material—*Pearee Mohun* vs. *Hurish Chunder*, 17 W. R., 141; *Raj Chookun* vs. *Busjeet*, 20 W. R., 165.

See section 176, *post*.

CHAPTER X.

OF DISCOVERY AND OF THE ADMISSION, INSPECTION, PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

Power to deliver interrogatories.

121. Any party may at any time by leave of the Court deliver through the Court interrogatories in writing for the examination of the opposite party, or, where there are more opposite parties than one, any one or more of such parties, with a note at the foot thereof stating which of such interrogatories each of such persons is required to answer:

Provided that no party shall deliver more than one set of interrogatories to the same person without the premission of the Court, and that no defendant shall deliver interrogatories for the examination of the plaintiff unless such defendant has previously tendered a written statement and such statement has been received and placed on the record.

Judicature Acts, Order 31, Rule 1. This section applies to H. C. and P. S. C. C It does not apply to rent-suits in Bengal—Act VIII of 1885, section 148, cl. (*a*).

Forms of Interrogatories.—See schedule IV, No 123, *infra*, and see *Chister* vs. *Wortley*, 18 C. B., 239; *Flitcroft* vs. *Fletcher*, 11 Exch., 543.

Opposite Party.—This does not mean a party having an adverse interest, but a party between whom and the applicant an issue is joined—*Molloy* vs. *Kirby*, 15 C. D., 162; *Eden* vs. *Weardale Co.*, 34 C. D., 223.

Minor.—Where the opposite party is of unsound mind or a minor, see *Waghji* vs. *Khabas*, I. L. R., 10 Bom., 167, no person acquainted with the facts, can be called on to answer interrogatories, or make an affidavit of documents on his behalf—*Duke* vs. *Stephens*, 30 C. D., 189. See also *Redfern* vs *Redfern*, 1 P. D. (1891), 139, and "MINOR," section 129, *post*.

Order to Answer.—Leave granted to administer interrogatories is not "an order to answer" within the meaning of section 136, *post*—*Prem Sukh* vs. *Indronath*, I. L. R., 18 Cal., 420.

Service of interrogatories.

122. Interrogatories delivered under section 121 shall be served on the pleader (if any) of the party interrogated, or in the manner hereinbefore provided for the service of summons, and the provisions of

sections 79, 80, 81 and 82 shall, in the latter case, apply so far as may be practicable.

This section applies to H. C and P. S. C. C., but not to rent-suits in Bengal—Act VIII of 1885, section 148, cl. (*a*).

Leave of the Court not Given—Leave will not be given in an action for penalties by a common informer; but the fact that the answer might lay the person interrogated open to a criminal charge or to an action for penalties is not in itself, in most cases, a sufficient reason why the interrogatory should be disallowed; and, as a general rule, the party interrogated must take the objection upon oath in his answer—*Martin* vs. *Treacher*, 16 Q. B. D., 507.

This chapter seems to confer on a party the right to exhibit interrogatories to his opponent, subject to the protection given by the exercise of judicial discretion, and probably to interrogate him as to every relevant matter on which he could examine him if he thought fit to call him as his witness at the trial—See *Lyell* vs. *Kennedy*, 8 App. Cas., 217, p. 234; and it is no answer to interrogatories in regard to a conversation to say that the solicitor of the party interrogating was a party to it, and that until he be examined and cross-examined, the interrogation is improper—*Attorney-General* vs. *Gaskill*, 20 C. D., 519. In giving leave the Court, as a rule, decides nothing as to the specific interrogatories, but only that there is a case for interrogating the party, that the interrogatories may possibly be in some degree relevant, that the general character of the proposed interrogatories is not improper, and that it is not sought to administer them for the mere purpose of annoyance and worry—*Hall* vs. *Liardet*, L. R., W. N. (83), 175; *Martin* vs. *Spicer*, 32 C. D., 592.

At any Time.—From Defendant.—Although the rule runs "at any time," a plaintiff will not be allowed discovery before filing his statement of claim—*Hancock* vs. *Guerin*, 4 Ex. D., 3; unless it is clear that he has a good cause of action, but it is unable to state it properly without the information asked for—*Cashin* vs. *Craddock*, 2 C. D., 140; *Hancock* vs. *Guerin*, 4 Ex. D., 3; *Harboard* vs. *Monk*, 9 C. D., 616. Where it was clear that defendant had accused plaintiff of forgery, but the exact words used were not known, and the parties present when the imputation was made refused to give any information, interrogatories were put to the defendant as to the precise words used—*Atkinson* vs. *Fosbrooke*, L. R., 1 Q. B., 628; and in an action for breach of duty in carrying goods by sea, a similar application was allowed, as plaintiff could not file a statement of claim before discovery—*Ley* vs. *Marshall*, W. N., 1876, p. 23. Nor as a rule may he, before the statement of defence (corresponding to defendant's written statement) has been filed, seek for discovery—*Strong* vs. *Tappin*, W. N., 1876, p. 22; for in a large majority of cases it is not possible until the defence is put in to tell whether the interrogatories are material, and it would be useless to interrogate on matters which would be at once admitted by the defendant.

Where interrogatories are delivered at such a stage of the case as render them liable to objection as improper, the defendant can, under section 125, refuse to answer unless sufficient reasons are shewn by the plaintiff (section 127)—See *Mercier* vs. *Cotton*, 1 Q. B. D., 4421. But see in connection with this case—*Harboard* vs. *Monk*, 9 C. D., 616.

In an action by executors, general rule stated—*Eade* vs. *Jacob*, 3 Ex. D., 335.

Discovery from Plaintiff.—Defendant cannot obtain discovery until he has filed his written statement (section 121), and if he is anxious to seek the aid of discovery, he should file his written statement as quickly as possible, and then deliver interrogatories—See *Disney* vs. *Longbourane*, 2 C. D., 704. See also *Haldane* vs. *Eckford*, L. R., 7 Eq., 425. The best time for delivering interrogatories is after the written statements have been filed and before the settlement of issues.

The same procedure may be adopted in miscellaneous proceedings after decree. Interrogatories as to accounts pending or to make the judgment available, or to find out how the property in cases of mesne profits has been managed, have been allowed, and no doubt will be admitted under this Code. Interrogatories can only be delivered in civil actions, and to the opposite party or parties, and if there are several parties, each cannot be compelled to answer more than relates to the case against himself—*Wigram*, p. 70. In a suit in which a corporation was plaintiff, the defendants could not file interrogatories for the examination of its former officers not parties to the suit—*Imperial Mercantile Credit Association* vs. *Witham*, L. R., 3 Eq., 89.

Application.—Applications under these sections should be made in Chambers on petition, and the order is "The plaintiff be allowed to interrogate." This order may be subsequently discussed in Court. The duty of the Court is to determine whether the applicant should be allowed to interrogate the other side, but not to determine what questions the party interrogated should be compelled to answer. If the interrogatories are scandalous, or in any way an abuse of the process of the Court, the Court may interfere at any stage of the suit. In other cases the party interrogated may, at his

peril, omit to answer the interrogatories to which he objects. Then the interrogating party should apply to the Court under section 127, *post*, for an order requiring the other party to answer or answer further, either by affidavit or *viva voce* examinations as the Judge directs, or the party interrogated may take a more cautious course,—he may file his affidavit in answer stating in it his objections to answer such questions as he objects to, and the interrogating party, if dissatisfied, can apply under section 127—*Mundle* vs. *Biswas*, 5 C. L. R., 509; I. L. R., 5 Cal., 707; *Prem Sukh* vs. *Indronath*, I. L. R., 18 Cal., 420.

Inquiry into propriety of exhibiting interrogatories.

123. The Court, in adjusting the costs of the suit, shall, at the instance of any party, inquire or cause inquiry to be made into the propriety of delivering such interrogatories; and if it thinks that such interrogatories have been delivered unreasonably, vexatiously or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

Judicature Acts, Order 31, Rule 3. This section applies to H. C. and P. S. C. C., but not to rent-suits in Bengal—Act VIII of 1885, section 148, cl. (*a*).

By section 121 interrogatories cannot be delivered except with the leave of the Court. This is the same as section 51 of the Common Law Procedure Act of 1854. In practice, such leave was given in Chambers, when the Judge would make enquiry into the propriety of delivering the interrogatories, and if they were objectionable, he would disallow the application with costs. Under the judicature rules the necessity of getting leave of the Court to administer interrogatories before the close of the pleadings was done away with, but by the amended rules of 1883 leave is required in every case, except where relief is sought on the ground of fraud or breach of trust.

Service of interrogatories on officer of corporation or company.

124. If any party to a suit be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply to the Court for an order allowing him to deliver interrogatories to any member or officer of such corporation, company or body, and an order may be made accordingly.

Judicature Acts, Order 31, Rule 4. This section applies to H. C. and P. S. C. C., but not to rent-suits in Bengal—Act VIII of 1885, section 148, cl. (*a*).

Member or Officer.—Formerly, in England, the officers of a corporation could not be interrogated unless they were personally parties to the suit—See *Republic of Peru* vs. *Weguelin*, L. R., 20 Eq., 140; under the present practice this is not so—*Wilson* vs. *Church*, 9 C. D., 553; the ordinary practice will probably be not to direct a member of the corporation to answer if it is shewn that there is a competent officer, generally the secretary, who has a sufficient knowledge of the facts—*Pavitt* vs. *The Metropolitan Coy.*, W. N., 1883, p. 100; *Manchester Val de Travers Paving Co.* vs. *Slagg*, W. N., 1882, p. 127; as a rule, the Secretary is the proper officer—*Berkeley* vs. *Standard Discount Co.*, 13 C. D., 97.

Quære, is a solicitor an officer?—See *In re Great Western Forest Co.*, 31 C. D., 496.

Practice.—The application should be made in Chambers against the company, and if there is any objection, the company appear by their solicitor, the officer does not. The Judge must be satisfied that the officer selected by the party has a competent knowledge of the facts and the means of answering—*Berkeley* vs. *Standard Dis. Co.* 13 C. D., 97; *Pavitt* vs. *The Metropolitan Coy.*, W. N., 1883, p. 100.

Costs.—The company's solicitor should act for the member or officer who is directed to answer, and prepare the answers for him, and charge the company with the

cost of so doing. He should not employ a separate solicitor—*Berkeley* vs. *Standard Discount Co.*, 13 C. D., 97; 9 C. D., 643.

The order should not be made if the interrogatories are objectionable. In an action on a policy an application was made for an order to deliver interrogatories to an officer of the defendant company. An objection was raised on behalf of the defendant to the interrogatories, and it was contended for the plaintiff that the nature of them could not be gone into at that stage of the case, but that defendant could object (section 125: *Held*, that whenever an order of Court is necessary, the interrogatories will be gone into on the application for the order, and that such order will not be granted as of course—*Hewitson* vs. *Whittington Life Insurance Society*, W. N., 1875, p. 219.

Foreign Sovereign—A foreign republic should, as far as is possible, be treated as a body corporate—*Rep. Costa Rica* vs. *Erlanger*, 1 C. D., 171, p. 174; a sovereign as a private individual—*Prioleau* vs. *United States*, L. R., 2 Eq., 659, p. 663. See note to section 129, *post*.

Power to refuse to answer interrogatories as irrelevant, &c.

125. Any party called upon to answer interrogatories, whether by himself or by any such member or officer, may refuse to answer any interrogatory on the ground that it is irrelevant, or is not put *bonâ fide* for the purposes of the suit, or that the matter inquired after is not sufficiently material at that stage of the suit, or on any other like ground.

Judicature Acts, Order 31, Rule 5. This section applies to H. C. and P. S. C. C., but not to rent-suits in Bengal—Act VIII of 1885, section 148, cl. (*a*).

The party interrogated must object on oath; the mere assertion of his counsel is not sufficient—*McFadden* vs. *Mayor and Corporation of Liverpool*, L. R., 3 Ex., 281.

The rule corresponding to this section allows either party to apply at Chambers to strike out objectionable interrogatories. When a party refuses to answer, the party interrogating must apply to the Court for an order under section 127, requiring him to answer, and the application should show the grounds on which it is based—See *The Princess of Wales* vs. *The Earl of Liverpool*, 1 Swans, 126. See note under section 122, *ante*.

Discovery is based on the following propositions:—

I.—It is the right, as a general rule, of a plaintiff in equity to examine the defendant upon oath as to all matters of fact which, being well pleaded in the bill, are material to the proof of the *plaintiff's case*, and which the defendant does not by his form of pleading admit.

II.—Courts of Equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defence. With this (if a) qualification, the right of the plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material *facts* as relate to the plaintiff's case or are necessary to support the case of the defendant—*Eade* vs. *Jacob*, 3 Ex. D., 335; *Attorney-General* vs. *Gaskill*, 20 C. D., 519, p. 529; *Bridges* vs. *Bridges*, 29 C. D., 29; see, however, *Ali Kader* vs. *Gobind Dass*, I. L. R., 17 Cal., 840, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the *defendant's case* is to be established, or to any discovery of the defendant's evidence.

III.—Interrogatories for the examination of a plaintiff differ from those of the examination of a defendant in this respect, that though a plaintiff or defendant is not entitled to discovery of his opponent's case, a defendant may ask any question tending to destroy the case of the plaintiff—*Hoffmann* vs. *Postile*, L. R., 4 Ch. Cas., 673; *Commissioners of Sewers of City of London* vs. *Glasse*, L. R., 15 Eq., 302. And if in the discovery of relevant facts the names of witnesses must be disclosed, it does not take away the right —*Marriott* vs. *Chamberlain*, 17 C. D., 154.

Limitation of these Propositions.—But in this country, interrogatories cannot be framed to anticipate or supply defects of pleading or to ascertain the case of the other side. If the pleading of either party is vague, the Court may call for a further written statement, or may frame and record issues until the case raised by the pleadings is recorded with sufficient clearness—*Ali Kader* vs. *Gobind Dass*, I. L. R., 17 Cal., 840. The only important difference between the procedure in England and here is that the Court may, though the parties cannot, demand oral pleadings before settlement of issues, and it seems a matter for consideration if this difference is sufficient to deprive a party of the right to use all his remedies as laid down in *Gay* vs. *Labouchere*, 4 Q. B. D., 206; *Benbow* vs. *Low*, 16 C. D., 93, and many other case in England. It is also suggested that no such limitation is necessary, and if the Judges in India limit discovery in the manner pointed out in *Parker* vs. *Wells*, 18 C. D., 477, p. 483—7; *Fennessy* vs. *Clark*, 37 C. D., 184, p. 187; and

Rowcliffe vs. *Leigh*, 6 C. D., 257, p. 263, and exercise the powers given them under section 135, *post*, little oppression can ensue.

General Rule.—A party is entitled in the Common Law Courts to discovery of everything which makes out his own case, or shows that he is in the right: and this includes specific allegations in the nature of a replication to an anticipated defence—*Remolamoney Dassee* vs. *Hulodhur Bullub*, 1 Boulnois, 618; *Ali Kader* vs *Gobind Dass*, I. L. R., 17 Cal., 840; but not to discovery of matter which support his opponent's case, or show that his opponent is right. The influence of Baron Alderson, who had been accustomed to proceedings in equity, led the way to allowing such interrogatories in suits for ejectment, where the defendant had been long in undisputed possession of the premises sought to be recovered and was ignorant of the nature of the title set up; but where a tenant withheld possession after the termination of his lease, and was sued for possession, it was decided that he could not interrogate the plaintiff as to whether his title had expired—*Wallen* vs. *Forrest*, L. R., 7 Q. B., 239; and in an action of trover for cotton, the defendant was not allowed to ask the plaintiff how and when he became possessed of, and entitled to, it—*Finney* vs. *Forwood*, L. R., 1 Ex., 61; see *The Derby Commercial Bank* vs. *Lumsden*, L. R., 5 C. P., 107.

On the other hand, where in an action by surviving parties the defendant pleaded a settlement of the account between him and the deceased by a bill not due, he was allowed to be asked as to the circumstances of the alleged settlement, whether he had ever drawn, accepted or delivered the bill as stated in his plea—*Hawkins* vs. *Carr*, L. R., 1 Q. B., 89; where in an action by executors against the makers of a note given to the testator, and defendant pleaded part-payment to the testator, the defendant was interrogated as to the time, place, and circumstances under which the alleged payment took place—*Hills* vs. *Water*, L. R., 9 C. P., 481; see, however, *Eads* vs. *Jacob*, 3 Ex. D., 335. From those cases, and especially the judgments of Coleridge, C. J., and Grove, J., in the case just cited, it would appear that a party may be interrogated in the Common Law Courts about matters connected with their case, provided such matters are essential, and exclusively within their knowledge. See also *Towns* vs. *Cocks*, L. R., 9 Ex., 45; *Stewart* vs. *Smith*, L. R., 2 C. P., 293.

One party may be interrogated as to any admissions he may have made tending to support his opponent's cause of action—*Hodsoll* vs. *Taylor*, L. R., 9 Q. B., 79; and he cannot object to discovery on the ground that such admissions were made in conversations with a servant or agent of the other party who might be called as a witness—*Bird* vs. *Walzey*, 1 C. B., N. S., 308. It should be borne in mind, however, that by section 23 of the Evidence Act (Act I of 1872), it is enacted that "in civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given;" provided that no legal adviser shall be excused from giving evidence of any communication made to him for an unlawful purpose, or of any fraudulent act which may come under his notice as legal adviser.

It is enacted by section 22 of the same Act that "oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shews that he is entitled to give secondary evidence of the contents of such document" under the recognized rules of procedure in such cases, or "unless the genuineness of such document is called in question." The same rules prevail in English law, (but see *Slattery* vs. *Pooley*, 6 M. & W., 669), and the Courts, keeping well within them, would not grant any order for discovery where the proposed interrogatories related to the contents of, or have a tendency to contradict, a written document—*Moor* vs. *Roberts*, 2 C. B., N. S., 680.

Probably the objection that the answers might subject him to a criminal prosecution, a civil suit, a penalty or a forfeiture might not be considered by itself as sufficient—*Martin* vs. *Treacher*, 16 Q. B. D., 507; see also *Redfern* vs. *Redfern*, 1 P. D., (1891), 139, see note to section 122, *ante*. Questions going to the credit of a party as a witness are inadmissible.—*Allhusen* vs. *Labouchere*, 3 Q. B. D., 654.

Where the guardian of a ward of Court absconded with the ward, it was held that the guardian's solicitor was bound to give all the information he could to aid in finding them—*Ramsbotham* vs. *Senior*, L. R., 8 Eq., 575.

Irrelevant—Irrelevant interrogatories should not be allowed; for there is a distinction between the right to interrogate and the right to cross-examine *Attorney-General* vs. *Gaskill*, 20 C. D., 519, p. 530; *Owen* vs. *Morgan*, 39 C. D., 316. In a suit on a partnership-deed, in which it was stated that a certain sum was to be taken as £6,000, interrogatories as to the items of which it is composed were not allowed—*Wier* vs. *Tucker*, L. R., 14 Eq., 25. In a suit for specific performance by plaintiffs, trustees of a married woman, defendant was not allowed to ask: (1) Whether the plaintiffs were not trustees of the money intended to be employed in the purchase? (2) What were the terms of the trust? (3) Whether it was not a breach of trust to employ the funds in the purchase of an under-lease? (4) As to the custody of the trust-deeds—*Mansfield* vs. *Childerhouse*, W. N., 1876, p. 258; 4 C. D., 83. In an action for the price of a horse sold, where defendant pleaded the horse had been falsely represented to be quiet and a good worker, he was not allowed to ask the plaintiff: (1) Was the horse, which is the subject of this action, the property of the plaintiff at the time of sale? (2) If it was your

property, how did it become so?—*Sieter* vs. *Harris*, W. N., 1876, p. 22. So, in an action by a principal against his agent for money received, interrogatories by the defendant to shake the character of the plaintiff were not allowed—*Baker* vs. *Newton*, W. N. 1876, p. 8.

In an action for libel against a Newspaper Company and a man named Jackson, it was ruled that interrogatories as to whether Jackson was publisher and supervisor of the paper, whether he was a shareholder in the company by whom the libellous paragraphs were brought to the office, and whether they were printed by Jackson or the company, were allowed. Interrogatories as to whether he was editor, wrote the paragraphs, saw and cautioned them, and whether he or the company had the originals, and if they objected to produce them, were disallowed — *Cater* vs. *Leeds Daily News Company and Jackson*, W. N., 1876, p. 11; but see *Jones* vs. *Richards*, 15 Q. B. D., 439. In an action for damages for seduction, the defendant cannot be asked how rich he is—*Hudson* vs. *Taylor*, L. R., 9 Q. B., 79.

Good Faith—Even if the interrogatories are relevant, they may be objected to on the ground that they have not been *put bonâ fide for the purposes of the suit*. All questions put *malâ fide*, with an ulterior object beyond that of helping the suit, should be disallowed—*Baker* vs. *Lane*, 3 H. C., 544; explained in *Beckford* vs. *Darcy*, L. R., 1 Ex., 357; *The Mary or Alexandra*, L. R., 2 A. & E., 319. When the onus of proof rests on a party, it seems reasonable that he should be allowed to interrogate his adversary; but when the onus of proof rests on a defendant, then, as a general rule, the plaintiff cannot require discovery of the matter for the purposes of the suit. In *Joy* vs. *Keekewick*, 2 Ves.; 679, plaintiff claimed as heir *ex parte materna*, stating there was no heir *ex-parte paterna*; defendant claimed *ex-parte paterna*. Plaintiff then asked discovery as to how he was heir, and to set forth all particulars of the births, deaths, and marriages of those through whom he claimed. The Lord Chancellor said: "This is a fishing bill to know how a man makes out his title as heir. He is to make it out; but he has no business to tell the plaintiff how he is to make it out. Allow the demurrer." But see *Lyell* vs. *Kennedy*, 8 App. Cas., 217, an action of ejectment, where the interrogatories delivered by the plaintiff were allowed.

Material to the Suit.—See section 135, *infra*.

A third objection is that they are "not sufficiently material at that stage of the suit." The word 'material' means more than relevant, and in the sense it is here used means materials as to the *case* made and *the relief* prayed for at the stage of the case when discovery is sought (Wigram, 45)—See *Parker* vs. *Wells*, 18 C. D., 477, p. 483; *Fennessy* vs. *Clark*, 37 C. D., 184, p. 187; or the first issue to be tried—*Rowcliffe* vs. *Leigh*, 6 C. D., 257, p. 263; *Neckram Dobay* vs. *The Bank of Bengal*, I. L. R., 14 Cal. 703. What is material at one stage of a suit may not be material at another. For instance, if defendant moved to take the plaint off the file on the ground that it shewed no cause of action at all, or a cause of action barred, interrogatories on the merits would not be allowed until the motion had been decided, for if the plaint were struck off, no necessity for discovery would arise. But if he files a written statement and joins issue, he will be liable to answer on the whole suit, though whether he will be compelled to do so or not will depend on the peculiar features of the case—*Chichester* vs *Marquis of Donegal*, L. R., 4 Ch. App., 419. In *Moore* vs. *Craven*, L. R., 7 Ch. App., 95, defendant, who was sued as a hop agent, denied the agency. He was asked to give the names of the persons to whom he had sold; Lord Hatherley, L. C., said: "The Court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but when the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the Court takes into consideration the special circumstances of the case; and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other hand, it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing. Here the question to be decided is agency or no agency. If the agency is proved, the defendant admits that there would be a right to an account. The names and addresses of the purchasers, even if fully set out, would not in any way tend to prove agency. The interrogatory therefore is not material to the issue about to be tried, and the exception must be overruled with costs."

And, on the same grounds as those given in this judgment, a plaintiff will not, as a rule, be granted discovery to which he is not entitled if he is wrong, and which if he wins will follow as of course. Thus, in a case of infringing of trade-marks, defendants, who had sealed up certain parts of entries and letters admitted to relate to the matters in question in the suit, were ordered by the first Court to unseal: (1) the names of customers and of places, and the prices, forming parts of such entries; and (2) the portions of letters and copies of letters which contained the names of the writers and of the persons to whom the letters copied were sent; and (3) the places to and from which the letters were sent; and (4) the description of the marks to be placed, or which had been placed on the goods referred to in such letters: *Held*, on appeal, that they ought not to be compelled to disclose the names of their customers, or the names of the persons to or from whom the letters were sent or received, or any prices, inasmuch

as their discovery might be used in a manner prejudicial to the defendants in their trade, and was not likely to assist the plaintiffs in making out their case at the hearing; the rest of the order was upheld—*Carver* vs. *Pinlo Leite*, L. R., 7 Ch. App., 90; *Bagnall* vs. *Carlyon*, W. N., 1874, p. 215.

Where the question is one of agency, discovery of the alleged agent's private transactions will not be allowed till the first point has been decided—*Great Western Colliery Co.* vs. *Tucker*, L. R., 9 Ch. App., 337; but discovery, though merely useful for the purposes of consequential relief after decree, will, in England, be ordered before decree, unless it be productive of unnecessary hardship on the defendant; thus in a suit for account based on a partnership, defendant was compelled to answer whether he had drawn out partnership moneys on his own account, although he objected to answer before the plaintiff had established the partnership—*Sadll* vs. *Browne*, L. R., 9 Ch., 364; and a mortgagee in possession admitting the mortgage, must answer as regards the state and particulars of the account before decree—*Elmer* vs. *Creasy*, L. R., 9 Ch. App., 69; *West of England Bank* vs. *Nicholls*, 6 C. D., 613; and in a suit for specific performance where the contract was not denied, defendant was compelled to set out the names of the persons to whom he had subsequently let out the premises, to give an account of the rents, and state if the plant was not deteriorating—*Dixon* vs. *Fraser*, L. R., 4 Eq., 497.

Damages.—Where the defendant's object has been to pay money into Court in satisfaction, he will be allowed to interrogate the plaintiff as to the particularity of the damage sustained by him—*Horne* vs. *Hough*, L. R., 9 C. P., 135. See also *Neckram Dobay* vs. *Bank of Bengal*, I. L. R., 14 Cal., 703, where interrogatories as to the way in which the plaintiff had arrived at the amount of damages claimed by him were not allowed.

Foreign Proceedings.—Interrogatories regarding legal proceedings in a foreign country are not material—*Hoffmann* vs. *Postile*, L. R., 4 Ch. App., 673.

Any other like Ground.—No rules have been framed for the guidance of our Courts in discovery, and probably the question may be dealt with subject to the provisions of sections 127 and 131, as if the party interrogated were in the witness-box, and all questions will be allowed which the party interrogated would be bound to answer if he were a witness—*Lychlinski* vs. *Mathy*, 10 C. B., N S., 838; *Hodsoll* vs. *Taylor*, L. R., 9 Q. B., 81; *Lyell* vs. *Kennedy*, 8 App. Cas., 217, p. 234. On this principle a party could plead all the exceptions allowed under the Evidence Act, and interrogatories will be disallowed regarding—(1) Matters of law—*Hoffmann* vs. *Postile*, L. R., 4 Ch. App., 673; (2) the conduct of a party in Court as Judge or Magistrate, or anything which came to his knowledge as such (section 121, Act I, 1872); (3) communications made during marriage, except in a suit between husband and wife (*id.*, section 122); professional communications (section 126); confidential communications with legal advisers (section 129); or matters of State derived from unpublished documents (section 123). See *Gay* vs. *Labouchere*, L. R., 4 Q B. D., 206; *Fisher* vs. *Owen*, 8 C. D., 561.

Objectionable or oppressive interrogatories should be struck out—*Winters* vs. *Dabbs*, W. N., 1876, p. 21. In a suit to set aside an agreement under which a partnership had been dissolved, plaintiff asked defendant to set forth the partnership accounts. The latter answered that the accounts were extensive, and he had no means of setting them out without paying an accountant, which he ought not be compelled to do as plaintiff had access to them: *Held*, a good answer—*Lockett* vs. *Lockett*, L. R., 4 Ch. App., 336.

Time for filing affidavit in answer.

126. Interrogatories shall be answered by affidavit to be filed in Court within ten days from the service thereof or within such further time as the Judge may allow.

Judicature Acts, Order 31, Rule 6. This section applies to H. C. and P.S.C.C., but not to rent-suits in Bengal—Act VIII of 1885, section 148, cl. (*a*).

An affidavit not sworn to before the proper authority may be admitted with the consent of the other side—*Bell* vs. *Turner*, L. R., 17 Eq., 439; *Lyle* v. *Edward*, L. R., 15 Eq., 67; and even if it has not been made on oath, it may be filed under similar circumstances, if certified to by the person before whom it was made—*Bacon* vs. *Turner*, W. N, 1876, p. 292.

The application for further time will not be granted as a matter of course, but should be supported by affidavit—*Brown* vs. *Lee*, 11 Beav., 92; see also *Byng* vs. *Clark*, 13 Beav., 99. For form of order, see *Weston* vs. *Cohen*, W. N., 1869, p. 74.

Procedure where party omits to answer sufficiently.

127. If any person interrogated omits or refuses to answer, or answers insufficiently, any interrogatory, the party interrogating may apply to the Court for an order requiring him to

answer or to answer further, as the case may be. And an order may be made requiring him to answer or to answer further either by affidavit or by *viva voce* examination as the Judge may direct:

Provided that the Judge shall not require an answer to any interrogatory which in his opinion need not have been answered under section 125.

Judicature Acts, Order 31, Rule 10. This section applies to H. C. and P. S. C. C.

If interrogatories are scandalous or in any way an abuse of the Court, the Court may interfere at any stage. In other cases the party interrogated may either omit to answer, or file an affidavit in answer, stating in it his objections to answer such questions as he objects to. Then the course for the interrogating party is to apply under this section for an order requiring the opposite party to answer or to answer further, as the case may be, either *viva voce* or by affidavit—*Mundle* vs. *Biswas*, I. L. R., 5 Cal., 707; 5 C. L. R., 509; *Prem Sukh* vs. *Indronath*, I. L. R., 18 Cal., 420.

Practice.—A party at whose instance interrogatories have been administered must put in the answers as part of his evidence if he wishes to use them at the hearing—*Gosto Behary Pal* vs. *Pal*, I. L. R., 4 Cal., 836; 4 C. L. R., 164.

General Rule.—The general rule is, that the person answering must answer sufficiently—*Bolckow* vs. *Fisher*, 10 Q. B D., 161; *Lyell* vs. *Kennedy*, 27 C. D., 1, p. 16; and that to answer a question substantially is sufficient—*Parker* vs. *Wells*, 18 C. D., 477, p. 487; *Lyell* vs. *Kennedy*, 27 C. D., 1, p. 16. It is not sufficient to answer from his own knowledge; he is bound to speak according to his knowledge, information and belief; if he has none, he should say so. Thus, where a defendant said: "I am personally wholly unacquainted with the facts inquired about by the said interrogations, and am unable to answer any of them from my own knowledge, save in as hereafter appears," the answer was held insufficient—*Minnehaha*, L. R., 3 A. and E., 148. Nor is it a sufficient answer that the questions in issue are not within his own knowledge, but only within the knowledge of his agents or servants, or the agents and servants of the corporation to which he belongs. He is bound to obtain the information from them and answer, unless it would be unreasonable to require him to do so—*Bolckow* vs. *Fisher*, 10 Q. B. D, 161; *Pavitt* vs. *Metropolitan Coy.*, W N., 1883, p. 100; *Southwark Water Co.* vs. *Quick*, 3 Q. B. D., 321; provided he is asked whether he inquired from them or the case is one where that which was done was obviously done in the master's absence, or such as in the ordinary course of business would be done by or be known to his servants or agents—*Ramsbotham* vs. *Shropshire Ry. Co.*, 24 C. D., 110.

Plaintiff company stated that defendants were directors and had sold the company property in which they were interested, and asked for an account of the profits derived by the defendants from the sale. Defendants appeared, and issues were framed. They then refused to answer on the grounds that the company had joined issue, that the pleadings were closed, and that the interrogatories did not refer to any issue raised; but the objections were set aside, and they were ordered to answer fully—*Chesterfield &c.*, vs. *Black*, W. N., 1876, p. 24.

Answers to interrogatories may be insufficient by reason of containing, in addition to the information asked for impertinent or otherwise objectionable matter—*Peyton* vs. *Harling*, L. R., 9 C. P., 9; *Lyell* vs. *Kennedy*, 27 C. D., 1, p. 16.

Corporation.—If a corporation put forward their town clerk to answer, he cannot refuse to answer ont he ground that the information asked was obtained by him as a solicitor in an action—*Mayor, &c., of Swansea* vs. *Querk*, 5 C. P. D., 106.

Power to demand admission of genuineness of documents.

128. Either party may, by a notice through the Court within a reasonable time, not less than ten days before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such document in evidence) the genuineness of any document material to the suit.

The admission shall also be made, in writing signed by the other party or his pleader and filed in Court.

If such notice be not given, no costs of proving such document shall be allowed, unless the Judge otherwise orders.

If such notice is not complied with within four days after its being served, and the Judge thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the result of the suit.

C. L. P. Act, 1854, section 117; Judicature Acts, Order 32, Rule 2. This section applies to H. C. and P. S. C. C.

Notice—No form has been given in the Appendix, but from the form in the English Rules it should run as follows;

In the Court of at

A. B. vs. *C. D.*

Take notice that the plaintiff (or defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant (or plaintiff), his solicitor or agent or vakil at on between the hours of ; and the defendant (or plaintiff) is hereby required within from the last mentioned date to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been: that such as are specified as copies are true copies, and such documents as are stated to have been served, sent, or delivered were so sent, served, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in the cause.

Dated of 18

To E. F., solicitor (or vakil or authorized agent) for defendant (or plaintiff).

G. H., solicitor (or vakil or agent) for the plaintiff (or defendant).

ORIGINALS.

DESCRIPTION OF DOCUMENTS.	DATES.
Deed of covenant A. B. and C. D. first part, and E. F. second part ...	Jan. 1st, 1848.
Indenture of lease of A. B. and C. D. ...	Feb. 1st, 1848.
Indenture of release between A. B., C. D. first part .	Feb 2nd, 1848.
Letter · Defendant to plaintiff	Mar. 1st, 1848.
Policy of insurance on goods by ship *Isabella* on voyage from Oporto to London	Dec. 3rd, 1847.
Memorandum of agreement between C. D., captain of said ship, and E. F.	Jan. 1st, 1848.
Bill-of-exchange for £100 at three months, drawn by A. B. on and accepted by C. D., endorsed by E. F. and G. H.	May 1st, 1849.

COPIES.

DESCRIPTION OF DOCUMENTS.	DATES.	Original or duplicate served, sent, or delivered; when, how, and by whom.
Register of baptism of A. B. in the parish of X	Jan. 1st, 1848.	
Letter. Plaintiff to Defendant ...	Feb. 1st, 1848.	Sent by post, Feb. 2nd, 1848.
Notice to produce papers	Mar. 1st, 1848.	Served, Mar. 2nd, 1848, on defendant's pleader, by E. F. of
Record of a judgment of the Court of , in an action *A.* vs. *I. N.* ...	Jan. 1st, 1840.	
Letters Patent of King Charles II in the Rolls Chapel	Jan. 1st, 1860.	

What Documents it should Contain. — From this form it is evident that notice should be given of *all* documents intended to be used in evidence, whether in possession or otherwise, and even though the opposite party had stated he would not admit them—*Ruther* vs. *Chapman*, 8 M. &. W., 388; *Story* vs. *Houlditch*, 1 Scott's N. R., 211; *Spencer* vs. *Borough*, 9 M. & W., 425; even though it might be doubtful whether the document, for instance, a copy of a deposition or a counter-part, might be legally admissible—*The Cromwell*, L. R., 3 A. & E., 316; *Doe* vs. *Smith*, 8 Ad. & El., 255. Otherwise "no costs of proving such document shall be allowed."

Effect of Admission.—The admission "saving all just exceptions to the admissibility of such document in evidence" does not enable a party to use copies as evidence, without laying a foundation for the secondary evidence by giving notice to the opposite party, &c.—*Sharpe* vs. *Lamb*, 11 A. & E., 805, or prevent the party admitting from objecting on the ground that the document has not been sufficiently stamped—*Vane* vs. *Whittington*, 2 Dowl., N. S., 757; but an admission of a document made by A as agent is an admission of his authority—*Wilks* vs. *Hopkins*, 1 C. B., 737.

Expense of Proving such Documents.—If the party serving notice fails to prove the document, the party refusing to admit will not be made liable for the costs, of the unsuccessful attempt -*Stracey* vs. *Blake*, 7 C. & P., 404; *Doe* vs. *Peters*, 1 C. & K., 279; *Treeman* vs. *Rosher*, 6 D. & L., 517.

Power to order discovery of document.

129. The Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may, at any time before the first hearing, apply to the Court for a like order.

Affidavit in answer to such order.

Every affidavit made under this section shall specify which, if any, of the documents therein mentioned the declarant objects to produce together with the grounds of such objection.

Judicature Acts, Order 31, Rules 12 13. This section applies to H. C. and P. S. C. C., but not to rent-suits in Bengal—Act VII of 1885, section 148, cl. (*a*).

Grounds of Application.—A party must show that he had a *primâ facie* case or show other sufficient cause in support of the application—*Lane* vs. *Gray*, L. R., 16 Eq., 552; *Mostyn* vs. *Western Coal and Iron Company*, W. N., 1875, p. 260, but see p. 230, and W. N., 1876, p. 24; and if it appears that the application is not urgent, and the effect of granting it would be to unduly retard the progress of the suit, it should be refused—W. N., 1875, p. 238. It need not contain mention of any documents, for it is probable that the applicant may not know the documents in his adversaries possession until he gets his affidavits—W. N., 1876, pp. 22, 24.

Any Matter in Question.—As to the procedure in England when a case is referred, see *Penrice* vs. *Williams*, 23 C. D., 353, and compare section 513, *infra*. The meaning of these words is that the document should be evidence upon any issue or which it is reasonable to suppose contains information which *may* either directly or indirectly enable the party requiring the affidavit, either to advance his own cause or damage the case of his adversary—*Compagnie Financiere* vs. *Peruvian Co.*, 11 Q. B. D., 55, p. 63.

How and by Whom Answered.—The party against whom the order issues must describe all his documents in the affidavit, although he asserts that he cannot be compelled to produce the documents—*Rumbold* vs. *Forteath*, 3 K. & J., 44; see also *Evans* vs. *Louis*, L. R., 1 C. P., 656; and the affidavit must be made by the party himself—Wilson, J. (H. Ct., Cal.), Feb. 17, 1879; *Kalian Bibi* vs. *Safdar Husain*, I. L. R., 8 Alla., 265; and where there are several parties all must ordinarily join—*Ryrie* vs. *Sivashankar*, I. L. R., 15 Bom., 7.

Official Liquidator.—In England the Official Liquidator, who is an officer of Court and under its control, cannot be called on to make an affidavit of documents—*In re Mutual Society*, 22 C. D., 714.

Lunatic—Minor.—In one case the next friend of a lunatic plaintiff was ordered to make the affidavit—*Higginson* vs. *Hall*, 10 C. D., 235; but in *Dyke* vs. *Stephens*, 30 C. D., 189, Pearson, J., declined to follow this decision, and refused either to order

the next friend of an infant plaintiff to make an affidavit as to documents or stay the action till he made the affidavit. See also *Waghji* vs. *Khatao*, I. L. R., 10 Bom., 167; and compare *Redfern* vs. *Redfern*, 1 P. D. (1891, 139), p. 146.

Corporation or Foreign State.—Where the party is a corporation or a Foreign Government and cannot make an affidavit, or the affidavit must be made by some person on the party's behalf—*Priolean* vs. *United States of America*, L. R., 2 Eq., 659; *Republic of Liberia* vs. *Roye*, 1 App Cas., 139. See note under section 124, *ante*.

Solicitor.—The order should not issue against the solicitor of the party from whom discovery is demanded—*Cashin* vs. *Craddock*, 2 C. D., 140.

Benames, Suit brought in the name of Another.—The plaintiff on the record must make discovery—*Wilson* vs. *Raffalovich*, 7 Q. B. D., 553.

Affidavit.—The affidavit should be in the following form with such variations as circumstances may require;

In the Court of at

A. B. vs. *C. D.*

I, the above-mentioned C D., make oath and say as follows:

1. I have in my power or possession the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto.

3. That (*here state upon what grounds the objection is made, and verify the facts as far as may be for the party must make the discovery, although he asserts that he cannot be compelled to produce—Rumbold* vs. *Forteath*, 3 K. & J., 44; *Lazarus* vs. *Mosely*, 5 Jur., N. S., 1110; *Nicholl* vs. *Jones*, 13 W. R., 451.)

4. I have had, but have not now, in my possession or power (*i.e.*, sole, not joint, possession—*Kearsley* vs. *Philips*, 10 Q. B. D., 465, and "CONTROL OR POSSESSION," section 130, *post*), the documents relating to the matter in question in this suit set forth in the second schedule hereto. (*Merely stating "I have not &c.," is insufficient, the party must state what he has had in his power*, W. N., 1876, p. 38.)

5. The last-mentioned documents were last in my possession or power on (*state when*).

6. That (*here state what has become of the last-mentioned documents, and in whose possession they are now.*)

7. According to the best of my knowledge, information and belief, I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my solicitors, pleaders or agents, solicitor, pleader or agent, or in the possession, custody or power of any other persons or person on my behalf (*possession of the agent is possession of the party—Reid* vs. *Langlois*, 14 Jur., 467; *Morice* vs. *Swaby*, 2 Beav., 500, &c.), any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of, or extract from, any such document or any other document whatsoever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

Objection Affidavit.—In England, a party seeking discovery must, as a general rule, rest on the affidavit; he cannot cross-examine upon it, nor adduce evidence to contradict it; neither can he do this in another form, namely, by administering general interrogatories — *Hall* vs. *Truman*, 29 C. D., 307; *Nichorel* vs. *Wheeler*, 17 Q B. D., 161. If he can show from the pleadings, the affidavit itself, or from the documents therein referred, that other documents exist in his possession or power which are material or relevant to the suit, the Court may compel him to make a further affidavit, but not otherwise—*Wright* vs. *Pitt*, L. R., 3 Ch. App., 809; *Noel* vs. *Noel*, 1 D. J. & S., 468; *Kenelly* vs. *Wyman*, I. L. R., 1 Cal., 178; *Jones* vs *Monte Video Co.*, 5 Q. B. D., 556; *Ross* vs. *Dublin Tram Co.*, L. R. Ir., 8 Q. B. D., 213; at the same time the party is not without other remedies. If the affidavit is not verified by the party in the cause—*Kalian Bibi* vs. *Safdar Husain*, I. L. R., 8 Alla., 265, or does not give a distinct description of the documents, he can take out a summons to consider the sufficiency—*Lazarus* vs. *Mosely*, 5 Jur., N. S., 1110; *Oriental Bank* vs. *Brown*, I. L. R., 12 Cal., 265; see *Ryris* vs. *Shivashankar*, I. L. R., 15 Bom., 7; and further, if the Court is satisfied that material documents not mentioned are in the deponent's possession, he will be compelled to make a further affidavit—*Sault* vs. *Browne*, L. R., 17 Eq., 402; *Compagnie Financiere* vs. *Peruvian Co.*, 11 Q. B. D., 55; and if he does not do so his case may be decided under section 136, *post*—*Kalian Bibi* vs. *Safdar Husain*, I. L. R., 8 Alla., 265; or he may interrogate as to specific documents or state specific facts material to his case, and ask the party if he has any documents relating to those specific facts or events, but he cannot administer general interrogatories — *Hall* vs. *Truman*, 29 C. D., 307; but see *Morris* vs. *Edwards*, 15 App. Cas., 309. And see *Att.-Gen.* vs. *Emerson*, 10 Q. B. D., 191; *Bewicke* vs. *Graham*, 7 Q. B. D., 400, where the party making the affidavit admitted possession of certain documents, but objected to produce them on the ground that they related to and supported his own case solely. See also *Oriental Bank* vs. *Brown*, I. L. R., 12 Cal., 265.

Where a defendant after answer has obtained an affidavit as to documents in the common form, and he finds the common form is not sufficiently pointed to obtain

discovery as to particular matters, he can file a concise statement of them with interrogatories, and it will be no answer for the other side to say that some of the matters given in the specific statement were comprised in, or that they were all referred to, in the answer, andt hat the first affidavit was sufficient—*Newall* vs. *The Telegraph Construction Company*, L. R., 2 Eq., 756.

Co-Plaintiffs, Co-Defendants.—Discovery of documents and inspection may be allowed to a plaintiff, from a co-plaintiff, or a defendant to a co-defendant if there are rights which have to be adjusted between them in the suit—*Shaw* vs. *Smith*, 18 Q. B. D., 193. See also *Brown* vs. *Watkins*, 16 Q. B. D., 125.

Power to order production of documents during suit.

130. The Court may, at any time during the pendency therein of any suit, order the production by any party thereto of such of the documents in his possession or power relating to any matter in question in such suit or proceeding as the Court thinks right; and the Court may deal with such documents when produced in such manner as appears just.

Judicature Act, Order 31, Rule 11. This section applies to H. C. and P. S. C. C.

Discretion.—A Court has no discretion to refuse production unless the documents are privileged—*Wallace* vs. *Jefferson*, I. L. R., 2 Bom., 453.

At any Time.—A party who has obtained privately, by interrogatories, or in the manner laid down in the last section, knowledge of the documents in the hands of his adversary, may proceed under this section to enforce their production. The application may be made at any time even in appeal—*In re National Funds Assurance Company*, W. N., 1876, p. 192; but not except in peculiar cases, before plaintiff has filed his written statement if the defendant has been served with a concise statement instead of a copy of the plaint—*Cashin* vs. *Craddock*, 2 C. D., 140; compare the remarks of Bowen, L. J., in *Elder* vs. *Carter*, 24 Q. B. D., 194, p. 201.

Against Whom to Issue.—The order must be made by the Court—*In re Leigh's Estate*, W. N., 1876, p. 266; and should not issue against any person not a party; not even a party's solicitor—*Cashin* vs. *Craddock*, 2 C. D., 140; nor is a verbal order to a pleader sufficient—*Doorgamonee Dassee* vs. *Benode Monee*, W. R., 1864, p. 164; and if a person having no interest in the suit has been made a party to obtain production of documents, he should apply to have his name struck out of the record as soon as possible. The order for production will not be made unless the Court is satisfied that the documents are essential to the party's suit, *at the time they are applied for* (*id.*); and if the discovery in such as might be prejudicial to the defendant irrespective of the suits, the Court will look narrowly to the question whether there is a reasonable prospect of its being of material service to the plaintiff at the hearing. But if the document is material, it must be produced unless it is privileged.

Relevancy how Decided.—In England, the general rule is that, as to relevancy the Court accepts the statement of the party from whom production is required, if he swears that to the best of his knowledge, information and belief, the documents called for do not contain anything impeaching his case, or supporting or material to the case of the other party—*Minet* vs. *Morgan*, 8 L. R., Ch. App., 361; but see *Att.-Gen.* vs. *Emerson*, 10 Q. B. D., 191; and *Emmerson* vs. *Ind.*, 33 C. D., 323. How far this rule will be carried out in our Courts, it is impossible to say; but in the absence of any settled practice it might be well to follow the rule laid down in section 162 of the Evidence Act, which empowers the Judge to decide any question of production or admissibility. In the Equity Courts when documents are material, the person interrogated may seal up such parts as he swears are privileged—*Talbot* vs. *Marshfield*, 1 L. R., Eq., 6; and his affidavit will prevail unless there is such an inconsistency on the record as leads to the belief that the affidavit is not true—*Greenwood* vs. *Greenwood*, 6 W. R., 119; *Parnell* vs. *Wood*, 1 P. D. (1892), 137. In the High Court when the right of a party producing documents, to seal certain portions of them is contested, the Court appoints an officer to whom the plaintiff states in confidence why he wants to inspect any portion of the documents sealed, and the officer after looking at the documents reports whether and in what way the part sealed or desired to be sealed is material to the case of the other party—*Heeralall Rukhit* vs. *Ram Surun*, I. L. R., 4 Cal., 835. And see section 162 of the Evidence Act. See the note under section 125 and "OBJECTION TO AFFIDAVIT," section 129, *supra*.

Privilege.—A Judge has no discretion as to refusing to allow the production of documents in possession of a party to the suit relating to the matter in issue unless they are privileged—*Wallace* vs. *Jefferson*, I. L. R., 2 Bom., 453. The law as regards

privilege will doubtless follow the Evidence Act; and if so, it is probable that production of the following documents will not be enforced.

1. Documents connected with a party's conduct as Judge or Magistrate in Court, or anything which came to his knowledge in Court as such (section 122).

2. Communications made during marriage, except in suits between husband and wife (section 122).

3. Unpublished documents of State (section 123).

4. Official correspondence where the public interests would suffer by the disclosure (section 124).

5. Documents containing information concerning commission of an offence given to a Magistrate or Police Officer (section 125).

6. Professional communications (section 126), of a confidential or private nature—*Mamon Hajee Haroon Mahammad* vs. *Moulvi Abdul Karim*, I. L. R., 3 Bom., 91; and see *Ryrie* vs. *Shivashankar*, I. L. R., 15 Bom., 7. The law on this point in England is as follows:—

Confidential Communications—Statements prepared in view of Litigation.—Documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a *bonâ fide* intention of being laid down before him for the purpose of taking his advice—*Southwark Water Co.* vs. *Quick*, 3 Q. B. D., 315. See *Anderson* vs. *Bank of Columbia*, 2 C. D., 644; *Bustros* vs. *White*, 1 Q. B. D., 423; *Wheeler* vs. *Le Merchant*, 17 C. D., 675; *Mason* vs. *Cattley*, 22 C. D., 609; and *Bipro Doss Dey* vs. *The Secretary of State for India*, I. L. R., 11 Cal., 655; *Ryrie* vs. *Shivashankar*, I. L. R., 15 Bom., 7, where the documents were held not privileged. They were held to be privileged in *Munchershaw* vs. *New Dhurumsey Weaving Co.*, I.L.R., 4 Bom., 576; *Lyell* vs. *Kennedy*, 27 C. D., 1; and *Nordon* vs. *Defries*, 8 Q. B. D., 508; *Ryrie* vs. *Shivashankar*, I. L. R., 15 Bom., 7. In *Young* vs. *Holloway*, 12 P. D., 167, the plaintiff and her solicitor and counsel received anonymous letters regarding (and relevant to) a pending suit; privilege was refused in regard to the letters received by the plaintiff herself, but allowed in regard to the others. And where a dispute arose between the plaintiff corporation and the defendant which it was contemplated might lead to litigation, the minutes of a Committee of the Corporation to whom the matter was referred were held to be privileged—*Mayor and Corporation of Bristol* vs. *Cox*, 26 C. D., 678, notwithstanding the defendant was a rate-payer.

Trustees and Companies.—The beneficial owner in a suit against his trustee and a rate-payer in a suit against the Corporation are in a better position than ordinary parties—*Postlethwaite* vs. *Rickman*, 35 C. D., 722; *Corporation of Bristol* vs. *Cox*, 26 C. D., 678, p. 683.

Correspondence with Solicitors.—Also all correspondence between a party or his predecessors in title and their solicitors as such, with respect to questions connected with the matters in dispute in the suit, although made before any litigation was in contemplation—*Minet* vs. *Morgan*, L. R., 8 Ch. App., 361; *Thomas* vs. *Rawlins*, 27 Beav., 140; *Wheatley* vs. *Williams*, 1 Mees. & W., 533; *Carp Mail* vs. *Powis*, 1 Phil., 686; *Baron* vs. *Baron*, Weekly Notes, 1876, p. 96: and a letter written by the solicitor of two plaintiffs to the solicitor of a third plaintiff is within the rule—*Kay* vs. *Poorunchand Poonalal Javherry*, I. L. R., 4 Bom., 631; and so is advice received with reference to these communications—*Ryrie* vs. *Shivashankar*, I. L. R., 15 Bom., 7. But privilege attaches only to statements made in professional confidence and in the legitimate course of professional employment of the solicitor, and communications made for the purpose of being guided in the commission of an offence, are not privileged—*Queen* vs. *Cook*, 14 Q. B. D., 153; and no privilege exists, where a person is charged with fraud, as regards communication between himself and his solicitor on this subject—*Gartside* vs. *Outram*, 26 L. J. (Ch.), 113; *Postelthwaite* vs. *S. C. Reckman*, 35 C. D., 722; *R.* vs. *Cox*, 14 Q. B. D., 153. So where a suit for specific performance was resisted on the ground of fraud and misrepresentation of the value of the property, inspection of plaintiff's title-deeds and accounts was allowed—*Sutherland* vs. *Singhee Churn*, I. L. R., 10 Cal., 808.

And see in regard to communications with muktars—the case of the *Queen* vs. *Chunderkant*, 1 B. L. R., Cr., 8.

Agent.—Nor does privilege attach to a statement made by one party against another when the communications were made on behalf of them all—*Reynell* vs. *Sprye*, 10 Beav., 51; *Tugwell* vs. *Hooper*, 10 Beav., 348; and no privilege at all attaches unless the communication is of a professional or quasi-professional nature, *i.e.*, a communication made by the party's solicitors, or by an agent in consequence of their suggestion. Thus a letter written by an agent direct on the subject-matter is not privileged—*Bustris* vs. *White*, 1 Q. B. D., 139, even though marked private and confidential—*Hopkinson* vs. *Lord Burleigh*, L. R., 2 Ch. App., 477, and after litigation was highly probable—*Anderson* vs. *Bank of Brit. Columbia*, 2 C. D., 644; *Wallace* vs. *Jefferson, Jr.*, I. L. R., 2 Bom., 453. So letters written between two servants but not with the purpose of being communicated to a solicitor are not privileged—*Bipro Dass* vs. *The Secretary of State*, I. L. R., 4 Cal., 655; and see *Ryrie* vs. *Shivashankar*, I. L. R., 15 Bom., 7.

Mortgage.—A mortgagee is bound to produce the mortgage-deed, but not the title-deeds, for the inspection of the mortgagor—*Patch* vs. *Ward*, L. R., 1 Eq., 436; but when the time for redemption is passed, and the mortgage is not impugned, if the mortgagor wants to see the deed, his title to redeem being admitted, he must pay the principal, interest and costs before production—*Chichester* vs. *Marquis of Donegal*, L. R., 5 C. D., 502. Compare section 130 of the Evidence Act, which refers only to witnesses, but probably the same rule would hold in our Courts.

In a redemption-suit by a second mortgagee against the first mortgagee, the defendant is bound to state in answer to interrogatories not only the amount due upon his security, but also what securities he holds for his debt—*West of England and South Wales Bank* vs. *Nicholls*, 6 C. D., 613.

Ejectment.—In an action of ejectment the defendant cannot protect himself from discovery on the ground that he is a *bonâ fide* purchaser for value without notice—*Emerson* vs. *Ind.*, 33 C. D., 323.

Waiver of Privilege.—Where documents are privileged, the fact that portions of them have been read to the plaintiff's solicitor by the solicitor of the defendant does not amount to waiver of privilege as regards the parts not read; but in regard to the parts read plaintiff's solicitor may be called as a witness and compelled to state in evidence what took place at the meeting including the substance of the portions read by him—*Kay* vs. *Poorunchand Poonalal Jaeherry*, I. L. R., 4 Bom., 631.

Control or Possession.—There is no power to compel a party to produce documents not in his control or possession. A, the owner of a ship and cargo, insured it, and then sold the cargo and freight to B. The ship was lost, and C, the broker, sued on behalf of B. A also sued for the insurance money. *Held*, C's action could not be stayed until he produced an affidavit of documents in A's possession—*Fraser* vs. *Burrows*, W. N., 1877, p. 76.

Joint Possession.—By possession is generally meant exclusive possession; production cannot be enforced of documents in joint possession of the party and a third person not joint in the suit—*Hadley* vs. *McDougall*, L. R., 7 Ch. App., 312, if the joint possession is proved to the satisfaction of the Court—*Bovill* vs. *Cowan*, 5 Ch. App., 495; *Kearsley* vs. *Philips*, 10 Q. B. D., 36, 465; compare *Carew* vs. *Carew*, P. D. (1891), 360. And see form of affidavit, section 129, *ante*. As to deeds in the custody of the Court, see *Vivian* vs. *Little*, 11 Q. B. D., 370.

Agent.—Possession of the agent is possession of the principal, and production will be enforced of document held by the solicitor or agent of a party exclusively for his principal—*Reid* vs. *Langlois*, 1 Mac. & G., 627; *Edmonds* vs. *Lord Foley*, 30 Beav., 282. See section 131 of the Evidence Act.

Solicitor's Lien.—A solicitor cannot refuse to produce such documents as are necessary in an administration suit, or in winding up a company, on the ground that he has a lien on them for costs—*In re Capital Fire Insurance Co.*, 24 C. D., 408.

Practice.—By section 163 of the Evidence Act, when a party calls for a document, and such document is produced in Court and inspected, the party producing it can compel him to put it in evidence; and by section 164, if a party refuse to produce, he cannot afterwards use it in evidence without the consent of the party calling for it.

Revision.—An order under this section is not open to revision and can only be impeached in appeal from the decree—*In re The Nizam of Hyderabad*, I. L. R., 9 Mad., 253.

Notice to produce for inspection documents referred to in plaint, &c.

131. Any party to a suit may at any time before or at the hearing thereof give notice through the Court to any other party to produce any specified document for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof.

Consequence of non-compliance with such notice.

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such

document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

Judicature Acts, Order 31, Rule 14. See Evidence Act, section 164. This section applies to H. C. and P. S. C. C.

Form of Application.—See section 134, *post*, and Schedule IV, No. 124, *infra*.

Specified.—That is specified in the plaint or pleadings. See marginal-note.

At any time before Hearing.—There seems to be a distinction between the right to production of documents specified in the plaint or pleadings, and a general application for discovery of documents relating to the matters in question in the action and the order to produce documents mentioned in the pleadings should be granted early in the case even before the person asking for it has filed a written statement—*Quilter* vs. *Heatly*, 23 C. D., 43.

To Whom Inspection will be Given.—In an action by a foreign principal to compel the production of accounts by his agent, the Court refused to order the defendant to give inspection to an agent of the plaintiffs to whom the defendant had shown a reasonable ground of objection—*Dadswell* vs. *Jacobs*, 34 C. D., 278, p. 282.

Contempt.—If the particular agent appointed to inspect attempted to use the knowledge he obtained by that inspection for any purpose other than the purposes of the action, he would be guilty of contempt, and on proper application, the Court would punish him—*Dadswell* vs. *Jacobs*, 34 C. D., 278, p. 282.

Party of Pleader.—This would probably include a party, his authorized agent, his pleader, or his solicitor—*Williams* vs. *Prince of Wales' Ass. Co.*, 23 Beav., 338; see *In re Credit Company*, 11 C. D., 356; but not a co-defendant—*Barbley* vs. *Barbley*, 1 Drew., 233, nor a relative—*Summerfield* vs. *Pritchard*, 17 Beav., 9. And when mere inspection of the party or his pleader without the assistance of persons possessed of a professional knowledge would be useless, a special application showing the grounds on which it is based should be made—*Swansea Vale Railway Co.* vs. *Budd*, L. R., 2 Eq., 274; *Lindsay* vs. *Gladstone*, L. R., 9 Eq., 132.

In Evidence—See *Dhapi* vs. *Ram Pershad*, I. L. R., 14 Cal., 768.

Sufficient Cause.—See *Webster* vs. *Whewall*, 15 C. D., 120; *Quilter* vs. *Heatly*, 23 C. D., 42.

His Own Title.—See notes under sections 125, 130, *supra*, and *Sutherland* vs. *Singhee Churn Dutt*, I. L. R., 10 Cal., 808. And as to the sufficiency of the affidavit, see *Roberts* vs. *Oppenheim*, W. N., 1884, p. 52; *Roberts* vs. *Oppenheim*, 23 C. D., 724.

If the party on whom the notice is served should answer in the manner prescribed in section 132, he should object to produce such documents as he considers he ought not to produce, leaving his adversary to get an order for inspection under section 133.

Party receiving such notice to deliver notice when and where inspection may be had.

132. The party to whom such notice is given shall, within ten days from the receipt thereof, deliver through the Court to the party giving the same a notice stating a time within three days from such delivery at which the documents, or such of them as he does not object to produce, may be inspected at his pleader's office or some other convenient place, and stating which, if any, of the documents he objects to produce, and on what grounds.

Judicature Acts, Order 31, Rule 16. This section applies to H. C. and P. S. C. C.

Ten Days.—As to when time begins to run, see *Dhapi* vs. *Ram Pershad*, I. L. R., 14 Cal., 768, 777; and see the same case for the remedy of the opposite party in case notice is given under this section.

Convenient Place.—When parties enter into a contract intending that it should be performed at or near the place where the party to perform it carries on his principal business and keeps his books, then if general inspection of these books be sought in an action brought against that party, it should ordinarily, if the defendant requires it, be taken at the place where he keeps his books—*Kevaldas Sakarchand* vs. *Pestonji*, I. L. R., 5 Bom., 467.

133. If any party served with notice under section 131 omits to give notice under section 132 of the time for inspection, or objects to give inspection, or names an inconvenient place for inspection, the party desiring it may apply to the Court for an order of inspection.

Application for order of inspection.

Judicature Acts, Order 31, Rule 17. This section applies to H. C. and P. S. C. C.
No order will be granted unless notice has been served under section 131—*Mohendro Nath* vs. *Ishan Chunder*, I. L. R., 10 Cal., 56. And see *Dhapi* vs. *Ram Pershad*, I. L. R., 14 Cal., 768.

Objects.—See note under section 134, *supra*.

134. Except in the case of documents referred to in the plaint, written statement or affidavit of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing (*a*) of what documents inspection is sought, (*b*) that the party applying is entitled to inspect them, and (*c*) that they are in the possession or power of the party against whom the application is made.

Application to be founded on affidavit.

Judicature Acts, Order 31, Rule 18. This section applies to H. C. and P. S. C. C.
This section only gives a right to such documents as the party has a *primâ facie* right to inspect, and does not enlarge the ordinary rule—*Mullock* vs. *Heath*, W. N., 1875, p. 291.
Discovery and interrogatories stand on a different ground from inspection. And an affidavit of the opposing party is not conclusive as to the possession of the document of which inspection is sought—*Wideman* vs. *Walpole*, 24 Q. B. D., 537, but see this case in appeal—*id.*, 626.

135. If the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, and if the Court is satisfied that the right to such discovery or inspection depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any such issue or question should be determined before deciding upon the right to the discovery or inspection, the Court may order that the issue or question be determined first and reserve the question as to the discovery or inspection.

Power to order issue or question on which right to discovery depends to be first determined.

Judicature Acts, Order 31, Rule 19. This section applies to H. C. and P. S. C. C.

Determination of any Issue.—The object of this section is to give the Court (before the hearing of the case) the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence to be used at the trial. The cause should be heard by the Judge who decides this issue—*Ahamedbhoy* vs. *Vullee bhoy*, I. L. R., 6 Bom., 572. It is usual to proceed on summons—*id.*, 703, p. 705.
For examples of cases tried in England under a corresponding rule, see *Rowcliffe* vs. *Leigh*, 6 C. D., 256; *Sheward* vs. *Lord Lonsdale*, 5 C. P. D., 47; *Parker* vs. *Wells*, 18 C. D., 477; *Leitch* vs. *Abbott*, 31 C. D., 374. See "MATERIAL TO THE SUIT," section 125, *ante*.

136. If any party fails to comply with any order under this chapter, to answer interrogatories or for discovery, production or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered ;

Consequences of failure to answer to or give inspection.

and the party interrogating or seeking discovery, production or inspection may apply to the Court for an order to that effect, and the Court may make such order accordingly.

Any party failing to comply with any order under this chapter, to answer interrogatories or for discovery, production or inspection, which has been served personally upon him, shall also be deemed guilty of an offence under section 188 of the Indian Penal Code.

Judicature Acts, Order 31, Rule 20. This section applies to H. C. and P. S. C. C.

Any Order.—No action can be taken under this section until an order has been passed under section 127, *ante*—*Prem Sukh* vs. *Indronath*, I. L. R., 18 Cal., 420. Overruling *Lalla Dabee* vs. *Santo*, I. L. R., 10 Cal., 505.

A case will not be dismissed or a defence struck out unless as a last resort—W. N., pp. 201-2; and unless the Court is satisfied that the party called on is avoiding making fair discovery—*Wilson* vs. *Raffalovich*, 7 Q. B. D., and if the parties concerned are purdanashin ladies, this should be taken into account—*Kalian Bibi* vs. *Safdar Husain*, I. L. R., 8 Alla., 266; but where defendant failed to answer interrogatories, and was allowed another week and again failed, Quain, J., said that the rule was inserted purposely to prevent procrastination, and made an order to strike out the defence unless the answer were filed within twenty-four hours — *Twycroft* vs. *Grant*, W. N., 1875, p. 229. See also *Khajah Assenoolla* vs. *Abdool Azeez*, I. L. R., 9 Cal., 923.

A and his wife B, trading under the name of Barrow & Co., sued C, who served them with an order for production; B alone made an affidavit of documents, A having meanwhile absconded. On an application to dismiss the suit, the Vice-Chancellor held that this section did not make it imperative to dismiss the suit and allowed B, the wife, to carry on the case—*Hartley* vs. *Owen*, W. N., 1876, p. 193.

The party against whom the order is passed can apply to have it set aside—*Khajah Assenoolla* vs. *Abdool Azeez*, I. L. R., 9 Cal., 923.

Joint Possession.—See *Carew* vs. *Carew*, 1 P. D. (1891), 360.

Practice.—It is not necessary that the order should be served before taking action—*Farden* vs. *Richter*, 23 Q. B. D., 124. On motion for attachment, see *Thomas* vs. *Palin*, 21 C. D., 360

Contempt.—In the High Court a party disobeying an order for inspection and discovery is also liable to be committed for contempt—*Hassonbhoy* vs. *Cowasji*, I. L. R., 7 Bom., 1; *Navivahoo* vs. *Naratam Das*, I. L. R., 7 Bom., 5.

Appeal —A decree under this section is appealable. It is not an *ex-parte* decree within the meaning of section 108, *ante*—*Chuni Lal* vs. *Chamman*, I. L. R., 7 Alla., 159.

Revision.—An order under this section may be open to revision under section 622, *infra*.—*Dhapi* vs. *Ram Pershad*, I. L. R., 14 Cal., 768.

137. The Court may of its own accord, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Court may send for papers from its own records or from other Courts.

Every application made under this section shall (unless the Court otherwise directs) be supported by an affidavit of the applicant or his pleader, shewing how the record is material to the suit in which the application is made. and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

Nothing contained in this section shall be deemed to enable the Court to use in evidence any document which under the Indian Evidence Act, 1872, would be inadmissible in the suit.

Act VIII of 1859, section 138, Ind. Jur., N. S., 283. This section applies to H. C. and P. S. C. C.

This section applies to Appellate Courts.—*Juggernath* vs. *Syud Mahomed*, 15 W. R., 173.

In its Discretion—The Court is not now bound to send for a record. In exercising the discretion allowed him, a Judge should first determine whether the document required is the record of a suit or proceeding in *another* Court: he cannot send for official papers to a public office as he could under the old law—*Juggernath* vs. *Syud Mahomed*, 15 W. R., 173; and apparently the only means of enforcing the production of such documents is by summons on the proper officer—*Sobbee Jha* vs. *Shosheenath*, 15 W. R., 150. Then he should see whether the applicant has exhausted the other means he might have had of obtaining the document he requires. He should not, however, refuse the application merely because in his opinion the document cannot be produced before the termination of the trial—*Krishna Churn* vs. *Protab Chunder*, I. L. R., 7 Cal., 560. Plaintiff appealed on the ground that the Lower Court had erred in not sending for original documents filed in another suit which were essential to his case since copies could not be attested by the subscribing witnesses; it was held that he should have applied under section 126, Act VIII of 1859, to the Court in possession of the document to have them returned, on depositing, if necessary, properly attested copies with the record, before he applied under this section—*Louis Coraah* vs. *Gooroo Churn*, 18 W. R.,13.

Quære.—Is the Court of Wards a Court under this section?—*Sobbee Jha* vs. *Shosheenath*, 15 W. R., 150.

Form of Order.—A Judge should pass a distinct order on the application: the words "nuthishamel pesh" are not sufficient—*Romun Kishen* vs. *Shaikh Kadir*, 6 W. R., 79; for, if the documents are important and there is nothing on the record to show that the application has been refused or the documents have been sent for and considered, the case may be remanded—*Ram Runjun* vs. *Gopee Bullub*, 18 W. R., 127.

Appeal.—But where A petitioned the Court to send for certain documents, and an order was made that the matter should be decided at the hearing, and no further application was made: *Held*, the applicant was not entitled to appeal on the ground that the record had not been sent for—*Chundi Churn* vs. *Doorga Persad*, 12 C. L. R., 81.

Admissibility—The Judge sending for the record cannot use in evidence documents inadmissible under the Evidence Act—*Narappa* vs. *Gapaya*, 2 Bom., 341; nor need he send for the whole record, but only such papers as are contained in the application—*Janokee Bebee* vs. *Shah Habeebul*, W. R., 1864, p. 272: and in all cases the party for whose benefit the documents have been used should be required to file copies on the record—*Narappa* vs. *Gapaya*, 2 Bom., 341.

Power to Refuse.—A Court has no discretion to refuse to send records which have been demanded under this section—*In the matter of Golap Coomary*, 4 C. L. R., 36.

Documentary evidence to be in readiness at first hearing.

138. The parties or their pleaders shall bring with them and have in readiness at the first hearing of the suit, to be produced when called for by the Court, all the documentary evidence of every description in their possession or power, on which they

intend to rely, and which has not already been filed in Court, and all documents which the Court at any time before such hearing has ordered to be produced.

This section applies to H. C. and P. S. C. C.

Scope of Section.—By section 59, *supra*, if plaintiff sues or relies on a document he must either produce it with his plaint, or enter it in the list attached to it. By section 63, any document which has not been produced or entered, cannot be received in evidence without leave of the Court—See *Promsook Chunder* vs. *Rajkisto Mitter*, 1 Hyde, 145; *Roshun Jehan* vs. *Inayut Hossein*, Marsh., 127; and by this section the parties must bring with them and have in readiness at the first hearing all the documentary evidence within their power and on which they rely, and file it, if called on, after the issues have been settled. If not called on they are not bound to file it then—*Mahbub Hossein* vs. *Patasu*, 1 B. L. R., 120. But if, during the course of a trial, something new were brought to light, and any additional issues were framed, the parties would not be entitled to shut out good and valuable evidence of whose genuineness there could be no doubt, merely because the other parties had, without good and assignable cause, abstained from bringing it before the Court on the first hearing—*Ikram Hossein* vs. *Ram Lochun*, 23 W. R., 29. So a Court may receive in evidence a document not filed with the plaint on being satisfied of its genuineness even though unstamped—*Attaullah Mundle* vs. *Saksooddeen Tarufdar*, W. R., 1864, p. 271.

"**In their Possession or Power**"—The corresponding section of Act VIII of 1859 (section 128) did not contain these limiting words. It ran as follows: "No documentary evidence of any kind which the parties or any of them may desire to produce, shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shewn to its satisfaction for the non-production thereof at the first hearing." On that section the High Court of Calcutta issued the following circular:

"This hearing, it will be observed, is the defendant's first opportunity (and the last, unless good cause be shewn) for production of documentary evidence. It is also an opportunity (and the last, unless good cause be shewn) for the plaintiff, with the sanction of the Court, to produce any documents which he may not have produced in Court with his plaint.

"A plaintiff occasionally has to prove his case, or a defendant to substantiate his defence to a suit, by documents in the possession or power of some other party to the suit, which documents of course cannot be produced by the party whose case they are to serve.

"When this is the position of the plaintiff, he may, under section 40 (and ordinarily he ought), 'at the time of presenting the plaint, deliver to the Court a description of the document, in order that the defendant may be required to produce the same;' when this is done, the summons (*vide* section 43) is to 'order the defendant to produce any written document in his possession or power, of which the plaintiff demands inspection, or upon which the defendant intends to rely in support of his defence; and where the production of such document is required by a defendant, or when the demand has not been made under sections 40 and 43 on the part of the plaintiff, section 107 provides that 'he shall at the earliest opportunity deliver to the Court two notices in writing to the party in whose possession or power he believes the document, writing, or other thing to be, calling upon him to produce the same; and one of such notices shall be filed in Court, and the other shall be delivered by the Court to the nazir or other proper officer to be served upon such party.'

"When such notices have been served within a reasonable time before the hearing of the suit, the party served is required by section 128 to produce the documents therein specified at the hearing.

"A party to the suit, or any other person, may also be summoned to produce a document (section 153) if necessary, and the Court has power, under section 170, to deal with persons being parties to the suit who fail to comply with orders to produce documents.

"It follows from these several sections that documentary evidence is to be produced in open Court; that it must be produced at the earliest opportunity, and not afterwards without the special sanction of the Court, or without good cause shewn; and that, where the production of such evidence rests with a party other than the party requiring it the Court is bound, on application made to it in reasonable time, to afford its aid in enforcing the production of such evidence, and it is the duty of all Judges to take care, as far as their Courts are concerned, that these principles are observed."—7 W. R., Civ. Cir., 4; approved of in *Brojosoondery Debea* vs. *Luchmee Koonwaree*, 20 W. R., 95.

Appeal.—The mere admission of further evidence after the first hearing is not a good ground for appeal—*Goshain Tola Ram* vs. *Rickmunee*, 12 W. R. (P. C.), 32; nor can an Appellate Court reject evidence admitted by the first Court, simply on that ground—*Minakshi* vs. *Velu*, I L. R., 8 Mad., 373; and see *Bhoom Narain* vs. *Kurmoon*, 1 W. R., 198. See also note under section 63, *ante*.

139. No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of section 138, shall be received at any subsequent stage of the proceedings unless good cause be shewn to the satisfaction of the Court for the non-productiont hereof, and the Judge receiving any such evidence shall record his reasons for so doing.

Effect of non-production of documents.

Act VIII of 1859, section 128. This section applies to H. C and P. S. C. C.

The parties are not entitled to adduce fresh documentary evidence after the issues in the case have been settled, if it has been in their power or possession ; but they may tender it subsequently, stating the grounds upon which it was not tendered at an earlier stage, and it remains for the Judge to admit or reject the application. In either case the grounds on which he acts should be stated on the record and must be so stated if the evidence is received—*Watson & Co.* vs. *Kunhye*, 9 W. R., 294. In dealing with applications under this section, it should be borne in mind that the main object of it is to prevent the fabrication of evidence during the trial, to meet those unexpected questions which sometimes arise, that it is limited to documents within the power or possession of the parties, and that it never was intended to allow, without leave, the production of any more documentary evidence than had been already filed at the first hearing—*Gour Hures* vs. *Pran Hures*, 21 W. R, 42. But the Court should call upon the parties to produce, or else the *stringent* terms of the following sections will not be enforced. Where a party who had not been called on by the Court, tendered documentary evidence the day after the issues had been framed, and there was nothing in the statement drawn up when fixing the issues shewing that any documents had been called for, it was held the evidence should have been received—*Mahbub Hossein* vs. *Patasu*, 1 B. L. R., 127.

140. The Court shall receive the documents respectively produced by the parties at the first hearing:

Documents to be received by Court.

Provided that the documents produced by each party be accompanied by an accurate list thereof prepared in such form as the High Court may from time to time direct.

The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Rejection of irrelevant or inadmissible documents.

Act VIII of 1859, section 129. This section applies to H. C. and P. S. C. C.

Reject.—The Judge, having called on the parties to produce their documentary evidence, must receive every document tendered by the parties; and, having inspected them, return such as he considers evidently irrelevant or inadmissible—*Roshun Jehan* vs. *Inayut Hossein*, Marsh., 127; or, if for want of time he is unable to inspect or consider them, he may allow them to be filed, and inspect and reject them afterwards—*Soodukhina* vs *Raj Mohan*, 11 W. R., 350. The documents retained by the Court cannot be used in evidence or put on the record until properly proved or admitted as provided in section 141, *infra*.

Where Sanction is Necessary.—Where anything must be done to obtain a document, it must be done by the party requiring it. Thus the party, and not the Court, must obtain the sanction of Government to an officer in the Telegraph Department producing a copy of a message that passed through his office—*Lekhraj* vs. *Pale Ram*, 2 Alla., 210.

Appeal.—No appeal lay from an order rejecting documents, nor can it be interfered with under the Charter Act—*In the matter of Erskine*, Petitioner, 18 W. R., 511; but it may be impugned on appeal from the final decree.

Endorsements on documents admitted in evidence.

141. (1) Subject to the provisions of the next following sub-section, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely :—

(*a*) the number and title of the suit,

(*b*) the name of the person producing the document,

(*c*) the date on which it was produced, and

(*d*) a statement of its having been so admitted,

and the endorsement shall be signed by the Judge.

(2) If a document so admitted is an entry in a book, account or record and a copy thereof has been substituted for the original under the next following section, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed by the Judge.

Act VII of 1888, section 13. This section applies to H. C. and P. S. C. C. It and the three following sections have been substituted by Act VII of 1888, section 13 for sections 141 and 142 of Act XIV of 1882.

A Copy Thereof—This refers to section 62, *ante*—See also 7 W. R., Civ. Cir., 7, approved of by the Privy Council in *Brojosoondery Debea* vs. *Luchmee Koonwaree*, 20 W. R., 95.

Documents how Proved—In dealing with documentary evidence, the substantial principles on which the authenticity and value of evidence rest should be observed by the Judge—*Rama Lakshmi* vs. *Sivanantha Perumal*, 14 Moore, 570, p. 588. He should not, for instance, accept secondary evidence without a sufficient reason why the original has not been produced—*Id.*; *Ram Gopal* vs. *Gordon Stuart*, 14 Moore, 453, p. 461; *Abbas Ali* vs. *Yudeen Ramy*, 3 Moore, 156; nor documents as proved, because they have not been denied by the opposite party—*Kirtesbash* vs. *Ramdhun*, B. L. R., F. B., 659; *Reazoonissa* vs. *Bookoo Chowdhrain*, 12 W. R., 267.

Endorsements on copies of admitted entries in books, accounts and records.

141A. (1) If a document admitted in evidence in the suit is an entry in a shop-book or other account in current use, the party on whose behalf the account is produced may furnish a copy of the entry.

(2) If such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(i) where the record, book or account is produced on behalf of a party, then by that party, or

(ii) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) When a copy of an entry is furnished under the foregoing provisions of this section, the Court shall, after

causing the copy to be examined, compared and attested in manner mentioned in section 62, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

Act VII of 1888, section 13. This section applies to H. C. and P. S. C. C.

Unstamped Documents.—Unstamped documents, or secondary evidence of them should not be received without payment of the stamp and penalty—*Haran Chunder* vs. *Russick Chunder*, 20 W.R., 63; but if such evidence has been admitted in the first Court, it should not be rejected by the Appellate Court. Nor will it ordinarily form a good ground for special appeal. See note on section 140, *ante*.

Unregistered Documents.—An unregistered document is admissible for the purpose of obtaining specific performance and secondary evidence of it is admissible if it remained unregistered without any fault of the plaintiff—*Nagappa* vs. *Devu*, I. L. R., 14 Mad., 55; *Bank of Bengal* vs. *Mackertich*, I. L. R., 10 Cal., 315; *Burjorji* vs. *Muncherji*, I. L. R., 5 Bom., 143.

Altered Documents.—If a document appears to have been altered, the onus of proving its genuineness lies on the party claiming under it. If he can shew the nature of the document in its original state and account for the alteration, it is admissible. Thus, where a deed was tampered with, while in the custody of the record-keeper, their Lordships of the Privy Council admitted it, saying: "It may be conceded that in an ordinary case the party who presents an instrument which is an essential part of his case in an apparently altered and suspicious state must fail from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions if there be, independently of the instrument, a corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document. Moreover, the peculiarity of the present case is that one of the issues to be determined is, what was the condition of the document when first produced by those who claim under it. The appellants may fairly contend that the rule above stated is not applicable to them until the question has been decided against them."—*Khoob Conwur* vs. *Moodnarain*, 9 Moore, 1, p. 17. See also *Garrard* vs. *Lewis*, 10 Q. B. D., 30; *Suffel* vs. *Bank of England*, 7 Q. B. D., 270; 9 Q. B. D., 555; *Leeds Bank* vs. *Walker*, 11 Q. B. D., 84; and see *Venkatesh* vs. *Baba Subraya*, I. L. R., 15 Bom., 44; *Govindsami* vs. *Kuppusami*, I. L. R., 12 Mad., 239; *Ramayyar* vs. *Shanmugam*, I. L. R., 15 Mad., 70, and the cases cited.

Translation.—The High Court has allowed the interpreter sometimes to translate a vernacular document *viva voce* when the expense of translation would be very great, and the necessity of a translation arose from unforeseen circumstances—*Sereavy Mistree* vs. *Cally Kinker Paulet*, Fulton, 22.

Endorsements on documents rejected as inadmissible in evidence.

142. When a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (*a*), (*b*) and (*c*) of section 141, sub-section (1), and a statement of its having been rejected, and the endorsement shall be signed by the Judge.

Act VII of 1888, section 13. This section applies to H. C. and P. S. C. C.

Recording of admitted and return of rejected documents.

142A. (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under section 141A, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the parties respectively producing them.

Act VII of 1888, section 13. This section applies to H. C. and P. S. C. C.

Documents which have not been proved but simply filed, as often happens in the mofussil, the Judge should pass over them as unproved, although it is the duty of the pleader for the opposite party to insist that they should not remain on the record at all—*Kalida Pershad* vs. *Ram Hari*, I. L. R., 5 Cal., 317; and where in the course of argument on appeal certain letters were tendered in evidence, which had not been marked or noted in the judgment, it was held they were not admissible, as no documents, though admitted in the answer to the notice to admit, were evidence unless put in at the trial and formally marked by the Registrar—*Watson* vs. *Rodwell*, 11 C. D., 153. But see note under section 187, *post*.

Admitted.—But if the opposite party when called on, states that he is not prepared to deny their genuineness, it appears they may be accepted without formal proof—*Indro Bhoosum* vs. *Goluck Chunder*, 12 W. R., 350; *contra*—*Kirtseebash* vs. *Ramdhun*, B. L. R. (F. B.), 659; but if the plaint and issues assume a document to have been executed, and raise questions depending only on that assumption, it need neither be proved nor filed—*Burjorji* vs. *Muncherji*, I. L. R., 5 Bom., 143.

Several Parties.—The admission of one party cannot affect another—*Kali Dutt* vs. *Sheikh Abdool*, 16 Ind. App., 96, p. 103.

Court may order any document to be impounded.

143. Notwithstanding anything contained in section 62, section 141A, sub-section (3), or section 142A, sub-section (2), the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court for such period and subject to such conditions as the Court thinks fit.

Act XIV of 1882, section 143, as amended by Act VII of 1888, section 14. This section applies to H. C. and P. S. C. C.

When document admitted in evidence may be returned.

144. In suits in which an appeal is not allowed, when the suit has been disposed of, and in suits in which an appeal is allowed, when the time for preferring an appeal from the decree has elapsed, or, if an appeal has been preferred, then after the appeal has been disposed of, any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record, shall, unless the document is impounded under section 143, be entitled to receive back the same:

When document may be returned before time limited.

Provided that a document may be returned at any time before either of such events, if the person applying for such return delivers to the proper officer a certified copy of such document to be substituted for the original:

Certain documents not to be returned.

Provided also that no document shall be returned which, by force of the decree, has become void or useless.

On the return of a document which has been admitted in evidence, a receipt shall be given by the party receiving it in a receipt-book to be kept for the purpose.

Receipt to be given for returned document.

Act VIII of 1859, sections 135-7. This section applies to H. C. and P. S. C. C.

145. The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

Provisions as to documents applied to material objects.

This section applies to H. C. and P. S. C. C.

CHAPTER XI.

OF THE SETTLEMENT OF ISSUES.

146. Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

Framing of issues.

Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue.

Each material proposition affirmed by one party and denied by the other must form the subject of a distinct issue.

Issues are of two kinds: (*a*) issues of fact, (*b*) issues of law.

At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to the Court to depend.

When the issues both of law and of fact arise in the same suit, and the Court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Nothing in this section requires the Court to frame and record issues when the defendant at the first hearing of the suit makes no defence.

Act VIII of 1859, section 139. This section applies to H. C.

The law gives no power to summon the opposite party to give evidence on the settlement of issues—*Anund Chunder Banerjee* vs. *Woomesh Chunder Roy*, 1 Hyde, 147; but

the Court may examine his pleader—*Gunga Narain* vs. *Tiluckram*, 15 Ind. App. 119, p. 121.

An order made by a Judge on the Original Side at settlement of issues fixing a date for final disposal is not an order under section 156, *post*—*R.*— vs. *R.*—, I. L. R., 14 Mad., 88.

Allegations from which issues may be framed.

147. The Court may frame the issues from all or any of the following materials :—

(*a*) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons ;

(*b*) allegations made in the plaint or in the written statements (if any) tendered in the suit, or in answer to interrogatories delivered in the suit ;

(*c*) the contents of documents produced by either party.

Act VIII of 1859, section 139. This section applies to H. C.

Examination of the Parties.—If both parties appear, so that the Court can ascertain from them the points in dispute, issues should be recorded ; but if either plaintiff or defendant does not appear, the Court should deal with it accordingly and is not bound to frame issues—*Ameer Ali* vs. *Imamooddeen*, 15 W. R., 145.

Pleading; Effect of not Raising an Issue: Admission.—Where a title is put forth and not denied, nor issue raised, the effect of the omission to deny may be the same as if the party omitting to deny the title admitted it. Thus, where plaintiffs claimed certain rights over tenants as sudder putneedars, and this claim was not denied, but defendants set up an intermediate tenure, but did not deny the existence of plaintiff's tenure or raise an issue upon it, it was held that the plaintiffs were not bound to prove their title—*Chundee Churn* vs. *Mobaruck*, 12 W. R., 469 ; and where plaintiff claimed under certain mortgages, and the defendant confined himself to saying that "the mortgages created by those bonds are insufficient and unjust," and did not move the Court to raise an issue as their *bona fides*, it was held that the mortgages were *bonâ fide* transactions, Couch, C. J., said : "If the defendant really intended by this portion of his written statement to raise such a question, he might have requested the Lower Court to frame an issue upon it. The plaintiff would then have had notice of such a question being raised, and might have produced evidence upon it and satisfied the Court that the mortgages were *bonâ fide* transactions. As no such issue was raised at the first hearing, we must take it that such a case was not put forward by the defendant, so as to make it necessary for the plaintiff to give any evidence on the point. It was said by the Judicial Committee, in a suit tried before the Code of Civil Procedure (*Anund Moyee Chowdrain* vs. *Sheeb Chunder Roy*, 2 W. R., P. C., 19 ; 9 Moore, 301), that they cannot apply the strict rule that averments not traversed must be taken to be admitted ; but where, in a suit under the Code, issues have been settled, averments upon which no issues is framed should be taken to be admitted, as the Court, before proceeding to frame and record the issues, is directed to enquire and ascertain upon what question of law or fact the parties are at issue"—*Ahmedee Begum* vs. *Dabee Persaud*, 18 W. R., 287 ; and see *Dwarka Doss* vs. *Jankee Doss*, 6 Moore, 88 ; *Mohima Chunder* vs. *Ram Kishore*, 15 B. L. R., 155 ; *contra*—*Madhopersad* vs. *Gajudhar*, I. L. R., 11 Cal., 111, p. 118. And in general it may be laid down, that only such averments should be made the subject of issues as are essential to support the cause of action and are denied by the defendant, or as are essential to support a plea and are denied by the plaintiff—*Birch* vs. *Furzind Ali*, 3 Alla., 303. But see *Bhoobun Chunder Shome* vs. *Ram Dyal*, 14 W. R., 55.

Interpretation.—In case of a vague issue the judgment may be used to interpret it—*Kamini Debi* vs. *Asutosh Mookerjee*, 15 Ind. App., 159, p. 163.

Estoppel, Mortgage, Redemption.—A pleading in a suit not between the same parties can never be an estoppel ; it may be an admission—*Mirza* vs. *Pidaparti*, 13 Ind. App., 32, p. 42 ; and an admission by one defendant does not bind the others—*Kali Duti* vs. *Abdul*, I. L. R., 16 Cal., 627. A petition asking for postponement of a sale is not an estoppel, and does not prevent the debtor pleading limitation—*Mina* vs. *Juggat*, I. L. R., 10 Cal., 196. Although the parties understood that a mortgage had been converted into a sale and admitted such in depositions and pleadings, such admissions did not operate as an estoppel or prevent the mortgagor from redeeming his property—*Abdul Rahim* vs. *Madharav*, I. L. R., 14 Bom., 78 ; and see *Venkatratnam* vs. *Reddiah*, I. L. R., 13 Mad.,

494. See also *Ralli* vs. *Caramalli*, I. L. R., 14 Bom., 102, p. 111. But if a company can only hold land in a certain way under Statute, they cannot plead that they became possessed of the property otherwise than by the Act -*Overseers of Putney* vs. *London and S. W. Ry.*, 1 Q. B. (1891), 440; and if a plaintiff sues persons apparently liable and defendants put in a defence, and afterwards attempt to enter another defence when the suit against the proper persons is barred, he will not be allowed to do so--*Steward* vs. *North Metn. Tram. Co.*, 16 Q. B. D., 556.

Issues.—When a plaintiff relies on a lease, the genuineness of which is disputed, the issue must be whether it is genuine or not—*Thakooranee Dossee* vs. *Goluck Chunder*, W. R., 157; in a suit for a kaboolyat of 25 parcels of land, the defendant alleged that he only held three and those not as plaintiff's ryot, the issues were held to be: (1) whether the ryot was in possession of only three or more than three parcels in the lands in question; and (2) whether plaintiff was entitled to receive a kaboolyat for all or any of those parcels—*Radha Kishore* vs. *Goluck Chunder*, 11 W. R., 366.

Rent-Suit.—Where a cultivator sued his landlord to pay less rent than had been assessed by a Sub-Collector in an order A, and to obtain a refund, and the Judge fixed an issue whether the defendant was entitled to rent at the rate specified in A, it was held that the proper issue should have been what was fair and reasonable rate of rent—*Kutty Subramaniya* vs. *Chinna*, 3 Mad., 25; in a suit for rent where defendant pleads a lakheraj title, the issue is not whether defendant's title is good but whether plaintiff has ever received rent—*Purbooddeen Mullick* vs. *Molaem*, 14 W. R., 149. In a rent-suit defendant denied that he held under plaintiff, and alleged that the jote belonged to two persons; that he, defendant, purchased the rights of one of them under a decree sale, and subsequently obtaining a sub-lease from the second sharer, he was liable to pay him and not plaintiff, it was held that the issues were: (1) whether defendant held in succession to the previous tenant, or the jote really belonged to two persons; (2) if so, if any decree had been passed against one of those persons under which the rights of that tenant alone could have been and were sold; (3) and whether consequently the defendant had acquired the jote or a portion of it only, and if he held the entire jote he would be liable —*Missleback* vs. *Luchmee Narain*, 17 W. R., 501.

Mortgage, Account.—In a suit by mortgagees in possession the proper issue is the terms of the mortgage and not previous possession unless limitation is raised—*Khoob Chund* vs. *Uchul Singh*, S. D., N. W., 1832, p. 87; in a suit on an account admitted as correct, the issue is whether the accounts have been admitted, and not whether they are correct—*Pransookh Khan* vs. *Ramzan Khan*, S. D., N. W., 1863, p. 300; and where A and B were sued as agents, for moneys received on behalf of their principal and they pleaded payment, the issue was whether they had paid—*Bykunt Nath* vs. *Kalee Churn*, 17 W. R., 149.

Malicious Prosecution.—A suit for instituting a suit against another, the issues are whether the former complainant acted maliciously and without probable cause—*Ram Buddun Singh* vs. *Sirdar Dyal*, 17 W. R., 101.

Against Representative.—When a suit was brought against the defendant as the representative of a person deceased, and the Courts below found that the amount was due, but that the defendant had not taken possession of any property of the deceased person: *Held*, the Court should have determined the further question whether the defendants were legal representatives of the deceased and entitled to his estate—*Avul Khadar* vs. *Ardhu Sel*, 2 Mad., 423.

Easement.—As to the proper issues in a suit to establish an easement by prescription when limitation is pleaded under section 26, Act XV of 1877, see *Achul Mahta* vs. *Rajun Mahta*, I. L. R., 6 Cal., 812; and in case of a presumed grant, see *Rajrup Koer* vs. *Abul Hossein*, I. L. R., 6 Cal., 394; *Punja Kuvarji* vs. *Bai*, I. L. R., 6 Bom., 20.

Omission to Settle Issues.—The omission to settle issues is not fatal to the trial of the suit, if it appears that the necessary points have been raised and discussed—*Katchekaleyana* vs. *Kachivijaya*, 12 Moore, 495; *Muttayan* vs. *Sangili*, 12 C. L. R., 169, p. 174; and where both parties invoked the decision of the Court upon a question raised by the pleadings and the question was argued, it was held that the judgment upon it was not *ultra vires*, because an issue was not framed embracing the whole question -*Soorjomanee Dayee* vs. *Suddanand Mohapattar*, 20 W. R., 377; and so, if the parties have gone to trial, well knowing what the real question is between them, and evidence has been taken, the errror is not fatal—*Mitna* vs. *Fazl Rub*, 13 Moore, 573; 15 W. R. (P. C.), 15, and especially so when this procedure has been adopted without objection—*Mahomed Basirooollah* vs. *Ahmed Ali*, 22 W. R., 448; but if the case is complex, and a settlement of issues is considered necessary, the case may be remanded on appeal for a new trial after settling and recording the points in dispute—*Rewun Pershad* vs. *Jankee Pershad*, 11 Moore, 25; *Jogeshur Rae* vs. *Doolun*, 2 Alla., 183; *Nilatatchi* vs. *Venkatachala*, 1 Mad., 131; but see *Anundo Lall* vs. *Boycauntram*, 4 C. L. R., 473.

On What Fixed.—The plaint and written statements are the pleadings in a suit, and issues may be framed on them—*Kissen Lall* vs. *Lalljeemul*, 1 Ind. Jur., N. S., 364;

but the Courts are not bound rigidly to adhere to the allegations set forth in them, where the real points in dispute are often missed by bad drafting—*Apaya* vs. *Rama*, I. L. R., 3 Bom., 210, but may frame the issues from the allegations made by the parties orally or otherwise—*Thakur Rohan* vs. *Thakur Surat*, 12 Ind. App., pp. 56-7; or from the statement of their pleaders—*Mahomed Mahmood* vs. *Safar Ali*, I. L. R., 11 Cal., 407; *Gunga Narain* vs. *Tiluckram*, 15 Ind. App., 119; or from the answers to the questions put by the Court to elicit the material facts—*Modhe* vs. *Dongre*, I. L. R., 5 Bom., at p. 614, although the plaint may be very informal—*Petabharaian* vs. *Trilokonath*, I. L. R., 11 Cal., 186, p. 193; or by itself disclose no cause of action—*Man Gobind Sircar* vs. *Umbika Monee*, 16 W. R., 218; *Moulvie Abdoollah* vs. *Shaha Mujeesooddeen*, 15 W. R., 286; or the real facts may differ from the statements contained in the plaint or written statements, or have not appeared in them—*Soonder Narain* vs. *Shaikh Namdar*, 21 W. R., 407, and make them more general than the answers of the pleader on specific points—*Radha Prasad* vs. *Lal Sahab*, I. L. R., 13 Alla., 53, p. 64; *Kamini Debi* vs. *Asutosh*, 15 Ind. App., p. 163; and see *Gunga Pershad* vs. *Maharani*, 12 Ind. App., 47, p. 50; provided the state of facts and equities there set up are not inconsistent with the pleadings—*Bizjee Bibee* vs. *Monohur Dose*, 2 Ind. Jur., N. S., 118; *Eshenchunder* vs. *Shamachurn*, 11 Moore, 7. Thus, where the cause of action stated in the plaint was that a document was a forgery, it was held wrong to raise an issue as to whether it had been executed under pressure—*Mahomed Buksh* vs. *Hosseini*, 15 Ind. App., 81; *Iyyappa* vs. *Ramalakshamma*, I. L. R., 13 Mad., 549.

Issues Agreed On.—And if a Court goes beyond the rights which are properly in issue between the parties, the decree of the Court is absolutely null and void—*Robinson* vs. *Duleep Singh*, 11 C. D., 813. If both parties have agreed to abide by certain issues, they are bound by them—*Shew Sukoy* vs. *Wajed Ali*, 13 W. R., 205; *Moondur Beebee* vs. *Hunooman*, 11 W. R., 277; *Beer Chunder* vs. *Tarinee Chunder*, 11 W. R., 20; so much so that when a defendant, pleading limitation, rested it on the fact that he had been twelve years in possession he was held barred in special appeal from saying that it did not dispose of the question of limitation—*Kisto Mohun* vs. *Noyan Tara*, 10 W. R., 389. As to the changes allowed, see note under section 53.

Co-Defendants.—No issue can be decided between co-defendants if the suit is dismissed—*Bevan* vs. *Crawford*, 6 C. D., 29, and see *Degumber Mitter* vs. *Khettur Mohun Mitter*, 2 W. R., 45; and the decision of issues between plaintiff and two defendants claiming under opposite titles is not decisive as between the defendants—*Kalee Kinkur* vs. *Kristo Mungul*, 11 W. R., 462: *contra*—*Mudhavi* vs. *Kelu*, I. L. R., 15 Mad., 265. See under section 13, *ante*.

Appellate Courts.—In appeal the case must be dealt with not on the mere wording of the plaint, but on the issues settled for trial and the manner in which the case was tried by the first Court—*Rup Singh* vs. *Baisni*, L. R., 11 Ind. App., p. 155; I. L. R., 7 Alla., 1; *Moung* vs. *Mah*, I. L. R., 11 Ind. App., 109, p. 120. And where issues have not been settled, but the judgment states the points for consideration, then, although the written statement does not raise the same points, they will be looked on as the issues—*Gunga Pershad* vs. *Maharani*, 12 Ind. App., 47, p. 50.

If the first Court has fixed and tried the wrong issues, the Appellate Court should lay down the proper issues, unless the issues decided have been agreed on by the parties—*Beer Chunder* vs. *Tarinee Chunder*, 11 W. R., 20; or have been sufficient to dispose of the matters raised in the pleadings—*Bhubon Mundul* vs. *Belas Money*, 1 Shome, 138; or the new issues would be a complete departure from the case set up in the Lower Court—*Punchanun Roy* vs. *Toyluckho*, 14 W. R., 466. But see *Madhopershad* vs. *Gajudhar*, I. L. R., 11 Cal., 111, p. 118.

New Issues.—Where a new and different issue is raised, it should be raised such a way as to give the parties the fullest opportunity of producing evidence upon it, because if it is at all likely that, in consequence of the issues in the first Court, the parties are induced to abstain from giving evidence, it would not be right to decide against them on account of the want of evidence—*Latoo Mundul* vs. *Bhoobun*, 17 W. R., 361; *Ram Persaud* vs. *Kristo Mohun*, 18 W. R. 297; and properly speaking, the Judge should, with some degree of formality, frame the issues and record whether the parties had desired to offer any evidence on them; but whether this is done or not, the pleaders should take care to move the Appellate Court that they may be allowed to tender evidence, otherwise the losing party may possibly be debarred from urging in special appeal that he had been misled by the issues laid down by the first Court—*Eshan Chunder* vs. *Dhonaye*, 11 W. R., 61. See, however, *Latoo Mundul* vs. *Bhoobun*, 17 W. R., 361.

In no case should an Appellate Court set aside a decision of the Lower Court on a point which, though essential, has not been raised in it, without framing an issue on the point and properly deciding it—*Mahomed Rasid Khan Chowdhry* vs. *Jadoo Mirdha*, 20 W. R., 401; and see *The Official Trustee* vs. *Krishna Chunder*, 12 Ind. App., 166; I. L. R., 12 Cal., 239.

148. If the Court be of opinion that the issues cannot be correctly framed without the examination of some person not before the Court, or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day to be fixed by the Court, and may (subject to the rules contained in the Indian Evidence Act) compel the attendance of any person, or the production of any document by the person in whose hands it may be, by summons or other process.

Court may examine witnesses or documents before framing issues.

Act VIII of 1859, section 140. This section applies to H. C.

149. The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed.

Power to amend, add and strike out issues.

The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

Act VIII of 1859, section 141. This section applies to H. C.

Power to Amend.—The power of amending issues under this section is almost the same as the power of amendment given to Judges in England by section 222 of the Common Law Procedure Act of 1852—*Nehora Roy* vs. *Radha Pershad*, 4 C. L. R., 353; I. L. R., 5 Cal., 64. At any time before decree, the Court may frame an additional issue embracing matter not included in the plaint, but not inconsistent with it or with the prayer thereof—*Modhe* vs. *Dongre*, I. L. R., 5 Bom., 609.

In what Cases Exercised.—Instead of dismissing the suit for any error in the plaint, the proper plan is to amend the issues whenever it appears necessary, so as to raise the real questions in difference between the parties—*East Indian Railway Co.* vs. *Jordan*, 14 W. R., O. A., 11; *Shookoomar* vs. *Cruise*, 6 W. R., Act X, 105; and where after the evidence of both parties had been taken, the principal defendant applied to file an amended written statement which raised a new defence, it was held that the Court was bound to receive it if it embraced the real question between the parties and to have amended the issues—*Bolye Meah* vs. *Khetoo Gorai*, 20 W. R., 208; but see *Baboo Lall* vs. *Ram Narain*, Coryton, 8, where it is stated that when there has been a hearing and settlement of issues, the Court will not exercise its discretionary power to raise a new issue except on clear proof of inadvertence or mistake or the discovery of new matters affecting the merits, and that such matter was not within the knowledge of the parties at the date of the former settlement of issues. And see also *Douglas* vs. *The Collector of Benares*, 5 Moore, 220. And in *Nehora Roy* vs. *Radha Pershad Singh*, 4 C. L. R., 353, it was held that a Judge is not bound, as a matter of law, to raise an issue on a point not disclosed in the pleadings, even though it be a point of jurisdiction.

Where no issue has been laid down, and the case is complex—*Rewan Pershad* vs. *Jankee Pershad*, 11 Moore, 25, or the issue, though in terms covering the main question does not sufficiently direct the attention of the parties to the main question of fact, and a party may have been prevented from adducing evidence—*Oolagappa Chetty* vs. *Arbuthnot*, L. R., 1 Ind. App., 268; 14 B. L. R., 115, their Lordships of the Privy Council have fixed new issues and remanded the case for trial. See as to "AMENDMENT of PLAINT," note under section 57, *ante*.

Limitation of Exercise.—The Court is not bound to try the suit in the manner in which the plaint is framed, for its object is merely to bring the matter in dispute between the parties before the Court; but on the settlement of issues the Judge is to

ascertain the question—*Arbuthnot & Co.* vs. *Betts*, 14 W. R., 181; yet if a plaint and its proof lead to particular issues, the Court is bound to raise them and give relief, provided they do not come by surprise on the defendant—*Obhoy Churn* vs. *Woomesh Chunder*, 2 Hyde, 263; but see *Deewan Dyashunker* vs. *Ameenooddeen Khan*, 3 Agra, 246, and are fairly within the scope of the pleadings—*Kishun Pershad* vs. *Bhowanee Deen*, 1 Agra, 47; or not inconsistent with them—*Eshan Chunder* vs. *Shama Churn*, 6 W. R. (P. C.), 57; *Sharoda Koomaree* vs. *Mohinee Mohun*, 20 W. R., 272; *Verasvami Gramini* vs. *Ayyasvami Gramini*, 1 Mad., 471; *Sidhee Nuzur Ali Khan* vs. *Ojoodhyaram*, 10 Moore, 552; *Modhe* vs. *Dongre*, I. L. R., 5 Bom., 609, p. 614; *Damodar* vs. *Parmandas*, I. L. R., 7 Bom., 155, p. 161; *Narayan* vs. *Hari*, I. L. R., 13 Bom., 664; but a plaintiff will not be allowed to set up one case and having proved another ask issues to be raised to suit the proof—*Obhoy Churn* vs. *Woomesh Chunder*, 2 Hyde, 263. In some cases the Courts have gone beyond this and have allowed issues to be raised not within the scope of the pleadings, but this is a matter of discretion under the first portion of this section—*Nehora* vs. *Radha Pershad*, 4 C. L. R., 353; I. L. R., 5 Cal., 64. A Court should not record a proceeding declaring itsintention to frame additional issues, and leave the actual framing for the time of giving judgment—*Kamul Kamini* vs. *Obhoy Churn*, 15 W. R., 151; on the contrary it should frame the issues, and fix a convenient day for their trial, regard being had to the facilities which the parties may have for producing their evidence—*Sreehuree Mundul* vs. *Judoonath*, 10 W. R., 169.

Already Settled.—When a Judge at the settlement of issues has refused to raise a certain issue, the question ought not to be re-opened at the trial by the then presiding Judge—*Bolye Chund* vs. *Moulard*, I. L. R., 4 Cal., 572; see also the case of *Nehora* vs. *Radha Pershad*, 4 C. L. R., 353; I. L. R., 5 Cal., 64; and *Robinson* vs. *Duleep Singh*, 11 C. D., 813. As to when the amendment may be set aside on appeal, see *Narayan* vs. *Hari*, I. L. R., 13 Bom., 664.

First Appeal.—In a declaratory suit if an objection is not taken under section 42 of the Specific Relief Act in the first Court, the plaint may be amended in appeal and a fresh issue framed, and the same rule applies if the defendant, while denying possession, does not raise a distinct issue upon it; but the Judge finds he is in possession of a portion of the property in dispute—*Abdulkadar* vs. *Mahomed*, I. L. R., 15 Mad., 15.

Special Appeal.—If the question has not been raised in the plaint, written statement or issues of the first Court, or in the grounds of first appeal, and the evidence has not been directed to it, it should not be raised in special appeal—*Ameeroonnissa* vs. *Abedoonissa*, L. R., 2 Ind. App., 87; *Sharoda Koomaree* vs. *Mohinee Mohun*, 20 W. R., 272.

Issues Allowed.—Every matter fairly within the scope of the plaint, if important for the decision of the substantive difference between the parties, should be framed into an issue, and the duty of framing them is thrown on the Courts in order to render substantial justice, and to prevent a party suing from being remitted to a new suit, when, by a suitable order as to terms upon which amendment shall be made, the Court by framing additional issues can determine in the existing suit the real question in controversy between the parties.

Account Settled; Suit on Items.—Thus, where A sued on an account settled, and failed to prove the alleged settlement, it was held that the suit should not have been dismissed, but that the Judge should have framed issues with regard to the items composing the account which were not barred, and given judgment on the merits—*Kishun Pershad* vs. *Bhowanee Deen*, 1 Agra (F. B.), 47; *Dwarka Doss* vs. *Jankee Doss*, 6 Moore, 88; *Obhoy Churn* vs. *Woomesh Chunder*, 2 Hyde, 263.

Partners.—Plaintiffs sued as partners, and it appeared on the evidence that two of them only were partners when the cause of action arose, and the Lower Court struck out the other names, it was held that this was wrong, and that the proper course would have been to amend the issues and raise the question whether the plaintiffs were or were not partners, and if it were found on the amended issue that only two of them were partners when the cause of action arose to have decreed in their favour—*East Indian Railway Co.* vs. *Jordan*, 14 W. R. (O. A.), 11.

Misdescription of Plaintiff.—In a suit for possession of land, where plaintiff described himself as the son of B, and defendant alleged that the land never belonged to B, but had been settled in the name of an idol and was then in possession of S, under whom he (defendant) held it under a lease and mortgage-deed; and the plaintiff, on the day on which the suit was finally disposed of, petitioned that he was the son of S, and was alleged to amend his plaint,—it was held that the Court should not have disposed of the case on that day, but should have framed issues and allowed the defendants every opportunity to produce evidence—*Durga Narain* vs. *Brojo Kisore*, 23 W. R., 172.

Mis-joinder of Defendants.—And so if a suit is brought against two persons, the Court can raise an issue whether one of them is solely liable, and, on finding him solely liable, pass a decree against him—*Banee Madhub* vs. *Bipro Dass*, 15 W. R., 69.

Possession; Foreclosure.—In a suit for possession, defendant pleaded limitation, but his witness unexpectedly disclosed that he was a mortgagee,—it was held that it was the

duty of the Court, when the mortgage was disclosed, to frame an issue on the subject—*Mujboot Singh* vs. *Chunder Mashee*, 16 W. R., 44; and where a person sued as a purchaser, but defendant denied the purchase, and the oral evidence proved the transaction was a mortgage, it was decided that the Court was bound to inquire into it by amending the issues—*Nundo Lall* vs. *Prosunno Moyee*, 19 W. R., 333.

Not Allowed.—In a suit for damages, there was a reference in the plaint to a contract to pay rent: *Held*, an issue could not be framed so as to recover rent—*Narayan* vs. *Hari*, I. L. R., 13 Bom., 664.

Evidence.—The issues fixed, and not the pleadings, ought to guide the parties as to production of evidence—*Huro Soondures* vs. *Amsena Begum*, 5 W. R., Act X, 72.

Order of Disposal.—The Judge may dispose of the issues in any order—*Sitanath Doss* vs. *Doyodronath Doss*, 23 W. R., 54; but separately, if possible—*Umbica Soondures* vs. *W. Woodin*, 3 W. R., 226.

Questions of fact or law may by agreement be stated in form of issue.

150. When the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue and enter into an agreement in writing—

(*a*) that, upon the finding of the Court in the affirmative or the negative of such issue, a sum of money specified in the agreement, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(*b*) that upon such finding some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(*c*) that upon such finding one or more of the parties shall do or abstain from doing some particular act specified in the agreement, and relating to the matter in dispute.

Act VIII of 1859, section 142. This section applies to H. C.

Where the issues are selected and agreed upon by the parties, they cannot be amended save by mutual consent—*Hamilton* vs. *Staley*, 28 Sol. Jo., 478, there is no appeal as to the form of them—*Hadee Ali* vs *Khorshed Begum*, S. D., N. W., 1851, p. 335. See "ISSUES AGREED TO," section 147, *ante*.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

151. If the Court be satisfied, after making such inquiry as it deems proper,—

(*a*) that the agreement was duly executed by the parties,

(*b*) that they have a substantial interest in the decision of such question as aforesaid, and

(*c*) that the same is fit to be tried and decided,

it may proceed to record and try the issue, and state its finding or opinion thereon in the same manner as if the issue had been framed by the Court;

and may, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement;

and upon the judgment so given, decree shall follow and may be executed in the same way as if the judgment had been pronounced in a contested suit.

Act VIII of 1859, section 143. This section applies to H. C.

May Pronounce Judgment.—A special case cannot be amended after hearing; but if a decision on a point of law is given on it under a mistake of fact, the Court is not bound by the decision unless it has been adopted by subsequent orders, but may disregard it, direct the action to go on to trial, and direct inquiries to ascertain the real facts—*Tomlin* vs. *Underhay*, 22 C. D., 495

The word "may" means "shall," and the Judge is bound to give judgment according to the agreement, although specific performance of it might ordinarily be refused—*Goculdas* vs. *Scott*, I. L. R., 16 Bom., 202, p. 216.

CHAPTER XII.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

If parties not at issue on any question of law or fact.

152. If at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

Act VIII of 1859, section 144. This section applies to H. C. and P. S. C. C.

Voluntary Appearance.—If the defendants voluntarily appear in Court and confess judgment, no summons is necessary for their appearance, and the Court should at once give judgment for the plaintiffs—*Bank of Bengal* vs. *Currie*, 3 B. L. R., 403; 12 W. R., 432.

Wrong Person.—When the plaintiff sues the right person, but serves the summons on another person of a similar name, who appears and denies liability, the suit should be dismissed with costs—*London, Bombay and Mediterranean Bank* vs. *Mahomed Ibrahim*, I. L. R., 4 Bom., 619.

If one of several defendants be not at issue with plaintiff.

153. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

This section is new. It applies to H. C. and P. S. C. C.

If parties at issue on question of law or fact.

154. When the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court be satisfied that no further argument or evidence than the parties can at once supply is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues,

Court may determine issue.

and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:

and pronounce judgment,

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them object.

If the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument, as the case requires.

Act VIII of 1859, section 145. This section applies to H. C. and P. S. C. C.

Parties are at Issue.—The Courts are bound to proceed on the facts alleged in the plaint, and cannot refuse to try issues of fact upon the merits on the ground of the legal effect of the facts alleged, except on the assumption that they can be and are proved. This assumption is, however, limited to the consideration of the legal effect of the facts pleaded in bar—*Nawab Sidhee* vs. *Ojoodhyaram Khan*, 10 Moore, 540.

Settlement of Issues.—When a summons has been issued for the settlement of issues only, a Judge should not proceed and try the cause unless under the circumstances laid down in this section, for otherwise he might preclude a party from adducing evidence in support of his case—*Sheikh Jeeawun* vs. *Goolab Khan*, 1 Alla., 147; but if the evidence adduced is decisive of the matter in dispute, then the Judge may dispose of the cause unless either of the parties distinctly objects and asks for time to produce evidence in support of his case—*Soorendro Pershad* vs. *Jugodbundhoo*, 22 W. R., 426.

155. If the summons has been issued for the final disposal of the suit, and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment,

If either party fails to produce his evidence, Court may pronounce judgment, or adjourn suit.

or may, if it thinks fit, after framing and recording issues under section 146, adjourn the suit for the production of such evidence as may be necessary to its decision upon such issues.

Act VIII of 1859, section 145. This section applies to H. C. and (except the second paragraph) to P. S. C. C.

Plaintiff sued on a bond to recover a sum of money. He filed no written statement, and the case was fixed for final disposal on the 23rd of April, when defendant admitted execution of the bond, but said that it had been delivered as a security to the plaintiff to borrow money and apply it to a special purpose which he had not done. On this, plaintiff's pleader stated that he was taken by surprise, that he had no instructions how to meet the defence, and asked for a postponement, which was refused: *Held*, the postponement should have been granted—*Ameer Ali* vs. *Run Bahadoor*, 7 W. R., 84.

CHAPTER XIII.

OF ADJOURNMENTS.

156. The Court may, if sufficient cause be shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Court may grant time, and adjourn hearing.

Costs of adjournment.

In all such cases the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment :

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing to be necessary for reasons to be recorded by the Judge with his own hand.

Act VIII of 1859, section 146. This section applies to H. C. and P. S. C. C.

A Civil Court is not competent to bind witnesses by recognizances to attend on a future day. See, however, section 173, *infra*.

Under Act VIII, 1859, a verbal order of the Court to witnesses requiring them to attend on a future day would not justify the issue of a warrant for the apprehension of such witnesses, if they failed to attend in obedience to such verbal order—*Venkatappah* vs. *Papammah*, 5 Mad., 132 ; but as to the present law, see sections 173, 174.

Sufficient Cause.—The plaintiffs made an application in Chambers for the issuing of a commission to England to take the evidence of a material witness, and in support of the application an affidavit of one of the defendants was used The Judge referred them to the Court, and on the application being renewed in Court, he declined to take cognizance of what had passed in Chambers, refused the application, as the affidavit was not in Court, and dismissed the suit : *Held*, that the Judge should have allowed time to produce the affidavit, and that postponement should not have been refused on that ground—*Dadabhai* vs. *Sorabji*, 3 Bom , 55. So where a person sued on a money-bond, and at the trial defendant, admitting the bond, pleaded that it had been given to plaintiff only as a security for borrowing money and to apply it in a certain manner, and plaintiff's pleader declared that he was taken by surprise and without instructions,—it was held that he should have been allowed another day—*Ameer Ali* vs. *Run Bahadoor*, 7 W. R., 84 ; and so also when a petition of objection was filed on the 5th, but the case was not taken up on the day fixed for hearing, as the Judge left the station on the 8th, for an uncertain period (putting the Court in charge of the Subordinate Judge), and on his return he decided the suit on a day not fixed for its hearing, although the objector applied for time to file his documents, it was considered that the objector had shewn sufficient cause for an adjournment—*Seetaram* vs. *She Gollam*, 18 W. R., 325.

Not Sufficient Cause.—Defendant was aware some time previous to the trial that his case was coming on. He got ill some ten or twelve days before hearing, but instead of asking for a commission, put in a medical certificate at the trial that he was confined to his bed by lumbago. It was held insufficient to support an application for an adjournment, and the suit was decreed against him—*Simon Elias* vs. *Jorawar Mull*, 24 W. R., 202.

Order.—Special notice should be given to the parties of the day fixed ; an adjournment by proclamation is irregular—6 Mad. R., xxix. Once an order for an adjournment has been made, it should not be rescinded on review, unless on good and sufficient cause shewn and in the presence of the other party—*Bishen Perkash* vs. *Ruttun Geer*, 20 W. R., 3.

Appeal.—Orders under this section are not open to appeal (section 588) ; but their propriety can be questioned in an appeal from the final decree (section 591)—*Bishen Perkash* vs. *Ruttun Geer*, 20 W. R., 3. Judges in appeal are not inclined to interfere with the inferior Court in exercise of the discretion allowed them to grant or refuse an adjournment—*Simon Elias* vs. *Jorawar Mull*, 24 W. R., 202.

Does Lie.—An order made on the settlement of issues fixing a day for final hearing is not an order under this section, and is appealable if made by a single Judge on the Original Side—*R.* vs. *R.*, I. L. R., 14 Mad., 88.

Procedure if parties fail to appear on day fixed.

157. If, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in

that behalf by Chapter VII, or make such other order as it thinks fit.

Act VIII of 1859, section 147. This section applies to H. C. and P. S. C. C.
See note to section 108, *ante*.

Other Order.—The Court is not bound to proceed under Chap. VII, *ante*—*Hira Dai* vs. *Hira*, I. L. R., 7 Alla., 538.

Does not Apply.—This section does not apply unless a day has been fixed for hearing under section 156—*Seetaram* vs. *She Gollam*, 18 W. R., 325; and it is illegal to decide a case in the absence of any party without fixing a day for the hearing of the case, if the hearing has not taken place on the day originally fixed—*Meer Mukhoo* vs. *Mussamut Ameerun*, S. D. (N. W.), 1865, p. 197.

Distinct from Section 158.—The distinction between this section and section 158 is that where there is a default in the appearance of the parties and their pleaders on the date fixed for the adjourned trial of suit, a decree may be passed under this section, and subsequently the case may be revived under section 103, *ante*, but where time has been given to one of the parties to do an act and he fails, the order passed is under section 158, the matter cannot be revived, but is only subject to review of judgment or to appeal—*Ryall* vs. *Sherman*, I. L. R , 1 Mad., 287; *Sriraja* vs. *Anumukonda*, I. L. R., 7 Mad., 41; *Ambalavana Padeiyatchi* vs. *Subramania Padeiyatchi*, 6 Mad., 262; *Alwar* vs. *Seshammal*, I. L. R., 10 Mad., 270
See note on section 100, *ante*.

Form of Order.—See "JUDGMENT," section 102, *ante*.

Court may proceed notwithstanding either party fails to produce evidence, &c.

158. If any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Act VIII of 1859, section 148. This section applies to H. C. and P. S. C. C.

Cause Attendance.—"It is the business of the Court, on receiving an application for a summons to a witness, or for a Commission to examine a witness, to consider whether it is likely that the summons can be served or the commission executed so as to bring the witness or his examination before the Court on the day fixed for the hearing. A party has a legal right to ask the assistance of the Court in these matters, and the Court should grant it as a matter of course. It is for the party and not for the Court to consider, whether he can derive any advantage from his application. If he has delayed so long that he fails to get the process executed in sufficient time, he, of course, must take the consequence of his delay, and the Court will not adjourn the case to remedy his neglect. Unless it appears clearly that it is not only improbable, but impossible, for the process to be effectually issued, the application should be complied with. Indeed, I have great doubts whether it should not be complied with in every instance, as it may happen that the case may not be called up for hearing on the day originally fixed, and possibly the witness or the return to the commission might be in Court on the day to which it may be adjourned. If the party to a suit thinks it worth his while to incur the expense of taking a process on the chance of deriving benefit from it, I would not prevent his doing so. I would only take care that he did not use the late issue of the process as an excuse for delaying the final hearing of the case"—*Hurree Dass* vs *Meer Moazzum*, 15 W. R., 447. See the note under section 159, *infra*.

Object of the Section.—See note under section 157, *supra*.

This section appears to contemplate a case where any one party and not both—*Alwar* vs. *Sheshammal*, I. L. R., 10 Mad., 270, has expressly obtained time to produce his evidence, or to procure the attendance of his witnesses, and has failed to do so. It does not refer to adjournments by the Court at its own motion—*Pearee Mohun* vs. *Shama Churn*, 19 W. R., 35; and where a case was dismissed for default in paying in the Commissioner's fee and no time was granted, the order was considered to have been passed under section 102, *ante*, and not under this section—*Shaik Saheb* vs. *Mahomed*, I. L. R., 13 Mad., 510; *Sriraja* vs. *Anumukonda*, I. L. R., 7 Mad., 71; so when after taking evidence but without entering on the merits, the Court dismissed the suit on the ground

that the stamp was insufficient and plaintiff would not make up the deficiency: *Held*, the order was not passed under this section; but see section 54, *ante*—*Muhammad* vs. *Muhammad*, I. L. R., 11 Alla., 91. But where a defendant's pleader, who had obtained an adjournment to obtain certain documents, failed and was still in default when the case was called on, and a decree was given to plaintiff, the decision was considered to fall within this section and not section 157—*Rangasawmy Mudeliar* vs. *Sirangan*, 4 Mad., 254; and where the vakil of the plaintiff on the second hearing of the case applied for a summons against a witness, and on the case coming on, was, owing to the absence of his witness, unprepared to go on, and the case was dismissed, the case was considered to have been disposed of under this section—*Comalammal* vs. *Rungasawmy*, 4 Mad., 56.

Where the plaintiff cited one of the defendants as his witness, but his application for his examination was disallowed under Act VIII of 1859, and on the adjourned day of hearing he failed to produce any other witness, it was held that, as the plaintiff had been prevented by insufficient grounds from examining the defendant as a witness, he had not committed default within the meaning of section 148, and that therefore the suit had not been properly heard and determined. The order was set aside, and the case was remanded—*Latchmana* vs. *Ragunatha*, 6 Mad., 299; and where in a suit, the issues having been settled, the hearing was adjourned to a fixed date for final disposal, and on that day, the plaintiff not appearing, the suit was dismissed under section 148, Act VIII of 1859: *Held*, that though the Court could have proceeded under section 147 of that Act (158 of this Code) to dismiss the suit, the order was bad, and the plaintiff had the right to petition under section 119 of that Act (section 103 of this Code)—*Ryall* vs. *Sherman*, I. L. R., 1 Mad., 287.

No New Suit—The effect of a decision under section 148, Act VIII of 1859, was to bar a second suit, even by a minor, unless on the ground of fraud—*Venkatachalam* vs. *Mahalakshamma*, I. L. R., 10 Mad., 272. See *Shaik Saheb* vs. *Mahomed*, I. L. R., 13 Mad., 510. And see note under section 157, *supra*.

New Evidence on Remand.—This section differs from section 148, Act VIII, 1859, inasmuch as under it the Court was bound to "decide the suit on the record." The effect of these words was, that though the Appellate Court could remand a case for decision on the merits, the Lower Court could not admit any evidence after the remand, but was bound to decide it on the record as it stood when the case was remanded—*Lochun Mundul* vs. *Wuzeer*, 13 W. R., 464; *Puddo Lochun* vs. *Sirdar Khan*, 12 W. R., 23; 3 B. L. R. App., 91. The Court is not so bound under the present procedure. See "EFFECT OF ORDER," section 563, *post*.

CHAPTER XIV.

OF THE SUMMONING AND ATTENDANCE OF WITNESSES.

Summons to attend to give evidence or produce documents.

159. The parties may, after the summons has been delivered or sent for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit, obtain, on application to the Court or to such officer as it appoints in this behalf, before the day fixed for such settlement or disposal, as the case may be, summonses to persons whose attendance is required either to give evidence or to produce documents.

See Act VIII of 1859, section 149. The words "or sent" have been added by Act VII of 1888, section 15. This section applies to P. S. C. C.

Summons to Attend.—Adjournment and summoning witnesses are distinct matters. Application to summon may be made at any stage of the case before hearing—*Bai Kali* vs. *Alarakh*, I. L. R., 15 Bom., 86; *Pandurang* vs. *Keskavji*, I. L. R., 6 Bom., 742; *Krishna Churn* vs. *Protab Chunder*, I. L. R., 7 Cal., 560. The Court is bound to issue summonses when asked for as a matter of course—*Brojo Nath* vs. *Protap Chunder*, 22 W. R., 296; *Kaji Ahmad* vs. *Haji*, I. L. R., 9 Bom., 308; unless, perhaps, they are summoned in such numbers or in such a manner as indicates a vexatious desire of obstructing the course of justice—*Ram Phul* vs. *Wahed Ali*, 14 W. R., 66, or the application has been made at a time when it is *absolutely impossible* that the witness can be brought in time to be examined before the party calling them closes his case—*Rajendro*

Narain vs. *Kumud Narain*, 3 C. L. R., 569; *Indro Chunder* vs. *Dunlop*, 9 W. R., 530; *Abdool Ali* vs. *Mullick Suddeerooddeen*, 14 W. R., 493; but though summonses have been granted, if the witnesses do not appear at the trial, the Court will proceed, unless an application is made to adjourn—*Nund Mohun* vs. *Goluck Nath*, 11 W. R., 99, and even then the Court is not bound to grant an adjournment unless on good cause shewn—*Abdool Kadir* vs. *Abin Mirdha*, 24 W. R., 290; *Bal Kali* vs. *Alarakh*, I. L. R., 15 Bom., 86. See note under section 158, *supra*.

Practice.—Parties who have the benefit of legal advice ought to be left to manage their own cases without interference from the Court. Where the evidence of a witness or the production of a document is material to plaintiff's case, it is his business to move the Court to take the necessary steps in the matter—*Nobin Chunder* vs. *Anungo Munjuree*, 23 W. R., 83, and though in cases where the process of the Court is abused any person affected can bring the matter before the Court, a mere witness summoned to give evidence has no right to apply to the Court to discharge the order—*In re Gold Company*, 12 C.D., 82.

Revision.—Where the Court of first instance refused to issue summonses and decided the case on the other evidence, and this decision was upheld on appeal, the High Court in Bombay set the order aside on revision—*Kaji Ahmad* vs. *Haji*, I. L. R., 9 Bom., 308.

Forms of Summonses.—See schedule IV, Nos. 125-6, *infra*.

Expenses of witnesses to be paid into Court on applying for summons.

160. The party applying for a summons shall, before the summons is granted and within a period to be fixed by the Court, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

Scale of expenses.

If the Court be subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to the rules (if any) laid down by competent authority.

Act VIII of 1859, section 151. This section applies to P. S. C. C.

A party need not pay any sum into Court until the Court has fixed what is reasonable—*Mohun Mundur* vs. *Brij Bhukun*, 9 W. R., 128, and the sum fixed must have reference to the travelling expenses or other charges of a similar nature; and where a witness who had incurred no expense in travelling asked for compensation for loss of time, the application was refused—*Nawab Nazim* vs. *Prosononarain*, 2 Hyde, 236. It should be sufficient to cover the witnesses' expenses to and from the Court and for one day's attendance—*Dubois de Suran* vs. *Hurrish Chunder*, 5 W. R., Ref., 6. No separate action will lie for such expenses—*Id.*

Tender of expenses to witness.

161. The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

Act VIII of 1859, section 151. This section applies to H. C. and P. S. C. C.

After the list of witnesses has been filed, and the cost of service, &c., deposited, the Court's officers, and not the party, are responsible for the service and return of process—*Mussitee Khanum* vs. *Hookoom Bibee*, 15 W. R., 88.

Procedure where insufficient sum paid in.

162. If it appear to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account;

and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons ; or the Court may discharge the person summoned without requiring him to give evidence ; or may both order such levy and discharge such person as aforesaid.

Expenses if witness detained more than one day.

If it be necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of the party at whose instance he was summoned ; or the Court may discharge the person summoned without requiring him to give evidence ; or may both order such levy and discharge such person as aforesaid.

Act VIII of 1859, section 151. This section applies to H. C. and P. S. C. C.

If it does not appear from the record that expenses have been deposited, and a witness does not attend, because his travelling charges have not been tendered to him, the party to blame will suffer—*Ishan Chunder* vs. *Onath Nath*, 18 W. R., 16.

A witness is entitled to be paid his expenses by the party at whose instance he has been called, although he has not applied for them before giving his evidence—*London, Bombay and Mediterranean Bank* vs. *Mahomed Ibrahim*, I. L. R., 4 Bom., 619.

Appeal.—There is no appeal from an order under this section (section 588). See, as to the old law, *Bijoy Kishen* vs. *Joy Kishen*, 12 W. R., 430.

Time, place, and purpose of attendance to be specified in summons.

163. Every summons for the attendance of a person to give evidence or produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes ; and any particular document which the person summoned is called on to produce shall be described in the summons with reasonable accuracy.

Act VIII of 1859, section 152. This section applies to H. C. and P. S. C. C.

A written summons distinctly describing the nature of the document required must be issued on a party required to produce it ; a verbal order to his pleader is not such a summons as is contemplated by law, and is not sufficient—*Doorgamonee Dossee* vs. *Binodemonee Dossee*, W. R., 1864, p. 164.

Forms of Summonses.—See schedule IV, Nos. 125-6, *infra*.

Summons to produce document.

164. Any person may be summoned to produce a document, without being summoned to give evidence ; and any person summoned merely to produce a document shall be deemed to have complied

with the summons, if he cause such document to be produced instead of attending personally to produce the same.

Act VIII of 1859, section 152. This section applies to H. C. and P. S. C. C.
A broker who has effected a policy and has a lien on it for his premium, may be compelled by the assured to produce it at the trial of an action against the underwriters —*Hanley* vs. *Leathley*, 10 B. & C., 858.

Power to require persons present in Court to give evidence.

165. Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his actual possession or power.

This section is new. It applies to H. C. and P. S. C. C.

Summons how served.

166. Every summons to a person to give evidence or produce a document shall be served as nearly may be in manner hereinbefore prescribed for the service of summons on the defendant; and the rules contained in Chapter VI as to proof of service shall apply in the case of all summonses served under this section.

Act VIII of 1859, sections 154—7. This section applies to H. C. and P. S. C. C.
See *Prem Chand Roy* vs. *Bacharam Mookerjee*, 6 W. R., 126.

Time for serving summons.

167. The service shall in all cases be made a sufficient time, before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Act VIII of 1859, section 154. This section applies to H. C. and P. S. C. C.

Attachment of property of absconding witness.

168. If the serving-officer certify to the Court that the summons for the attendance of a person, either to give evidence or to produce a document, cannot be served, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the non-service:

and upon being satisfied that such evidence or production is material, and that the person for whose attendance the summons has been issued is absconding or keeping out of the way for the purpose of avoiding the service of the summons, may issue a proclamation requiring him to attend to give evidence, or produce the document, at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door of the house in which he ordinarily resides.

If he does not attend at the time and place named in such proclamation, the Court may, in its discretion, at the instance of the party on whose application the summons was issued, make an order for the attachment of the property of the person whose attendance is required, to such amount as the Court thinks fit, not exceeding the amount of the costs of attachment and of the fine which may be imposed under section 170:

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

Act VIII of 1859, section 159. This section applies to H. C. and P. S. C. C. The words "shall . . . by another Court" in the first paragraph have been inserted by Act VII of 1888, section 16.

Proof of Non-Service.—If the serving-officer returns that the summons cannot be served, the Court is bound to examine him on oath, touching the non-service, unless it is verified by affidavit.

Proclamation, When to Issue—It is the duty of the party requiring a proclamation to move the Court—*Nund Mohun* vs. *Golucknath*, 11 W. R., 99. Before it can issue, the Judge must be satisfied, and the grounds of his satisfaction should be recorded—*Ozeer Mahomed* vs. *Bydnath*, 5 W. R., Act X, 6 (although possibly that is not absolutely necessary—compare *Sidhessuree Debia* vs. *Denobhundhoo*, 6 W. R., 65), that the evidence of the witness is material, and that he is keeping out of the way of the summons—*Kulee Dass* vs. *Eshan Chunder*, 13 W. R., 416, or absconding—*Ajoodya Doss* vs. *Misrun*, 15 W. R., 176. Both these conditions must be fulfilled—*Bhoobun Moyee* vs. *Kishoree*, 6 W. R., 235; and where they exist, the Judge should not refuse an application, unless it appears that the applicant is not entitled to the assistance of the Court either by reason of having aided in or connived at the absconding of the witness, or of having otherwise placed himself in such a position that it would be inequitable to grant it—*Rajoo Singh* vs. *Lalla Balgobind*, 1 W. R., 26. See also *Sheik Jafur* vs. *Goroo Pershad*, 3 W. R., 97.

Material.—When the return was made on the day of trial, the party was considered entitled to some time to prove that the witness's evidence was material—*Prem Chand Roy* vs. *Becharam*, 6 W. R., 126.

Procedure after Proclamation.—On the expiry of the proclamation, it is the duty of the party to make an application for attachment if he wishes to exhaust all the means granted to enforce attendance, and if he goes to trial on the evidence he has obtained the case must be decided on it—*Luchmun Singh* vs. *Chokowree*, 25 W. R., 154. The Judge is not bound to act on the application; he has a discretion, but the discretion must be exercised in a reasonable manner—*Poran Chunder* vs. *Gopenath Singh*, 8 W. R., 505; and if he refuses to issue a process of attachment he should record his reasons for refusing—*Ozeer Mahomed* vs. *Bydnath*, 5 W. R., Act X, 6, though apparently he is not bound to do so—compare *Sidhessuree Debia* vs. *Denobhundhoo*, 6 W. R., 65.

Claims to Property Attached.—A Judge has no power to order the attachment of any property unless it belongs to the persons whose attendance is necessary, and he should be most careful not to disturb the possession of a third party. At the same time the law does not make any provision for any investigation by a Judge into the claims of a third party to property which has been attached, and he commits no error in refusing to do so. The claimant is not barred by the sale, and may bring an action in the Civil Court—*Queen* vs. *Chunroo Roy*, 7 W. R., Cr., 35.

If witness appears, attachment may be withdrawn.

169. If, on the attachment of his property, such person appears and satisfies the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court shall direct that the

property be released from attachment, and shall make such order as to the costs of the attachment, as it thinks fit.

Act VIII of 1859, section 160. This section applies to H. C. and P. S. C. C.

If such Person Appears.—This means that he has given himself up voluntarily. This section seems to contemplate that there will be a trial by the Court, and implies that evidence to prove the person had absconded as well as evidence in exculpation of his conduct should be heard in his presence, and a determination come to on the point whether he had absconded or striven to evade service—*Bishonath Sircar*, Petitioner, 3 W. R., Cr., 63. Where a Magistrate under a very similar section refused to release property and dispose of a case without allowing the party to shew cause, his decision was set aside—*Jhundoo Singh and others*, Petitioners, 5 W. R., Cr., 8; see also *Mudhusudun Singh*, Petitioner, 1 W. R., Cr., 27.

Procedure if witness fails to appear.

170. If such person does not appear, or, appearing, fails to satisfy the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court may impose upon him such fine not exceeding five hundred rupees as the Court thinks fit, having regard to his condition in life and all the circumstances of the case, and may order the property attached, or any part thereof, to be sold for the purpose of satisfying all costs incurred in consequence of such attachment, together with the amount of the said fine, if any:

Provided that, if the person whose attendance is required, pays into Court the costs and fine as aforesaid, the Court shall order the property to be released from attachment.

Act VIII of 1859, section 160. This section applies to H. C. and P. S. C. C.

Fine when Imposed.—Before a Judge should proceed to fine a person under this section and order the sale of his property, he should be careful to see that all the formalities required by law, when issuing processes of proclamation and attachment, have been complied with, as any serious error of law in so doing might be sufficient to vitiate the order of sale. Looking at the decisions, on the Criminal Procedure Code, it seems probable that an order of fine and sale would be set aside if the Judge issued processes of proclamation and attachment without recording on what grounds he was satisfied that the evidence was material, and that the party had absconded or concealed himself in order to evade service—*Bishonath Sircar*, Petitioner, 3 W. R., Cr., 63; or if there was any doubt whether the proclamation was properly issued, and there was no evidence to shew that the party did not appear within the time fixed by the proclamation—*Shewdyal Singh* vs. *Griban*, 6 W. R., Cr., 73. A nazir's report is not legal evidence on which to base a conviction—*Nilcant Bhattacharjee*, Petitioner, W. R., Mis., 1864.

A witness is not bound to attend if the trial is fixed for a Sunday—*Queen* vs. *Hargobind Dutta Sircar*, 8 B. L. R., App., 12.

A suit will not lie to set aside a sale under this section—*Bukhorse Sing* vs. *Government*, 8 W. R., 207; but the claimant is not barred by the sale, and may bring an action against the purchaser to establish his right to the property—*Queen* vs. *Chumroo Roy*, 7 W. R., Cr., 35.

Court may of its own accord summon as witnesses strangers to suit.

171. Subject to the rules of this Code as to attendance and appearance and to the provisions of the Indian Evidence Act, 1872, if the Court at any time thinks it necessary to examine any person other than a party to the suit

and not named as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Act XXIII of 1861, section 9. This section applies to H. C. and M. S. C. C.

Duty of persons summoned to give evidence or produce document.

172. Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit must attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document must either attend to produce it, or cause it to be produced, at such time and place.

Act VIII of 1859, section 167. This section applies to H. C. and P. S. C. C.

When they may depart.

173. No person so summoned and attending shall depart unless and until (*a*) he has been examined or has produced the document and the Court has risen, or (*b*) he has obtained the Court's leave to depart.

This section applies to H. C. and P. S. C. C.
This section gets rid of a difficulty felt in the case of *Venkatappa* vs. *Papammah*, 5 Mad., 132, in which it was held that when a case was adjourned for further hearing before the witnesses had been examined, the Court could not bind them down to attend again.

Consequences of failure to comply with summons.

174. If any person on whom a summons to give evidence or produce a document has been served fails to comply with the summons, or if any person so summoned and attending departs in contravention of section 173, the Court may order him to be arrested and brought before the Court :

Provided that no such order shall be made when the Court has reason to believe that the person so failing had a lawful excuse for such failure.

When any person so brought before the Court fails to satisfy it that he had a lawful excuse for not complynig with the summons, the Court may sentence him to fine not exceeding five hundred rupees.

Explanation.—Non-payment or non-tender of a sum sufficient to defray the expenses mentioned in section 160 shall be deemed a lawful excuse within the meaning of this section.

Procedure when witness apprehended cannot give evidence or produce documents.

If any person so apprehended and brought before the Court cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him.

Act VIII of 1859, section 169. This section applies to H. C. and P. S. C. C.

Scope of Section.—This section contemplates the case of a person who has been served and failing to attend has been arrested and brought before the Court; it does not apply to the case of a person who attends and says he has not the document required —*In re Prem Chand*, I. L. R., 12 Bom., 63; nor to the case of a person who has not been served.

Procedure—It is the duty of the parties to move the Court when witnesses do not appear—*Bachman* vs. *Lall Beharee*, 13 W. R., 324; and though the Court has a discretion, it should not allow witnesses to evade attendance—*Saroda Dossee* vs. *Burda Kant Roy*, 5 W. R., Act X, 49; *Ozeer Mahomed* vs. *Bydnath*, 5 W. R., Act X, 6; and if they are material, and there is no reason to believe that the applicant has aided in or connived at their absconding, or has otherwise placed himself in a position that it would be inequitable to grant his application, the application should be granted—*Rajoo Singh* vs. *Lalla Balgobind*, 1 W. R., 26; and it is not necessary to institute a formal investigation beforehand—*Periyanna Chetty* vs. *Gobinda*, 5 Mad., 104. The opinion of the Judge that the witnesses are not likely to benefit a party's case—*Ozeer Mahomed* vs. *Bydnath*, 5 W. R., Act X, 6, or his dislike to punish witnesses for non-attendance afford no valid reason for refusal—*Nilmonee Banerjee* vs. *Shurbo*, 6 W. R., 14. For the same reason, if the case falls clearly within the section, summonses should not be re-issued—*Bissembhur Sircar* vs. *Soorodhuny*, 3 W. R., 21.

The Court is bound to pass some order on an application under this section—*Nilmoney Chowdhry* vs. *Hossein Ally*, 5 W. R., 222.

Lawful Excuse.—*See* "*Explanation*," in this section, and not under section 177, *infra*.

Procedure when witness absconds.

175. If any person so failing to comply with a summons absconds or keeps out of the way, so that he cannot be apprehended and brought before the Court, the provisions of section 168, 169 and 170 shall, *mutatis mutandis*, apply.

Act VIII of 159, section 169. This section applies to H. C. and P. S. C. C.

Persons bound to attend in person.

176. No one shall be bound to attend in person to give evidence or to be examined in Court unless he resides—

(*a*) within the local limits of its ordinary original jurisdiction, or

(*b*) without such limits and at a place less than fifty or where there is railway communication for five-sixths of the distance between the place where he resides and the place where the Court is situated two hundred miles distance from the Court-house.

This section applies to H. C. and P. S. C. C.

Consequence of refusal of party to give evidence when called on by Court.

177. If any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his actual possession or power, the Court may in its discretion either pass a decree against him, or make such order in relation to the suit as the Court thinks fit.

Act VII of 1859, section 126. This section applies to H. C. and P. S. C. C. See note under section 178, *infra*.

The party must be present in Court; he must refuse without lawful excuse; and the document must then and there be in his actual possession or power. Even then the Court may exercise its discretion, and is not bound to give a decree against him; but a party who *bonâ fide*, and for a substantial reason, requires the evidence of another to be taken, ought not, under ordinary circumstances, have a decree given against him until that evidence has been given—*Roy Dhunput* vs. *Prem Bibee*, 24 W. R., 72. If a party when summoned as a witness refuses to produce accounts relevant and material (partnership accounts) *Katakam* vs. *Bhupalam*, 4 Mad., 142, or to answer a material question, and does not endeavour to purge his contempt—*Jeshta Ramji* vs. *Awaker*, 3 Mad., 299, the suit may be dismissed.

Lawful Excuse.—Lawful excuse will more or less depend on the circumstances of each case, and the decision in one case can scarcely be a guide to the decision in another, unless the facts of the case are given, so that the Court may see precisely on what materials the decision was come to—*Doorga Dutt* vs. *Jhsengoor Jan*, 18 W. R., 63. This section generally refers to such an excuse as, under the Evidence Act, would justify a refusal to give evidence or produce the document required. *Lekh Raj* vs. *Palee Run*, 1 Alla., 241. See note under section 120, *supra*.

Probate.—This section applies to probate cases, but it will not justify the Judge in dispensing with proof of the excution of a will—*Ravji Ranchod* vs. *Vishnu*, I. L. R., 9 Bom., 241.

Rules as to witnesses to apply to parties summoned.

178. Whenever any party to a suit is required to give evidence or to produce a document, the rules as to witnesses contained in this Code shall apply to him so far as they are applicable.

This section applies to H. C. and P. S. C. C.

Section 170 of Act VIII, 1859, has not been re-enacted; and save in the cases referred to in sections 177 and 120, a case cannot be decided against a party for merely disobeying an order to attend.

CHAPTER XV.

OF THE HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

This Chapter applies to all persons required to give evidence or produce documents in any proceeding under this Code—section 615, *infra*.

Statement and production of evidence by party having right to begin.

179. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

Explanation.—The plaintiff has the right to begin unless where the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Rules as to right to begin.

Taylor on Evidence, sections 350, 353, 356. This section applies to H. C. and P. S. C. C.

Right to Begin.—There is no invariable rule that in a suit for mesne profits, the *onus* is on the defendants—*Krishna Mohun* vs. *Kunjo Behari*, 9 C. L. R., 1.

In a suit for partition of certain property and money-lending business, the defendant admitted a nucleus of joint property and claimed the rights to begin: *Held*, that unless the defendant admitted all the material allegation in the plaint, the plaintiffs were entitled to begin—*Aghore Nauth* vs. *Prem Chund*, 7 C. L. R., 274.

Where a claim was made under section 246, Act VIII, 1859, by a third party to some timber which had been attached by a prohibitory order under section 234, corresponding to section 278, *post*, the claimant was compelled to begin—*Nga Tha Yah* vs. *Burn*, 2 B. L. R. (F. B.), 91.

Where a preliminary issue is raised by the defendant which goes to the root of the case defendant begins—*Fatmabai* vs. *Aishabai*, I. L. R., 12 Bom., 454; p. 459; but if in appeal the respondent objects that no appeal lies, the appellant begins—*Rustomji* vs. *Kessowji*, I. L. R., 8 Bom., 287.

High Court.—The Common Law practice in respect of the right to begin has always been followed by the High Court—*Rungamony Dossee* vs. *Brojo Lall Dey*, Cory., 25; and where a party did not go into evidence, but had not intimated his intention not to do so, the other side was entitled to reply—*Virasvami* vs. *Appasvami*, 1 Mad., 377.

Onus of Proof.—The test is to determine which party will win if no evidence is given, or if no more evidence is given than is given at any particular stage of the case, and wherever a person asserts affirmatively as part of his case that a certain state of fact is present or is absent or that a particular thing is insufficient for a particular purpose, he is bound to prove it positively, and the rule is not relaxed even where the facts lie peculiarly within the knowledge of the opposite party—*Abrath* vs. *Nor. Eastn. Ry. Co.*, 11 Q. B. D., 440; *id.*, 11 App. Cas., 247; *Hurryhur Mookhopadya* vs. *Nobokisto Mookerjee*, 14 Moore, 152; *Sartaj* vs. *Deoraj*, 15 Ind. App., 51, p. 65; but no question of *onus* of proof arises where there is evidence from which an inference decisive of the case can be drawn by the persons entitled to find the facts—*Speight* vs. *Ganut*, 22 C. D., 727, p. 766; *Owners of "Vindomara"* vs. *Lamb*, App Cas. (1891), 1, p. 7. See in regard to transferability of an estate—*Sartaj* vs. *Deoraj*, 15 Ind. App., 51; to a right to retain possession of an intermediate tenure—*The Secretary of State* vs. *Luchmeswar Singh*, 16 Ind. App., 6; of a ryot's right—*Mohima Chunder* vs. *Mohesh Chunder*, 16 Ind. App., 23; *Appa Rau* vs. *Subbanna*, I. L. R., 13 Mad., 60; *Faki Abdulla* vs. *Babaji*, I. L. R., Bom., 458, p. 461; or to resume a lakheraj tenure—*Koylashbashiny* vs. *Gocoolmoni*, I. L. R., 8 Cal., 230; *Bacharam* vs. *Peary Mohun*, I. L. R., 9 Cal, 813; *Narendra* vs. *Bishun Chundra*, I. L. R., 12 Cal., 182.

How many Counsel Heard.—Plaintiffs must be represented by one pleader or set of pleaders and cannot be represented severally by different pleaders—*Jankibai* vs. *Atmaram*, 8 Bom., 241.

On Motion.—It is not the practice to hear more than one counsel or vakil in support of original motions or applications against which no cause has been shewn in the first instance—The Petition of *Baroda Soondree Dossee*, B. L. R., Sup. Vol., 609.

Statement and production of evidence by other party.

180. The other party shall then state his case and produce his evidence (if any).

Reply by party beginning.

The party beginning is then entitled to reply.

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at

his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party. In the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

This section applies to H. C. and P. S. C. C.

Witnesses to be examined in open Court.

181. The evidence of the witnesses in attendance shall be taken orally in open Court in the presence, and under the personal direction and superintendence, of the Judge.

Act VIII of 1859, section 172. This section applies to H. C. and P. S. C. C.
As to Oudh—see Act XVIII of 1876, section 19, and section 3, *ante*.

Purda Ladies—Purda ladies, not claiming exemption under section 640, should be allowed to remain in their palanquins in Court while giving their evidence—1 B L. R., App., 1; and the same privilege should be extended to women who, though not purda ladies, are not accustomed generally to appear before the public—*Kustomohun Mookerjee* vs. *S. M. Adarmoney Dabee*, 2 Hyde, 88.

In regard to cases of contempt, see *ex-parte Padavay Chetti*, 2 Mad., 319; *Lekh Raj* vs. *Palee Ram*, 1 Alla., 241.

Examination of Witnesses.—It is not the business of the Court to determine what witnesses shall be examined; the parties must select them, summon them, and, if they do not attend, move the Court to secure their attendance—*Nund Mohun* vs. *Goluck Nath*, 11 W. R., 99, and when they are present, call upon the Court to examine such of them as they may offer for examination—*Morno Moyee* vs. *Bheem Coomar*, 6 W. R., 231; *Soonder Narain* vs. *Shaikh Namdar*, 21 W. R., 407, notwithstanding the nazir may have reported that they are in attendance—*Deen Dyal* vs. *Danee Roy*, 13 W. R., 185. On the other hand, it is the duty of the Judge to examine every witness tendered, though he has not been summoned or his name has not been entered in the list—*Rakhal Doss* vs. *Protap Chunder*, 12 W. R., 455, unless it is clear that the intention of the person producing the witness is to delay or obstruct justice—*Chowdhry Khoorgo* vs. *Shib Tohul*, 17 W. R., 172. He should not select a certain number for examination—*Ramdhan Mandal* vs. *Raj Ballab*, 6 B. L. R., App., 10; nor send some away because he had examined as many on one side, as on the other—*Gopee Ojha* vs. *Hur Gobind*, 12 W. R., 229, nor because he thinks their evidence will probably not be of much value—*Loolo Singh* vs. *Rajendur Laha*, 8 W. R., 364; *Shaikh Ibhram* vs. *Suleman*, I. L. R., 9 Bom., 146, nor because he is satisfied on the evidence already recorded—*Brij Soondur Roy* vs. *Khairunnissa*, 23 W. R., 63.

First Appeal.—But if the Judge refuses to examine them as unnecessary, or tells the party so, and the party does not tender them, the Appellate Judge should not, if the matter is brought to his notice, decide the case without hearing the witnesses—*Ram Jewun* vs *Radha Pershad*, 16 W. R., 109; *Hurrish Chunder* vs. *Gopal Chunder*, 20 W. R., 203; *Khuda Baksh* vs. *Imam Ali*, I. L. R., 9 Alla., 339, provided he is satisfied that the witnesses were present, and a *bonâ fide* application for their examination was made—*Keenoo Singh Roy* vs. *Eshan Chunder Roy*, 6 W R., 213; *Surm* vs. *Uthman*, 2 Alla., 209, and this, looking at the general practice, should be proved by a copy of the petition and refusal to examine and not by affidavit—*Ramessur Bhuttacharjee* vs. *Shib Narain*, 14 W. R., 419; *Gooroo Doss* vs. *Puran Mundul*, 12 W. R., 363, but see *Parmeshari Proshad* vs. *Mahomed Syud*, I. L. R., 6 Cal., 608, p. 611.

Second Appeal.—If no such objection is raised before the first Appellate Judge, then, to succeed in special appeal, it must be shewn that they would have been material to the case—*Nilkaunth Surma* vs. *Soosela Debia*, 6 W. R., 324; *Osman Singh* vs. *Chummun Mahtoon*, 15 W. R., 87.

Further Evidence when Allowed.—It is in the discretion of the Court of first instance to allow a party to call further evidence after he has closed his case—*Rakhal Dos*

Mundul vs. *Protap Chunder*, 12 W. R., 455; but it should not be allowed without some good reason—*Hurro Monee Dassea* vs. *Onookool Chunder*, 8 W. R., 461.

A plaintiff has no right to complain that he had no opportunity of producing rebutting evidence, when he was summoned on behalf of defendant, and did not attend—*Radha Jeebun* vs. *Grees Chunder Roy*, 8 W. R., 461; and where such evidence is allowed, it should be confined to matters which the party proposing to contradict would have been allowed himself to prove in evidence—*Kazi Gulam Ali* vs. *Aga Khan*, 6 Bom., 93.

Plaintiff's Witness called for Defendant.—When a witness has been examined on behalf of the plaintiff, he cannot be recalled as a witness for the defendant without leave obtained at the end of the first examination—*Mackintosh* vs. *Nobin Money Dassee*, 2 Ind. Jur., N. S., 160.

Leaving Court.—There should be cogent reasons to necessitate the Court to order principals to leave the Court while the evidence of a witness is being recorded. The other witnesses should leave the Court—*Buddrenath* vs. *Issorepershad*, 2 Hyde, 249.

Account Books.—Under the Rules of the High Court, account books not translated cannot be referred to in an appeal without the special leave of the Court—*Madhub Pershad* vs. *Fool Coomaree*, 19 W. R., 121.

How evidence shall be taken in appealable cases.

182. In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and also in the presence of the parties or their pleaders, and the Judge shall, if necessary, correct the same and shall sign it.

Act VIII of 1859, section 172, sentence 2.

This section applies to cases under Act X, 1870—*Heysham* vs. *Bhola Nath Mullick*, 17 W. R., 221. As to Oudh—see Act XVIII of 1876, section 19; Central Provinces—see Act II of 1879, section 2.

The direction to take down evidence is imperative; and where the provisions of this section have not been followed, as if the evidence has not been read over and signed, the whole proceeding is irregular, and the evidence cannot be read in appeal—*In the matter of Ajudhia Prashad*, 7 B. L. R., 75; *In re Lakhmidas Hanzray*, 5 Bom., 63, or admitted in a trial for perjury based on it—*The Empress* vs. *Mahadeb Gossami*, I. L. R., 6 Cal., 762; (S C.) 8 Cal., 292. So where evidence has been recorded in the absence of the opposite party, it will be rejected if objected to—*Bommaransi Bahadoor* vs. *Rangasamy Mudaly*, 9 Moore, 232; see also *Queen* vs. *Issur Raout*, 8 W. R., Cir., 63; and in special appeal the case will be remanded to have the evidence properly recorded, provided the objection has been taken in regular appeal—*Shaikh Lall Mahomed* vs. *Shaikh Peer*, 18 W. R., 112.

Corrections in depositions should be attested by the initials of the officers making them—1 C. O., N. W., 183.

When deposition to be interpreted.

183. If the evidence is taken down under section 182 in a language different from that in which it was given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it was given.

Act VIII of 1859, section 171, clause 3. As to Oudh—see Act XVIII, 1876, section 19 and section 3, *ante*.

184. In cases in which the evidence is not taken down in writing by the Judge, he shall be bound as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record.

Memorandum when evidence not taken down by Judge.

Act VIII of 1859, section 172, sentence 8. Not in force in Central Provinces—Act II of 1879 and section 3, *ante*. As to Oudh, see note under section 183, *supra*.

Separate Memorandum—A separate memorandum on each witness should be recorded at the time of the examination in the vernacular of the Judge, and it should contain every material answer made by the witness in the examination-in-chief, the cross-examination, and in reply to questions put by the Court in the form of a narrative—*Shaik Suheeoodeen* vs. *Luchmeeput*, 6 W. R., 112; 4 Civ. O., N. W., 1866.

Record—The vernacular record, and not the memorandum, is looked upon as the deposition of the witness, and where there is any discrepancy, the vernacular record must be followed—*Heeranath Kooeree* vs. *Burm Narain*, 15 W. R., 375. In a case of perjury on a statement made before a Civil Court, the Court of Session, finding that the Judge had not made any memorandum, considered that the case could not proceed; but the High Court directed him to try the prisoner on the vernacular record—*Reg.* vs. *Beharee Lall*, 9 W. R., Cr., 69.

185. Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down with his own hand.

When evidence may be taken in English.

Act VIII of 1859, section 172, sentence 4. Not in force in Central Provinces—Act I of 1879, section 2, modified in Oudh—Act XVIII of 1876, section 19, and section 3, *ante*.

185A. (1) The Local Government may, by notification in the official Gazette, direct, with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall, instead of being taken down in the manner prescribed in the foregoing sections, be taken down by him with his own hand in the English language.

Power for Local Government to require evidence to be recorded in English.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

(3) Evidence taken down under sub-section (1) or sub-section (2) shall be in the form mentioned in section 182, and be read over and signed, and, as occasion may require, interpreted and corrected, as if it were evidence taken down under that section.

(4) The Local Government may, by notification in the official Gazette, revoke or vary a direction notified under sub-section (1).

This section has been inserted by Act VII of 1888, section 17.

Any particular question and answer may be taken down.

186. The Court may of its own motion, or on the application of any party or his pleader take down, or cause to be taken down, any particular question and answer, or any objection to any question, if there appear any special reason for so doing.

Act VIII of 1859, section 172, sentence 5. This section applies to H. C., and is in force in a modified form in Oudh—Act XVIII of 1876, section 19.

Questions objected to and allowed by Court.

187. If any question put to a witness be objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Act VIII of 1859, section 172, sentence 6, modified in Oudh—Act XVIII of 1876, section 19; section 3, *ante*.

Objection when Made.—Objections to the admission of evidence should be made in the first Court in which it is possible to object, or they will not be listened to in the Court of Appeal—*Kissen Kaminee* vs. *Ram Chunder*, 12 W. R., 13; *Rommarauze Bahadur* vs. *Rangasamy Mudaly*, 6 Moore, 232; and if the evidence has been admitted without objection in the Lower Court, it must be weighed and not rejected by the Appellate Court—*Bodhnarain Singh* vs. *Omrao*, 13 Moore, 529; *Ranee Pudmavati* vs. *Doolar Singh*, 4 Moore, 285; *Chimnaji* vs. *Dinkar*, I. L. R., 11 Bom., 320. See note under section 141, *ante*.

Stamp.—The decision of the first Court is final—*Punchanund* vs. *Taramoni*, I. L. R., 12 Cal., 64.

Remarks on demeanour of witnesses.

188. The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Act VIII of 1859, section 172, sentence 7. This section applies to H. C., modified in Oudh—Act XVIII of 1876, section 19; section 3, *ante*.

Memorandum of evidence in unappealable cases.

189. In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record.

As to the Central Provinces—See Act II of 1879, section 2, Oudh—see Act XVIII, 1876, section 19, and section 3, *ante*.

In Bengal there is no fixed practice, but as a rule the memorandum is written legibly in the vernacular of the Judge, or in English, if he is sufficiently acquainted with that language, and signed by the Judge and dated.

Judge unable to make such memorandum to record reason of his inability.

190. If the Judge be rendered unable to make a memorandum as above required by this Chapter, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

Every memorandum so made shall form part of the record.

Act VIII of 1859, section 172, sentence 9. This section applies to P. S. C. C., to *all* rent suits in Bengal—Act VIII of 1885, section 148; modified in Oudh—Act XVIII of 1876, section 19, and does not apply to the Central Provinces—Act II of 1879, section 2.

This section seems to contemplate some personal inability. Press of business should not, unless under exceptional circumstances, be accepted as a reason for the inability of any officer to record his memorandum.

Power to deal with evidence taken down by another Judge.

191. (1) Where the Judge taking down any evidence, or causing any memorandum to be made, under this Chapter, is prevented by death, transfer or other cause from concluding the trial of the suit, any successor to such Judge may deal with such evidence or memorandum as if he himself had taken it down or caused it to be made, and proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-section (1) shall apply, so far as they can be made applicable, to a suit transferred under section 25:

Provided that a Court transferring a suit under that section may, if it thinks fit, direct that the Court to which the suit is transferred shall recall all or any of the witnesses who have been examined and take their evidence afresh.

This section has been substituted by Act VII of 1888, section 18. It applies to P. S. C. C., modified in Central Provinces—Act II of 1879, section 2.

Irregularities—The general rule is, that a Judge cannot rely on evidence taken in another Court, but is bound to record his own evidence, and decide upon it—*Ali Buksh* vs. *Shaikh Sumeerooddeen*, 12 W. R., 477; reading over their previous depositions to the witnesses in a criminal case, and asking them if they are true, is wrong—*Queen* vs. *Kalunder Dass*, 2 Alla., 100; but in civil suits the necessity to examine persons who have already given evidence in a previous case may be waived by the parties assenting—*Syud Mahomed* vs. *Oomdah*, 15 W. R., 184; and so the irregularity is waived if the parties agree to treat the former record as incorporated in the latter—*Juguendur Bunwaree* vs. *Din Dyal*, I. W. R., 310; *Jadu Rai* vs. *Kanizak*, I. L. R., 8 Alla., 576, and where such an agreement has been entered into, the witnesses should not be re-examined without some good reason being adduced—*Sreenath Ray* vs. *Goluck Chunder*, 15 W. R., 348.

Where the Judge died before writing his judgment, but signed an entry in a book decreeing the suit, it was held that his successor had not acted without jurisdiction in re-opening the case—*Sukram* vs. *Kala Kahar*, 3 B. L. R., 105. See section 199, *infra*.

The present section relaxes the general rule in cases—(1) where the Judge has died, or (2) has been removed—*Naranbhai Vrijbakandas* vs. *Naroshankar Chandroshankar*,

4 Bom., 98; or the case has been transferred and has been framed to avoid the effect of the decision reported at I. L. R., 7 Alla., 857; I. L. R., 8 Alla., 35. See section 193, *infra*.

Power to examine witness immediately.

192. If a witness be about to leave the jurisdiction of the Court, or if other sufficient cause be shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of either party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and may then be read at any hearing of the suit.

Act VII of 1859, section 173. This section applies to P. S. C. C.

An examination under this section being on the same footing as the examination of a witness in a cause must be conducted by counsel—*Hoffman* vs. *Framjee*, Coryton, 7, and before the Court: not before a Commissioner—*Edwards* vs. *Muller*, 5 B. L. R., 252.

Court may recall and examine witness.

193. The Court may at any stage of the suit recall any witness who has been examined and who has not departed in accordance with section 173, and may (subject to the provisions of the Indian Evidence Act, 1872) put such questions to him as the Court thinks fit.

A Court continuing a suit under section 191 may recall and re-examine a witness who has departed in accordance with section 173.

This section applies to H. C. and P. S. C. C. The last paragraph has been added by Act VII of 1888, section 19.

CHAPTER XVI.

OF AFFIDAVITS.

Power to order any point to be proved by affidavit.

194. Any Court of first instance and any Appellate Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order

shall not be made authorizing the evidence of such witness to be given by affidavit.

Judicature Acts, Order 37, Rule 1. This section applies to H. C.

Practice—Affidavits cannot be used without an order of Court, nor at all if the opposite party desires the production of the witness for cross-examination—*Blackburn Union* vs. *Brooks*, 7 C. D., 68; but see *De Mora* vs. *Concra*, 32 C. D., 141.

The Supreme Court would not admit an affidavit to correct the certificate of an officer of Court to shew it was wrong—*Doss* vs. *Denee*, Fulton, 165.

Form of Affidavit.—Each consists of three formal parts: (1) the title; (2) the name and place of abode of the deponent; (3) the jurat. The title should give the style of the Court and the names of the parties to the action as given in the proceedings and describe the affidavit as entitle the cause in which it is filed. The jurat generally written on the left corner of the affidavit must state that the deponent was sworn (if there are more deponents than one, the several names must be given), and the day of the month on which it was made, and should shew that the person before whom it was sworn had jurisdiction.

See note under section 180, *ante*.

Power to order attendance of declarant for cross-examination.

195. Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance, for cross-examination, of the declarant.

Such attendance shall be in Court, unless the declarant is exempted under this Code from personal appearance in Court, or the Court otherwise directs.

Judicature Acts, Order 37, Rule 2. This section applies to H. C.

Cross-Examination.—In interlocutory proceedings cross-examination will not be allowed on affidavit, because it would defeat the object of the whole proceedings, which is despatch. In final proceedings cross-examination will be allowed.

Affidavit in Reply.— Instead of a cross-examination plaintiff will be allowed to file an affidavit meeting matter which has been first raised in defendant's affidavit. A party will be allowed to bring new matter before the Court by a replying affidavit—*Peacock* vs. *Harper*, 7 C. D., 648. Act VI of 1855 is the foundation of the practice on the Original Side of the High Court in the matter of affidavits—*Robarts* vs. *Steele*, 20th December 1877.

"**Exempted.**"—See sections 640, 641, *post*.

Matters to which affidavits shall be confined.

196. Affidavits shall be confined to such facts as the declarant is able of his own knowledge to prove except on interlocutory applications, on which statements of his belief may be admitted, provided that reasonable grounds thereof be set forth.

The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party producing the same.

Judicature Acts, Order 37, Rule 3. This section applies to H. C.

Irregularity—Leave to file informal affidavits cannot be obtained from a Court of Appeal.—W. N., 1876, p. 157. An affidavit couched in the form "I, A B, of &c. say" instead of in the usual form "I, A B, *make oath and say*" is inadmissible—*Allen* vs. *Taylor*, L. R., 10 Eq., 52.

Objections To.—It would appear that objections to irregular affidavits should be taken when the affidavits are put in, as objections to a deposition taken by commission

for irregularity should be made when the deposition is tendered in evidence and not by an interlocutory motion to take it off the record—*De Britto* vs. *Hillel*, L. R., 15 Eq., 213. An objection for length and irrelevancy should be made at the time of hearing—*Owens* vs. *Emmens*, W. N., 1875, pp. 210, 234.

Oath of declarant by whom to be administered.

197. In the case of any affidavit under this Code—

(*a*) any Court or Magistrate, or

(*b*) any officer whom a High Court may appoint in this behalf, or

(*c*) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath of the declarant.

This applies to H. C.

The jurat should describe the person before whom the affidavit has been sworn, so that it may appear to have been taken by a competent authority.

CHAPTER XVII.

OF JUDGMENT AND DECREE.

Judgment when pronounced.

198. The Court, after the evidence has been duly taken, and the parties have been heard either in person or by their respective pleaders or recognized agents, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

Act VIII of 1859, section 183. This section applies to P. S. C. C.

A judgment does not create a right or title, it only asserts an antecedent one—*Doss* vs. *Bannerjee*, 1 Boulnois, 80.

The meaning of this section is that judgment must be given upon evidence duly recorded before the Judge himself, and not on evidence taken before another person, unless where such evidence is as it is under sections 382, 391 and 191, admissible at the hearing—*Naranbhai* vs. *Naroshankar*, 4 Bom., 102, but the irregularity may be waived by consent of parties, and would not be a good ground for reversing a date in special appeal unless it appeared that the appellant had been prejudiced by it.—*Radhanath* vs. *Jodonath*, 7 W. R., 441, and see "IRREGULARITIES," section 191, *ante*.

Judgment in Open Court.—Judgment should be pronounced in open Court; but where a Judge made a local enquiry, and taking evidence on the spot gave judgment there instead of returning to Court, the irregularity was not considered a good ground of appeal—*Nilmoney Singh* vs. *Bhobany Churn*, Marsh., 327.

Oral Opinion.—There is no objection to a Judge at the close of the hearing of a suit stating at once orally the judgment which he intends to record and deliver; but it would not be a judgment; he must afterwards pronounce his written judgment in open Court—5 Mad., VIII.

Written Opinion.—The written opinions of the Judges of the High Court who have heard the case, but who have ceased to be Judges before judgment is pronounced, can only be regarded as mere minutes and not as judgments—*Mutty Lall* vs. *Deshka*, 9 W. R., 1.

Power to pronounce judgment written by Judge's predecessor.

199. A Judge may pronounce a judgment written by his predecessor, but not pronounced.

This section follows the decision in the case of *Parbutty* vs. *Higgin*, 17 W. R., 475. It applies to P. S. C. C.

Effect of Obtaining Judgment.—As to the meaning to be attached to similar words in an Act of the Legislature see *Mungniram* vs. *Gursahai*, I. L. R., 17 Cal., 347, p. 357.

Language of judgment.

200. The judgment shall be written in the language of the Court, or in English, or in the Judge's mother-tongue.

Act VIII of 1859, section 184. This section applies to P. S. C. C.

Under Act VIII of 1859, the judgment must have been written either in the vernacular language of the Judge, or in English; under the present law another alternative, the "language of the Court," has been added. See on this point section 645, *infra*. The irregularity of recording a judgment in the wrong language does not affect the validity of the decision—*Huro Soonduree* vs. *Sreedhur*, 17 W. R., 352.

Translation of judgment.

201. Whenever the judgment is written in any language other than that of the Court, the judgment shall, if any of the parties so require, be translated into the language of the Court, and the translation shall also be signed by the Judge or such officer as he appoints in this behalf.

Act VIII of 1859, section 185. This section applies to P. S. C. C.

Judgment to be dated and signed.

202. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it, and shall not be altered or added to, save to correct verbal errors or to supply some accidental defect not affecting a material part of the case, or on review.

Act VIII of 1859, section 185. This section applies to P. S. C. C.

Date of Judgment.—This means the date on which the judgment is delivered—*Mamtazul Huq* vs. *Mithai*, I. L. R., 9 Cal., 711. See "DATE OF DECREE," section 205, *infra*.

Shall not be Altered.—This section prohibits the Judge from adding to his judgment. Under Act VIII, the High Court at Calcutta decided that, though the Code did not authorize the recording of any further grounds for a decision or of any addition to a judgment once delivered, such a course was not expressly forbidden, and a Judge might lawfully append to his judgment such additional reasons as might tend more fully to show the correctness of the decision at which he had arrived, provided the further grounds did not alter the ground on which the decision proceeded—*Snadden* vs. *Todd, Finlay & Co.*, 7 W. R., 286. But it seems doubtful whether such a mode of procedure would now be countenanced by the Privy Council. Their Lordships, referring to a somewhat similar practice, said: "The rule requires the reasons given by the Judges to be communicated to the Registrar," and the observations made by Lord Kingsdown, in delivering the judgment of the Committee in *Brown* vs. *Gregory*, show that these reasons ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal—*Richer* vs. *Voyer*, 5 App. Cas., 481.

Wrong Judgments.—It is the duty of every Judge to proceed as far as the practice of his Court will allow him to recall and cancel any invalid order which he has made *per incuriam*—*Tuffuzool Hossein* vs. *Rughoonath Prasad*, 8 B. L. R., 186; 14 Moore, 40, p. 48. See on this point *Luchman Singh* vs. *Mohan*, I. L. R., 2 Alla., at p. 505; and compare *Muhammad* vs. *Abdul*, 16 Ind. App., 104; *Blake* vs. *Harvey*, 29 C. D., 827, p. 833.

English Practice.—In England, a Judge may always reconsider his decision until the order is drawn up—*In re St. Nazaire Co.*, 12 C. D., at p. 91. See "HIGH COURT," section 206, *infra*.

Termination of Suit.—The termination of a suit mentioned in Article 89, Act XV of 1877 is when judgment is given in the Court in which the action is commenced—*Balkrishna* vs. *Govind Shiraji*, I. L. R., 7 Bom., 518.

203. The judgments of the Courts of Small Causes need not contain more than the points for determination and the decision thereupon.

Judgments of Small Cause Courts.

The judgments of all other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Judgments of other Courts.

Act VIII of 1859, section 185. This section applies to P. S. C. C.

Courts of Small Causes.—If the judgment of a Small Cause Court is defective, the High Court can set aside the decree and direct a trial on the merits—*Malik Rahmat* vs. *Shiva Prasad*, I. L. R., 13 Alla., 533.

Judgment, what is—When a Court consist of more Judges than one, the memoranda written by the Judges when apart do not amount to a judgment, and a final decision or determination should not be pronounced until the Judges, by conference and discussion of the points, have striven to arrive at an unanimous judgment—*Khetut Chunder* vs. *Tarrachurn*, 6 W. R., 269; *Rohilkhand and Kumaon Bank* vs. *Row*, I. L. R., 6 Alla., 468. And the opinions of Judges who have heard the case, but cease to be Judges of the High Court before judgment is pronounced, cannot be treated as judgments, but as mere minutes or memoranda — *Mohamed Akil* vs. *Asadunnissa*, 9 W. R., 1; *Brand* vs. *Hammersmith and City Railway Company*, L. R., 2 Q. B., 223.

Judgment, effect of.—It is extremely doubtful whether there exists in India (exclusive of the particular jurisdictions which are exercised by the Courts in matters of probate and the like—Evidence Act, section 41; and those which, in case of war, might be exercised in matters of prize) any ordinary Courts capable of giving what can be technically called a judgment *in rem*—*Jogendur Deb* vs. *Funindar Deb*, 17 W. R., 104; the Mofussil Courts cannot—*Kanhya Loll* vs. *Radha Churn*, 7 W. R., 338; *Gungadhur Roy* vs. *Umasoondery*, 7 W. R., 347; *Yarakalamma* vs *Ankala*, 2 Mad., 276; *Kuttama Nauchear* vs. *Shivagungah*, 2 W. R., P. C., 31.

Between Parties.—Their judgments are only judgments *inter partes*, and do not conclude any persons but the plaintiffs and defendants, or their representatives, on the same matter—*Balaji* vs. *Dharma*, 2 Bom., 363, and a Judge should not allow his judgment in one case to govern his decision in another (where either party is different) without the consent of both, though the subject-matter of the dispute is similar, and the evidence is similar in character—*Sorendronath* vs. *Purmanund*, 15 W. R., 342.

Evidence.—Such judgments do not conclude other parties, and should not be admitted in evidence against them—*Gujju Lall* vs. *Fatteh*, I. L. R., 6 Cal., 171; unless to prove a custom—*Jianutullah* vs. *Romoni*, I. L. R., 15 Cal., 233; or to show the character of the enjoyment of the possessor—*Peari Mohun* vs. *Drobomoyi*, I. L. R., 11 Cal., 745; *Rameshur Pershad* vs. *Koonj*, 6 Ind. App., 33; or the landlord—*Hira Lal* vs. *Hills*, 11 C. L. R., 529; and see *The Collector of Gorakhpur* vs. *Palakdhari*, I. L. R., 12 Alla., 1; or the possession in fact at the time of the litigation—*Neill* vs. *Duke of Devonshire*, 8 App. Cas., 135, p. 165. See *Baijnath Sahay* vs. *Raghonath*, 12 C. L. R., 186, p. 187. See "EVIDENCE," section 206, *post*.

Contents of Judgment.—By section 359, Act VIII, 1859, it was declared that a judgment should contain the point or points for determination of the decision thereon and the reasons for the decision, and it was held that under that section the Judges should distinctly record in their judgments the points to be decided, their findings on each point raised, and their reasons for them—*Gouhur Ali* vs. *Ashrufoonissa*, 9 Moore, 496; *Chunder Kant* vs. *Hurish*, 1 W. R., 214; *Shurbessur Ghose* vs. *Sadhoo*, 15 W. R., 130 In the case of *Katchekaleyana* vs. *Kachivijaya*, 12 Moore, 495, p. 502, in which the Judges of the High Court gave no reasons for their judgment, their Lordships of the Privy Council said: "Their Lordships have considered this case, and they must, in the first place, express their regret that the record contains no statement of the grounds of the decison of the High Court which is now under appeal. The Charter of the High Court of Judicature, section 42, expressly requires that the reasons of their finding should be recorded by the Judges and transmitted for the information of this Court, and it is the subject of great regret, especially in a case which comes before their Lordships *ex parte*, that the grounds of the judgment appealed from should be wanting in the record. But in the absence of any such information, their Lordships must deal with the case as it appears on the record in the present suit." See also *Ramasami* vs. *Bhaskarasami*, I. L. R., 2 Mad., at p. 70; *Shaikh Muhammad* vs. *Zubaida*, 16 Ind. App., 205, p. 210; I. L. R., 11 Alla., 460. And in another case their Lordships ruled that, in all appealable cases, the

Lower Courts should decide on all the issues fixed; since, by forbearing to do so, they were often obliged to remand cases which might otherwise be finally decided on appeal—*Tarakant* vs. *Puddomoney*, 5 W. R., P. C., 63. See note on section 574, *infra*.

Imperfect Judgment.—See note on section 574, *post*. And see as the corresponding section of the Criminal Procedure Code—*Ram Das Maghi*, I. L. R., 13 Cal., 110; *Kamaruddin* vs. *Sonatun*, I. L. R., 11 Cal., 449; *In re Shivappa*, I. L. R., 15 Bom., 11. A finding of fact without reasons is not binding in second appeal—*Kamat* vs. *Kamat*, I. L. R., 8 Bom., 368; *Purshotam* vs. *Durgoji*, I. L. R., 14 Bom., 452.

Practice.—When a judgment is defective, and the same Judge is in office, the proper course is to remand the case, and direct him to record his decision—*Tatur Khawas* vs. *Loke Nath*, 15 W. R., 131; *Kamat* vs. *Kamat*, I. L R., 8 Bom., 368; but if the Judge is dead and a remand is necessary, a new trial should be directed, even though it may be on the evidence already recorded—*Nobo Chunder* vs. *Ishur Chunder*, 12 W. R., 254; but see *Katchekaleyana* vs. *Kachivijaya*, 12 Moore, 502, and where the High Court remanded a case with directions that the Judge should record a proper judgment, and the Judge having been transferred, his successor had the case re argued and recorded judgment, it was held that effect should be given to the first though defective judgment—*Kristna Reddi* vs. *Srinivasa*, 5 Mad., 174. See note under section 574, *infra*.

Personal Knowledge—A Judge should not, without giving evidence, import into his judgment his knowledge of any particular fact—*Hurpurshad* vs. *Sheo Dyal*, 3 Ind. App., 286; and see *Empress* vs. *Donnelly*, I. L. R., 2 Cal., 405. In a case in which the principal point at issue was the legitimacy of the plaintiff, and the Judge was influenced by the resemblance he bore to the person he claimed as his father, who had been personally known to the Judge, it was held that the decision of the Judge upon the personal resemblance could not be received or acted on by a Court of Appeal—*Jeswunt Singjee* vs. *Jet Singjee*, 3 Moore, 245; see also *Meethun Beebee* vs. *Busheer Khan*, 11 Moore, 213, p. 221. But where the Judge declared that certain persons were unworthy of credit, inasmuch as he knew them to be professional witnesses, and the Judges of the Suddar Dewanny censured him for making such an observation, their Lordships of the Privy Council said: "Their Lordships think it right to state that on that censure they do not at all concur. It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case that it is heard by a Judge acquainted with the character of the parties produced as witnesses, and who is capable, therefore, of forming an opinion upon the credit due to them"—*Bamun Doss* vs. *Tarinee*, 7 Moore, 203. And see the remarks in the case of *Mahomed Baksh* vs. *Hosseini*, 15 Ind. App., 81, p. 91.

Construction.—In construing a judgment, if a difficulty is found in reconciling the conclusion ultimately arrived at with a previous part of the judgment, such part must be rejected—*Bykunt Chunder* vs. *Dhunput Singh*, 19 W. R., 104. See "**Interpretation**," section 206, *post*.

Court to state its decision on each issue.

Exception.

204. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons thereof, upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit.

Act VIII of 1859, section 186.

Be sufficient for the Decision of the Suit—These words do not prevent a Judge deciding all the issues raised in the suit—*Devarakonda* vs. *Devarakonda*, I. L. R., 4 Mad., 134.

In cases appealable on the facts the Lower Courts should, as far as practicable, pronounce an opinion on all the important points, since by omitting to do so a case may be remanded on appeal to the High Court or Privy Council, which might otherwise be finally decided on appeal—*Tarakant* vs. *Puddomoney*, 5 W. R., P. C., 63. But the Court which has the final decision of questions of fact should confine itself to the matter upon which the decision turns—*Nanda* vs. *Bonomali*, I. L. R., 11 Cal., 544.

The judgment in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made—*Eshenchunder* vs. *Shamachurn*, 11 Moore, 7; 6 W. R., P. C., 57; *Mylapore* vs. *Yeo Kay*, I. L. R., 14 Cal., 802.

See notes under sections 147, 149, *ante*.

205. The decree shall bear date the day on which the judgment was pronounced; and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Date of decree.

Act VIII of 1859, section 189. This section applies to P. S. C. C.

Under Act VIII, though Judges were bound to define clearly their intentions in a decree, the vakils were bound to see that the decrees were drawn up according to the terms of the judgments, but by the present section this labour is thrown upon the Judge. See *Ram Lochun* vs. *Munsoor*, 10 W. R., 96.

See notes under section 2, *ante*, and section 540, *post*.

Date of Decree—The decree must bear the date on which judgment is delivered and not the date on which it is drawn up—*Ramey* vs. *Broughton*, I. L. R., 10 Cal., 652; *Bani Madhub* vs. *Matungini*, I. L. R., 13 Cal., 104.

Mesne Profits.—In a suit under section 211, *post*, there is no final decree until the enquiry is ended and mesne profits determined—*Dildar* vs. *Mujeedunnissa*, I. L. R., 4 Cal., 629; *Anando* vs. *Anando*, I. L. R., 14 Cal., 50; *Krishnan* vs. *Nilakandan*, I. L. R., 8 Mad., 137. And see "DETERMINATION OF MESNE PROFITS," section 211, *post*.

Redemption.—Where a decree for redemption declared that the improvements of the mortgagee should, when determined in execution, be deducted, the date of the decree was held to be the date on which this was done—*Krishnan* vs. *Nilakandan*, I. L. R., 8 Mad., 137. See "DATE OF JUDGMENT," section 202, *ante*.

Limitation.—A suitor is entitled, in computing the period within which he can appeal, to deduct the time between the delivery of the judgment and the actual signing of the decree—*Bani Madhub* vs. *Matungini*, I. L. R., 13 Cal., 104; *contra*—*Bechi* vs. *Ahsanullah*, I. L. R., 12 Alla., 461.

206. The decree must agree with the judgment: it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claims, as stated in the register, and shall specify clearly the relief granted or other determination of the suit.

Contents of decree.

The decree shall also state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid.

If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error:

Power to amend decree.

Provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment.

Act VIII of 1859, section 189. This section applies to P. S. C. C.

High Courts.—This section does not apply to the High Court and for its power to amend, see *Karim* vs. *Rajooma*, I. L. R., 12 Bom., 174, p. 183. See "WRONG JUDGMENTS," section 202, *ante*.

Power to Amend.—The Court should not amend except in accordance with this section—*Abdul Hayai* vs. *Chunia*, I. L. R., 8 Alla., 377; *Dhan Singh* vs. *Basant*, I. L. R., 8 Alla., 519.

Representative Parties—During the pendency of a suit brought by A for immoveable property A died and his only son was allowed to represent him. It was held that in the decree he should be described as "substituted appellant as representative of his father A"—*Rau Bijai* vs. *Jayatpal*, I. L. R., 18 Cal., 111.

Amendment.—The officer passing judgment is the proper person to construe it afterwards should any doubt arise as to its meaning—*Shaikh Besharut* vs. *Shah Gholam*, 4 W. R., Mis., 13; and where a decree requires amendment, the party aggrieved should apply to the Court in which it was granted and not appeal—*Bunwaree Chand* vs. *Mudden Mohan*, 21 W. R., 41.

Where the decree is imperfect, and the Judge who pronounced it has left the district, and it is impossible to draw up a decree from the judgment, a new trial should be ordered —*Kishen Dyal* vs. *Moulvi Abdul Lateef*, 19 W. R., 267.

Date of Amendment.—Except as specially provided for in section 32, *ante*, the amended decree is operative from the date of the decree—*Pydel* vs. *Chathappan*, I. L. R., 14 Mad., 150.

Amendment not Allowed.—The decree should not be amended after execution is barred. Moreover, as it is the duty of the parties and their pleaders to see that the decree is drawn up in proper form before it is signed, an application to amend should not be entertained if made long after the date of the decree—*Goluck Chunder* vs. *Gunga*, 20 W. R., 111; *Tasi Ram* vs. *Man Singh*, I. L. R., 8 Alla., 492.

Not an Amendment.—Interest was given in the decree from the date of suit, whereas it was only given in the judgment prior to that date: *Held*, the Court was empowered under section 209, *post*, to give the additional interest in the decree and there was no variance—*Kolai Ram* vs. *Pali Ram*, I. L. R., 7 Alla., 755.

Appellate Decree.—If the Appeal Court merely confirms the decree of the Lower Court, the latter can amend—*Sundara* vs. *Subbanna*, I. L. R., 9 Mad., 354; *Ramsarun* vs. *Pershidar*, I. L. R., 10 Alla., 51; not so, only the Court of Appeal—*Muhammad Sulaiman* vs. *Muhammad Yar*, I. L. R., 11 Alla., 267; *Tarsi Ram* vs. *Man Singh*, I. L. R., 8 Alla., 492; and if the Court of first instance amends the appellate decree, the order is not one passed under this section and is open to appeal—*Muhammad Sulaiman* vs. *Fatima*, I. L. R., 11 Alla., 314. An Appellate Court should not vary a decree not objected to in the first Court, or in the grounds of appeal—*McEllister* vs. *Biggs*, 8 App. Cas., 314, p. 317. See "FINAL DECREE," *infra*.

Further Relief.—The decree in appeal may vary the decree appealed against not only in those points in which it is erroneous, but also in respect to matters occurring subsequently which are admitted—*Sakharam* vs. *Hari Krishna*, I. L. R., 6 Bom., 113, provided the erroneous portion has been appealed against—*Raghu Nath* vs. *Pareshram*, I. L. R., 9 Cal., 635.

Limitation.—In the North-West, it seems, the application should be made within 3 years—*Gaya Prasad* vs. *Sikri*, I. L. R., 4 Alla., 23—See, however, *Darbo* vs. *Kesho Rai*, I. L. R., 9 Alla., 364, not so in Bombay—*Shivapa* vs. *Shivpanch*, I. L. R., 11 Bom., 284; and in Madras the action of the Judge under this section is looked upon as ministerial, to which neither limitation nor *res judicata* applies—*Jivraji* vs. *Pragji*, I. L. R., 10 Mad., 51.

Remedies.—If an application for review is made on several grounds, and one of them refers to a clerical mistake, the application should be refused with leave to apply to amend the clerical error under this section; but if this is not done and the clerical error is amended on review, the decree then drawn up becomes the final decree, and an appeal will be against it if brought within time—*Joykissen Mookerjee* vs. *Ataoor Rohoman*, I. L. R., 6 Cal., 22; and see *Bala Natha* vs. *Bhiva Natha*, I. L. R., 13 Bom., 496. But in the North-West an order under this section is considered a separate adjudication not appealable—*Raghunath Das* vs. *Raj Kumar*, I. L. R., 7 Alla., 876; but if it is not within the section—*Dhan Singh* vs. *Basant Singh*, I. L. R., 8 Alla., 519; *Abdul Hayai* vs. *Chunia*, I. L. R., 8 Alla., 377; or wrongly interprets the judgment, it is subject to revision under section 622, *post*—*Surta* vs. *Gunga*, I. L. R., 7 Alla., 875; *Ragunath Das* vs. *Raj Kumar*, I. L. R., 7 Alla., 876, or section 15 the Charter Act—*Muhammed* vs. *Fatima*, I. L. R., 9 Alla., 104. An order amending can also be objected to in execution of decree —*Abdul Hayai* vs. *Chunia*, I. L. R., 8 Alla., 377, and an appeal lies from the decision—*Muhammad Sulaiman* vs. *Fatima*, I. L. R., 11 Alla., 314. See "PAID BY INSTALMENTS," section 210, *post*.

Charter.—No appeal lies from an order to amend by one of the Judges who heard the case—*Muhammad* vs. *Ishanullah*, I. L. R., 14 Alla., 226.

Evidence.—A decree, though not decisive of the matter in dispute, is admissible in evidence between the same parties—*Run Bahadur* vs. *Lachoo Koer*, 12 Ind. App., 230; and even when not between the same parties, to show the nature of the title of the person who is in possession of the disputed property—*Rameshar Prasad* vs. *Koonj Behari*, 6 Ind. App, 33; *Hira Lal* vs. *Hills*, 11 C. L. R., 530. See "*Evidence*," section 203, *ante*.

Decree: Order.—A decree must follow judgment, and is a necessary part of the ultimate procedure in all suits and must be drawn up before an appeal can be laid—*Ranjit* vs. *Ilahi Buksh*, I. L. R., 5 Alla., 520, (compare *Bhola* vs. *Ramdhun*, I. L. R., 7 Alla., 894). It differs from an order: the former expresses the result of the judicial proceeding; the latter is apparently confined to such orders as are given in the course of the proceedings, and do not finally dispose of the matter. Further, a decree under the Code must be in a civil suit—*Menakshi* vs. *Subramaniya*, 14 Ind. App., 160, p. 166.

Letters Patent.—Under section 15 of the Letters Patent for 1865, an appeal lies from the judgment of one Judge, and from the judgment of two or more Judges of the High Court equally divided in opinion; and it has been held that, comparing that section with the Procedure Code, the word 'judgment' means a decision *determining* some right or liability—*The Justices of the Peace in Calcutta* vs. *The Oriental Gas Company*, 8 B. L. R., 433. In this case, Couch, C. J., said:—"A decision of the High Court of Madras was also referred to, in which it was held that the refusal of a Judge to give leave to institute a suit on the Original Side of the Court under clause 12 of the Charter was a judgment, and as such appealable under clause 15—*DeSouza* vs. *Coles*, 3 Mad., 384. The Court there said that the word 'judgment' in clause 15 could not be 'limited to the final judgment in a suit at all, but must be held to have the more general meaning of any decision or determination affecting the right or the interest of any suitor or applicant." And again, 'where the language giving the appeal is so general in its terms as that contained in the 15th clause of the Charter, it is, we think, impossible to prescribe any limits to the right to appeal founded on the nature of the order or decree appealed from.' We are not prepared to go to this extent We think that 'judgment,' in clause 15, means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined. Both classes are provided for in clauses 39 and 41 of the Charter. An order, such as that before us, which only authorizes a proceeding to be taken for the determination of a question between the parties, cannot be considered a judgment." So in *Reasut Hossein* vs. *Hadjee Abdoollah*, L. R., 3 Ind. App., 221, their Lordships of the Privy Council held as follows:—"Their Lordships are disposed to think that an order, rejecting an application for registration under the Act of 1871, must be taken to be so far in the nature of a *decree* within the meaning of Act VIII of 1859, as to fall within the operation of the sections in question" (there on review). "The proceeding may be, what is technically called in India, a miscellaneous proceeding, or it may be a summary suit; but the order made upon it is, so far as concerns the matter in dispute, final between the parties. Whether it is subject to appeal or not, it is, so far as the Court pronouncing it is concerned, a final order of adjudication between the parties." So an order finally disposing of a right to execute a decree is a judgment—*Hurrish Chunder* vs. *Kalisunderi*, I. L. R., 9 Cal., 482. But an order not determining any right but only a question of procedure is not. Thus an order granting a certificate to appeal to the Privy Council—*Lutf Ali* vs. *Asgur*, I. L. R., 17 Cal., 455; or an order refusing time to furnish security in such an appeal are not judgments within the Charter—*Kishen* vs. *Tiluckdhari*, I. L. R., 18 Cal., 182.

What amounts to a Decree.—An order rejecting a plaint—*The Justices of the Peace for Calcutta* vs. *The Oriental Gas Company*, 8 B. L. R., 433; 17 W. R., 364, even on the ground that it is insufficiently stamped—*Ajoodhya* vs. *Gunga Pershad*, 6 C. L. R, 567; I. L. R., 6 Cal., 249; *Omrao Mirza* vs. *Jones*, 12 C. L. R., 148; or that the plaintiffs are minors—*Beni Ram* vs. *Ram Lal*, I. L. R., 13 Cal., 189; (but see *Rattonbai* vs. *Chabildas*, I. L. R., 13 Bom., 7); or returning a plaintiff for including causes of action which could not be joined without leave of the Court—*Bandhan Singh* vs. *Solhu*, I. L. R., 8 Alla., 191; an order refusing the application of a decree-holder under section 331—*Fonindro* vs. *Jugodishwari*, I L. R., 14 Cal., 234; an order that a suit do abate under section 366, *post*—*Bhikhaji* vs. *Purshotam*, I. L. R., 10 Bom., 220; an order allowing a suit to be withdrawn under section 373—*Ganga Ram* vs. *Datta*, I. L. R., 8 Alla., 82; *contra*—*Pallaji* vs. *Ganu*, I. L. R., 15 Bom., 370. An order directing money to be paid out of Court in execution—*Bissunath Chundra* vs. *Khantomani*, 6 B. L. R, 747; an order refusing to entertain a suit—*Golam Ehya* vs. *Lalla Doorga*, 3 W. R., Act X, 17; an order under section 396, directing a partition—*Bhola Nath Dass* vs. *Sonamoni*, I. L. R., 12 Cal., 273; *Bepin Behari* vs. *Lal Mohun*, I. L. R., 12 Cal., 209; *Dulhin Golap* vs. *Radha Dulari*, I. L. R., 19 Cal., 463; an order rejecting an appeal as barred—*Gunga Dass* vs. *Ramjoy*, I. L. R, 12 Cal., 30; *Gulab Rai* vs. *Mangli*, I. L. R., 7 Alla., 42, or insufficiently stamped—*Rup Singh* vs. *Mukraj*, I L. R., 7 Alla., 887; an order by the Court of Appeal directing the Judge of the first Court to draw up a decree in a certain form—*Bhugwan Dass* vs. *Nund Lall*, I. L. R., 12 Cal., 173; or dismissing a suit under section 381—*Williams* vs. *Brown*, I. L. R., 8 Alla., 108; an order refusing leave to sue under clause 12 of the Letters Patent—*Hadjee Ismail* vs. *Mahomed*, 13 B. L. R., 91; an order striking off a petition for leave to sue as a pauper without any inquiry into the alleged poverty—*Baldeo* vs. *Gula*

Kuar, I. L. R., 9 Alla., 129; an order under the Administrator-General's Act, ascertaining the commission payable to that officer, and passed by a single Judge of the High Court—*Somasundaram* vs. *The Administrator-General*, I. L. R., 1 Mad., 148; an order passed in a suit referring it to the Commissioner to take the accounts between the parties—*Hirji Jina* vs. *Narran*, 12 Bom., 129; but see *Rustomji* vs. *Kessowji*, I. L. R., 3 Bom., 161; *Rustomji* vs. *Kessowji*, I. L. R., 8 Bom., 287; an order rejecting an application for execution in the Privy Council department—*Kally Soondery* vs. *Hurrish Chunder*, I. L. R., 6 Cal., 594 (compare *Manly* vs. *Patterson*, I. L. R., 7 Cal., 339); *Lutf Ali* vs. *Asgur Raza*, I. L. R., 17 Cal., 455; an order under section 37, Act VIII of 1869 (B. C.)—*Brojendro Coomar* vs. *Krishna Coomar*, I. L. R., 7 Cal., 684; an order in execution disallowing the objections raised by a judgment-debtor to execution being taken out by an assignee of the decree—*Murli Dhar* vs. *Parsotam*, I. L. R., 2 Alla., 91; an order directing the removal of certain buildings as being included in the decree—*Uda Begam* vs. *Imamud-Din*, I. L. R., 2 Alla., 74; an order refusing a person who obtained a certificate under section 3, Act XL of 1848, to defend a suit on behalf of a minor—*Baldeo Das* vs. *Gobind*, I. L. R., 7 Alla., 914; and an order under the Letters Patent directing minors to be handed over to a guardian—*Kristo Kissor* vs. *Kadermoye*, 2 C. L. R., 583, are all orders amounting to decree. See also *Rustomji* vs. *Kessowji*, I. L. R., 3 Bom., 161. See "ORDER NOT A DECREE" section 2, *ante*.

Final Decree.—A decree does not become 'final' until the time for the last appeal allowed has expired, or where appealed from, until the decision of the ultimate Court of Appeal has been given—*Shaikh Ewaz* vs. *Mokuna*, I. L. R., 1 Alla., 132; followed in *Ram Sahai* vs. *Gaya*, I. L. R., 7 Alla., 107; but in England a final decree is opposed to an interlocutory order and means the concluding and conclusive ruling of the presiding Judge—*Neill* vs. *Duke of Devonshire*, 8 App. Cas., 135, p. 165.

An appellate decree cannot be reviewed by the Lower Court—*Onraet* vs. *Sunkur Dutt Singh*, 14 W. R., 26; *Wahid Ali* vs. *Enaet Alae*, 14 W. R., 288. See "APPELLATE DECREE," *supra*, and "WHAT DECREE TO BE EXECUTED," section 223, *post*.

Form of Decree.—All the material bindings should be embodied in the decree—*Niamut Khan* vs. *Phadu*, I. L. R., 6 Cal., 319, so far as they support the decision arrived at—*Run Bahadoor* vs. *Lachoo Koer*, L. R., 12 Ind. App., 23, p. 34. It must agree with the judgment, and under the last section the Judge should be satisfied of such agreement before he signs it. The relief granted should be consistent with the plaint and pleadings in the suit—*Eshenchunder* vs. *Shama Churn*, 11 Moore, 7; 6 W. R., P. C., 57. See note under section 13, *ante*.

Where the appellate decree is joint and relates to the whole case—*Ragunath* vs. *Abdul Hye*, I. L. R., 14 Cal., 26; *Gobardhan* vs. *Gopal Ram*, I. L. R., 7 Alla., 367, it is the final decree, and the only decree capable of being executed after it has been passed, whether it reverses, modifies or confirms that given in the Lower Court—*Arunachellathudayan* vs. *Veladayan*, 5 Mad., 215; *Ram Charan* vs. *Lakhi Cant*, 7 B. L. R., 704; *Wahid Ali* vs. *Mullick*, 14 W. R., 288; *Muhammad Sulaiman* vs. *Muhammad*, I. L. R., 11 Alla., 267; and care should be taken in drawing it up that it expressly embodies so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decrees—*Kistokinker Ghose Roy* vs. *Burrodacaunt*, 10 B. L. R., 101; but if it merely affirms without more the decree of the first Court, the latter decree may be referred to for explanation and information—*Ramsaran* vs. *Pershidhar*, I. L. R., 10 Alla., 51, but whether it affects the period within which an act must be done in the first Court is not clear—*Manabikraman* vs. *Unniappan*, I. L. R., 15 Mad., 170. See *Muhammad Sulaiman* vs. *Muhammad*, I. L. R., 11 Alla., 267. See "WHAT DECREE MAY BE EXECUTED," section 223, *post*.

Cross Demand.—Where two parties appeal, so that one is a cross-appeal to the other, there should be only one final decree between the parties—*Lalla Rughoobuns Sahoy* vs. *Asloo*, 20 W. R., 294. Plaintiff's suit being dismissed in the Lower Court, he appealed, and got a decree for a portion of his claim with costs: respondent got costs for the portion disallowed. *Held*, that the respondent could not take out execution for his costs, as there was only one decree, and that he could only execute for the sum remaining after deducting them from the amount awarded to him—*Issur Chunder* vs. *Mun Mohun*, 12 W. R., 308.

Costs.—The costs of proceedings in execution of a rent-decree should not be added to the decree so as to make it appealable under section 58, Act VIII of 1869—*Kadumbini Dabya* vs. *Koylash*, I. L. R., 6 Cal., 554. As to the manner of entering costs in an appeal decree, see *Mothoora Mohun* vs. *Hury Kishore Roy*, 18 W. R., 286.

Relief.—A plaintiff suing for a share in property should not get more than he has asked for—*Samat* vs. *Amra*, I. L. R., 6 Bom., 394. Subject, however, to this that the Appellate Court may vary the decree, in accordance with matters admitted, which have occurred subsequently—*Sakharam* vs. *Hari*, I. L. R., 6 Bom., 113; and where the amount of mesne profits is to be determined on inquiry by the Court, the plaintiff is not limited to the account in his plaint—*Jadoomony Dabee* vs. *Hafez*, I. L. R., 8 Cal., 295; *Gauri Prosad* vs. *Reily*, I. L. R., 9 Cal., 112. See note under section 212, *post*.

Ordering Part.—The decree should be drawn up in one or other of the forms in Schedule IV. A copy of the judgment, with a statement of costs attached, is not sufficient -*Purmessuree Dutt* vs. *Joynath*, 15 W. R., 326. No person takes under a decree unless it is given to him in the ordering part, even though his name is mentioned in it—*Syud Zoynul Abdeen* vs. *Phoolash*, 15 W. R., 126; nor can anything be given unless the giver is expressly named—*Janokee Nath* vs. *Joy Kishen*, 15 W. R., 4. What is given and taken should be declared—*Krishtokishore* vs. *Roop Lall*, I. L. R., 8 Cal., 687; even costs, though the judgment says that they should be given—*Nabo Kristo* vs. *Parbutty Churn*, 13 W. R., 23; *Goluck Chunder* vs. *Gunga Narain*, 18 W. R., 111; or interest -*Mosoodun Lall* vs. *Bhekaree*, 6 W. R., Mis., 109; *Pillai* vs. *Pillai*, 2 Ind. App., 228; or mesne profits—*Chowdhry Nain Singh* vs. *Jawahare Singh*, 1 Alla., 246, or interest on mesne profits—*Mahomed Yakoob* vs. *Mahomed*, 22 W. R., 533, and costs will not be allowed in execution even in Privy Council cases if not expressly declared though mesne profits may—*Leelanund Singh* vs. *Court of Wards*, 14 W. R., 387; nor interest on costs—*Muddun Thakoor* vs. *Morrison*, 18 W.R., 253; *Forester* vs. *The Secretary of State*, L. R., 4 Ind. App., 137; but it is not necessary in an appeal decree that the specific sums which go to make up the costs should be set forth—*Mothoora Mohun* vs. *Hurry Kishore Roy*, 18 W. R., 286.

Persons Liable.—In the Mofussil Courts, the person declared liable must be a party to the record, though perhaps it may be otherwise on the Original Side of the High Court if the parties commit contempt—*Jointee Chunder Sein* vs. *Anundo Lall*, 14 W. R., A. O., 1; *Sreemutty Bama Sundary Dossee* vs. *Anundo Lall*, Bourke, 44. Though one defendant should not generally be made to pay another defendant's costs—*Ram Chunder* vs. *Kisto Kaminee*, 10 W. R., 194, he may be made to do so, if he colludes with the plaintiff and makes him bring a suit for his benefit, and also to pay his own costs—*Bhyroo Bagot* vs. *Deo Narain*, Marsh., 608.

Rent. Possession.—If the plaintiff has assessed the rent on certain lands at Re. 1-8 per beegah, he should not be awarded Rs. 2 by the decree—*Ghyrullah* vs. *Kishoremath*, 5 W. R., Act X, 60; if he seeks for possession of land under a purchase from a widow in an undivided Hindu family, he cannot get a decree fastening the amount of a previous mortgage on the land, though the mortgage was part of the consideration—*Madava Naikan* vs. *Appavu*, 2 Mad., 394; and where a person sued to recover land on a lease, defendant pleaded a sale, and the lease was found not to be genuine, but the land was decreed on the ground that, though there had been a sale, it had not been consented to by the proper parties and was invalid; it was held that, as no issue had been raised as regards the sale, and the plaintiff rested his claim on other grounds which had failed, the suit should have been dismissed—*Palaniyandi* vs. *Muttusami*, 2 Mad., 441.

In a suit to recover possession of property held under a lease which had expired after the action had been brought, the decree should not be for possession; but a declaration that the plaintiff is entitled to possession up to the expiry of the lease—*Umanund Roy* vs. *Sreekishen*, 7 W. R., 248.

Connected with Mortgage.—A decree to enforce a contract of hypothecation, before the Transfer of Property Act, should state that the property shall be sold unless the debtor pays the amount with interest, within a period to be named—*Chetti Gaundan* vs. *Sundaram*, 2 Mad., 51; and the right to realise the debt might be limited to the mortgaged property only—*Solano* vs. *Moran*, 4 C. L. R., 11, but after the passing of that a decree in the form given in section 86 of that Act, and the procedure of that Act is allowable in cases of mortgage executed before it.—*Dinendra* vs. *Chandra*, I. L. R., 12 Cal., 436; *Umla* vs. *Umrao*, I. L. R., 11 Alla., 367; and the sale of the property is subject to the limitation mentioned in section 99 of the Act—*Kaveri* vs. *Anathayya*, I. L. R., 10 Mad., 129; *Durgayya* vs. *Anantha*, I. L. R., 14 Mad., 74.

If the mortgagee of two properties seeks to enforce his charge against one after having bought the equity of redemption in the other, the decree should apportion the claim according to their relative values, and enforce the mortgage only to that extent, *Kishen Pertab Sahee* vs. *Lalla Nund*, 25 W. R., 388, and see *Nilakant Banerji* vs. *Mullick*—I. L. R., 12 Cal., 414; 12 Ind. App., 171, p. 180; but see *Naro Hari* vs. *Vithalbhat*, I. L. R., 10 Bom., 648.

In a suit by a second mortgagee against a third mortgagee and the mortgagor asking for an account and sale, the decretal order should set forth what is due to the third mortgagee as well as the plaintiff—*Auhindro Bhoosun* vs. *Chunnoololl*, I. L. R., 5 Cal., 101.

Foreclosure and Sale—See No. 109, Appendix, *post*.

Declaration to succeed to a Mutt.—Time may be given to qualify for the position—*Rangachariar* vs. *Yegna*, I. L. R., 13 Mad., 524.

Granting a declaratory decree in a matter of discretion—*Pirthi Pal* vs *Guman*, I. L. R., 17 Cal., 933; and if a plaintiff ask for two or more rights and only succeeds as to one, a declaration should be inserted in the decree barring his right to that which he had failed to establish—*Dhunput Sing* vs. *Narain Pershad*, 20 W. R., 94; *Saput Singh* vs. *Imrit*, I. L. R., 5 Cal., 720.

Contribution.—In a suit for contribution the decree should, if possible, declare the liability of each of the defendants—*Bhurut Pandey* vs. *Munthora Koer*, 23 W. R., 421; a joint decree should not be given—*Mohadeo Misser* vs. *Lahoree*, 24 W. R., 250.

Accounts.—In a suit against a *gomashta* to obtain accounts, it is not sufficient to make a decree ordering the defendant to render *nikash* papers to the plaintiff: it is the business of the Court to examine the papers brought before it, and to determine whether they are correct and fair account between the parties—*Shushee Shekhur* vs. *Suleem*, 22 W. R., 191, either directly or in the manner laid down in sections 394 and 395, *post*—*Annoda Persaid* vs. *Dwarkanath*, I. L.R., 6 Cal., 754; *Shoshi Bhoosun* vs. *Guru Churn*, I. L.R., 7 Cal., 89, and in the manner described in the case of *Hurrinath* vs. *Krishna Kumar*, I. L. R., 14 Cal., 147, p. 153.

Easement.—The declaration of a right to have a roof projecting over another man's land and discharging water on it, includes as an accessary right the right to enter and repair—*Hayagreeva* vs. *Sami*, I. L. R., 15 Mad., 286.

Legal Representative.—In a suit against a legal representative the decree should state that it is against the defendant in that character—*Girdharlal* vs. *Baishir*, I. L. R., 8 Bom., 309; *Viraragavamma* vs. *Samudrala*, I. L. R., 8 Mad., 208; and see—*Guruvappa* vs. *Thimma*, I. L. R., 10 Mad., 316; *Sathuvayyan* vs. *Muthusami*, I. L. R., 12 Mad., 325. See "REPRESENTATIVE CAPACITY," section 50, *ante*, and 316, *post*.

Maintenance.—A decree for maintenance should not only declare the sum payable in future, but also direct it to be paid—*Vishnu* vs. *Manjamma*, I.L.R., 9 Bom., 108; *Ashutosh* vs. *Lukhimoni*, I. L. R., 19 Cal., 139; and see *Mansa* vs. *Jiwan*, I. L. R., 9 Alla., 33; but if it does not—*Vinayak* vs. *Abaji*, I. L. R., 12 Bom., 416, or it does and the decree gets barred, a new suit will lie on it as a mere declaratory decree—*Sabhanatha* vs. *Subba*, I. L. R., 7 Mad., 80.

A decree for maintenance in favour of a Hindu widow may be set aside or suspended for unchastity—*Vishnu* vs. *Manjamma*, I. L. R., 9 Bom., 108.

Cancellation of a Document.—Where a mortgage deed is cancelled for fraud, the money actually advanced with interest to the date of payment should be decreed—*Ajit Singh* vs. *Bijai*, I. L. R., 11 Cal., 61.

Imperfect Decrees—A decree-holder can receive only what is entered in the decree; and if the terms of the decree are so uncertain that it is impossible to ascertain what has been decreed, evidence cannot afterwards be taken to amend the uncertainty in the decree. The law expressly allows certain matters to be ascertained in execution, and beyond these it is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court in execution to decide what the Judge intended to decree—*Dwarkanath Haldar* vs. *Kamalakanth*, 3 B. L. R., App., 128; and see *Joytara Dassee* vs. *Mahomed Mobaruck*, I. L. R., 8 Cal., 975; but if on reference to the record the defect in the record can be so far met as to render the decree capable of execution, it should be executed—*Jawahir Mal* vs. *Kistur Chand*, I. L. R., 13 Alla., 343; and see "INTERPRETATION," *infra*. And in execution a decree cannot be altered or varied—*Pillai* vs. *Pillai*, L. R., 2 Ind. App., 219; *Forester* vs. *The Secretary of State*, L. R., 4 Ind. App., 137; *Seth* vs. *Murli*, L. R., 5 Ind. App., 78.

A decree declaring that the defendant has a right of occupancy on payment of a proper rent without defining the rent is defective—*Kalee Narain* vs. *Chunder Narain*, 23 W. R., 228; and so is a decree awarding mesne profits at the rate admitted by the defendants, and larger mesne profits contingent on a higher rate being proved in execution—*Syud Lotfoollah* vs. *Nusseebun*, 10 W. R., 24; or for possession of a specific quantity of land without defining the boundaries—*Kangal Chundra* vs. *Kanye Lall*, I. L. R., 4 Cal., 69; or for exclusive possession of land not in the sole possession of the judgment-debtors, and the shares of the different shareholders have not been defined—*Prosunno Coomar* vs. *Addessuree*, 18 W. R., 43; or awarding all the villages claimed, and there are no villages mentioned in plaint or decree, though a separate paper giving the villages was filed with the plaint—*Muhammad* vs. *Muhammad*, I. L. R., 6 Alla., 30; so also a declaratory decree regarding the possession of an idol from time to time by contending parties, which does not define the period of worship by each, and provide for the reconveyance of the idol is defective—*Ram Soondur* vs. *Taruck Chunder*, 19 W. R., 28.

And if the vakils do not object to the particulars of the decree when brought to their notice, no appeal to amend will be listened to—*Mahommed Ruhimooddeen* vs. *Beer Protab*, 18 W. R., 303.

Remedy.—Where the decree is imperfect, and the Judge who pronounced it has left the district, and it is impossible to draw up a decree from the judgment, it seems there is no alternative but to order a new trial—*Kishen Dyal* vs. *Abdool Lutsef*, 19 W. R., 267.

When Void—The decree determines the right between the parties; and in order to determine what it really decides, it is often essential to see what are the rights in dispute between the parties, and what were alleged between them; because if a decree gives the rights which are not properly in issue, it is absolutely null and void—*Robinson* vs. *Duleep Singh*, 11 C. D., at p. 823; and see *Joytara Dassee* vs. *Mahomed*, I. L. R., 8 Cal., 975; *Omrito Lall* vs. *Ramdhun*, 18 W. R., 503.

Interpretation.—The construction of a decree must be governed by the pleadings and judgment—*Robinson* vs. *Duleep Singh*, 11 C. D., at p. 813; *Lochmon Singh* vs.

Mohon, I. L. R., 2 Alla., 497; *Sankara* vs. *Kalu*, I. L. R., 14 Mad., 29; *Radha Pershad* vs. *Torab Ali*, I. L. R., 18 Cal., 108; *Kali Krishna* vs. *The Secretary of State*, I. L. R., 16 Cal., 173, p. 183; 15 Ind. App., 186; *Shri Ganesh* vs. *Keshavrav*, I. L. R., 15 Bom., 625, p. 638; *Beemabai* vs. *Tamunabai*, I. L. R., 13 Mad., 313; *Jagabjit* vs. *Sarabjit*, I. L. R., 19 Cal., 159.

Mortgage.—Before the Transfer of Property Act, the usual mortgage decree contained a provision for realization of the debt from the general property of the debtor in the event of the mortgaged property proving insufficient, and where a decree did not contain such a provision, it was considered as limiting the relief to the mortgaged property—*Solano* vs. *Moran*, 4 C. L. R., 11; see the form of a mortgage bond—*Kalan Singh* vs. *Bakar Ali*, I. L. R., 5 Alla., p. 5. Where a decree stated a certain sum was decreed and ordered the hypothecated property to be sold for it, and added, "and it is also ordered and decreed that the defendant pay the plaintiff the sum of Rs. 99 in respect of costs."—*Held*, the decree was only personal in regard to costs—*Poran Kuar* vs. *Durga*, I. L. R., 10 Alla., 127. This interpretation formerly created a difficulty, but now under the Transfer of Property Act the plaintiff can get a money decree in the same suit under section 90—*Raj Singh* vs. *Parmanund*, I. L. R., 11 Alla., 486; *Sonatun* vs. *Ali*, I. L. R., 16 Cal., 423. Plaintiff sued on a mortgage bond and impleaded the property. He obtained a decree for plaintiff in favour of his claim and costs against defendant. It was held to be simply a money decree—*Thamman Singh* vs. *Ganga Ram*, I. L. R., 2 Alla., 342.

A decree "according to the terms of the judgment-debtor's written statement" incorporates the terms of it—*Ram Nandan* vs. *Lal Dhar*, I. L. R., 3 Alla., 775. A decree for "the plaintiff's claim with costs" means the claim as laid in the plaint—*Soude Shrinivasapa* vs. *Krishnapa*, I. L. R., 11 Bom., 177; but see *Thamman Singh* vs. *Ganga Ram*, I. L. R., 2 Alla., 342; for the "entire sum of money covered by the bond," means a decree for principal and interest specified—*Shah Aleh Ahmed* vs. *Bany*, 18 W. R., 277. A decree for "possession with wasilat," where the plaint gives no specific boundaries, meant a decree for a share in an undivided estate and not for specific lands *Ram Lochun* vs. *Munsoor*, 10 W. R., 96; the words "the plaintiff is to have judgment for his moiety with interest at the full legal rate, and the costs of the proceedings in the Court below," have been held to give plaintiff a decree for the moiety claimed by him, *i.e.*, the sum which he alleged to be due, for principal *plus* interest, with interest from the date of suit up to realization—*Gopee Kissen* vs. *Brindabun Chunder*, 19 W. R., 41. Where the Judge, after finding a certain sum due, went on to decree costs and interest thereon, this was held not to justify a decree for interest on the sum decreed—*Kalee Nath* vs. *Nuboddeep Chunder*, 17 W. R., 175; and if there is a set-off on account of costs, interest should only run on the amount after set-off has been deducted *Amanut Ali* vs. *Mussamut Bindhoo*, 13 W. R., 138.

Redemption.—The first Court gave power to redeem within two months, and this was confirmed by the High Court: *Held*, the two months ran from the date of the High Court's decree—*Daulat* vs. *Bhukandas*, I. L. R., 11 Bom., 172; but this rule does not apply if the appeal is withdrawn—*Rattaju* vs. *Gunu*, I. L. R., 15 Bom., 370; *Chudsama* vs. *Mahani*, I. L. R., 16 Bom., 243; and the same rule applies in a decree for pre-emption—*Rup Chand* vs. *Shamsh-ul-sehan*, I. L. R., 11 Alla., 346; but see *Kodai Singh* vs. *Jairri*, I. L. R., 13 Alla., 376. In Calcutta a redemption decree can be executed even after the time fixed in the decree has passed—*Poresh Nath* vs. *Ramjodu*, I. L. R., 16 Cal., 246; but not in Madras—*Elyadath* vs. *Krishna*, I. L. R., 13 Mad., 267, nor in the North-West—*Oudh Behari* vs. *Nageshwar*, I. L. R., 13 Alla., 278; nor can the time be extended after the period has elapsed—*Ram Lal* vs. *Har Narain*, I. L. R., 13 Alla., 400.

Costs and Interest.—In Privy Council cases where their Lordships direct a decree for a certain specified sum of costs, *plus* costs, for the appeal to England, or costs in the Courts below, the latter clause covers the costs of translating the appeal record and its transmission to England—*Muddun Thakoor* vs. *Morrison*, 18 W. R., 253; *Asgur Ali* vs. *Nugendro*, 23 W. R., 463; *Sharoda Pershad* vs. *Luchmeeput Singh*, 18 W. R., 89; and see *Ram Coomar* vs. *Prosunno*, I. L. R., 10 Cal., 106; and in one case interest was allowed on them at 6 per cent. per annum, though not specifically declared—*Nil Madhub* vs. *Bissumbhur*, 21 W. R., 411; but see *Muddun Thakoor* vs. *Morrison*, 18 W. R., 253, *supra*. So if "interest" merely is decreed, a reasonable amount may be allowed—*Kughoonundun Singh* vs. *Arcott*, 19 W. R., 47; *Madhab Lal* vs. *Noyan Ghose*, 6 C. L. R., 231, unless it appears from the calculation of the amount due what was the rate intended, when it will be allowed—*Shah Abdoolah* vs. *Meer Reasut Hossein*, 17 W. R., 414.

Sale.—In a suit on a mortgage security the decree was for sale of the mortgaged property, and in event of the proceeds being insufficient, that the balance should be recovered from the other property and person of the judgment-debtor. It was held that no separate order under section 90 of the Transfer of Property Act was necessary before selling the non-mortgaged property—*Batak Nath* vs. *Pitambar*, I. L. R., 13 Alla., 360; *Durga Dai* vs. *Bhagrat*, I. L. R., 13 Alla., 356.

Embankment.—A erected an embankment and prevented the influx of water into B's land. B sued A on this account, and got a decree for the removal of the embankment. It was removed accordingly. A then erected another on a different spot which had,

however, the same effect of keeping the water out of B's property. *Held*, the real object of the suit, as well as the spirit of the decree, was to prevent any obstruction on the part of A to the influx of water, and not merely the removal of a particular embankment and directed the removal of the second embankment in execution—*Roop Chunder Copalee*, Petitioner, S. D. A. Sum. Decis., February 2, 1841.

Partition.—In a suit for partition a compromise was filed, agreeing that certain ascertained property should be divided in certain proportions, and certain other property not then ascertained should be divided in the same manner. The Court declared that a decree should pass in the terms of the compromise. *Held*, that it could only be executed against the ascertained property and was merely declaratory in regard to the property unascertained—*Ram Lapit Ram* vs. *Chooaram*, 4 C. L. R., 97.

Time.—The mention in a decree of a time when a decree becomes enforceable is not a condition, but indicates a term from which limitation runs—*Narayan* vs. *Vithul*, I. L. R., 12 Bom., 23.

In a suit for pre-emption the first Court allowed one month to redeem. In appeal filed after the expiry of the period the decree was confirmed; but no period mentioned: *Held*, that the month must be calculated from the judgment in appeal—*Rupchand* vs. *Shamshaljehan*, I. L. R., 11 Alla., 346; but see *Kodai Singh* vs. *Jaisri*, I. L. R., 13 Alla., 189; but where in a redemption decree the time was fixed and an appeal was preferred, but withdrawn by permission, time ran as in the decree of the Lower Court—*Patloji* vs. *Ganu*, I. L. R., 15 Bom., 270; *Chudasama* vs. *Mahani*, I. L. R., 16 Bom., 243.

Effect of Decree.—As a rule, a decree is only binding between the parties principal and *pro formâ*—*Trilochun Chuckerbutty* vs. *Govind Chunder Roy*, 1 Shome, 244 (see note under section 332, *post*), and their representatives; after decree, representatives cannot open up the original proceeding—*Ram Bhunjun* vs. *Munder Keer*, 23 W. R., 127; and it creates an obligation superseding that existing before it—*Navlu* vs. *Raghu*, I. L. R., 8 Bom., 303; *Tatya* vs. *Balagi*, I. L. R., 7 Bom., 330, which is enforceable so long as the decree is not set aside in a suit instituted for that purpose—*Huro Chunder Biswas* vs. *Nobo Kishore Mookerjee*, W. R., 1864, p. 159; but it must be enforced in execution and does not support a new action—*Rash Munjoree* vs. *Radha Soondures*, 23 W. R., 283; *Muhunt Nursingh* vs. *Komrooddeen*, 20 W. R., 412.

Lien.—No lien can arise if Court has not jurisdiction to bind real property, and this may happen if the Court is a Small Cause Court which cannot affect real property at all, or the property is wholly beyond the Court's local jurisdiction—*Luchmeenath Singh* vs. *Madho Doss*, 2 Alla., 70; or the procedure followed is such as negatives the idea, that any lien can arise. No charge could be declared under the procedure in section 53, Act XX, 1866—*Anna Bibee* vs. *Ram Kant*, 19 W. R., 251; *Akhe Ram* vs. *Nund Kishore*, I. L. R., 1 Alla., 236.

Maintenance.—See in respect to a Muhammadan wife against her husband—*Abdul Futteh* vs. *Zabunessa*, I. L. R., 6 Cal., 631; and, if arrears are sued for by a Hindu, see *Pirthi Singh* vs. *Raj Kooer*, 2 Alla., 170; as to when not a charge, see *Muttia* vs. *Virammal*, I. L. R., 10 Mad., 283.

Wrong Person.—See "HINDUS," section 234, *infra*; "*Hindu*," section 252, *infra*. If plaintiff gets a decree against the wrong person, it does not affect the right of the real owner—*Baswantapa* vs. *Ranú*, I. L. R., 9 Bom., 86; *Akoba* vs. *Sakkaram* (*id.*), 429. Certain executors acting under an order of Court borrowed money for funeral expenses. The creditors got a decree for the same against executors and an adopted son. Meantime A succeeded in setting aside the will and in having the adoption declared void. *Held*, the creditor's decree did not affect either A or the property—*Fanindro* vs. *Jugudishwari*, I. L. R., 14 Cal., 316.

Joint and Several Liability.—Where a decree is joint and several, the fact that one debtor has paid his share of an instalment will not modify his liability if default be made by another judgment-debtor—*Salig Ram* vs. *Ram Sewuk*, 2 Agra, Mis., 14.

Registration Priority.—A decree on a registered mortgage-bond has priority over a previous decree on a prior unregistered mortgage obtained after registration—*Himalaya Bank* vs. *Simla Bank*, I. L. R., 8 Alla., 23; and see *Jagrup* vs. *Radhey*, I. L. R., 13 Alla., 288.

Hindu Representative.—In certain cases, where the members of the family have no conflicting interests, and the interests of the joint family is in issue, though the form of the decree is that of a personal decree, the judgment-debtor is looked on as the representative of the members of a joint and undivided Hindu family—*Jogendro Deb Roy* vs. *Fonendro Kut*, 14 Moore, 367, p. 376; and the decree should state whether it is personal, or binding on the party as representative only—*Ramkishore* vs. *Kallykanto*, I. L. R., 6 Cal., 479; for, unless it is manifest that he has been sued in the latter capacity, the party to the decree cannot bind the interests of others—*Loki Mahto* vs. *Aghorse*, I. L. R., 5 Cal., 144; *Abilak* vs. *Rubbi Roy*, I. L. R., 11 Cal., 293; *Summona* vs. *Dig Narain*, I. L. R., 10 Cal., 1, even if he be the father—*Babaji* vs. *Dhuri*, I. L. R., 9 Bom., 365; *Gurusami* vs. *Samurle*, I. L. R., 5 Mad., 37; *Chockalmya* vs. *Subbaraya*, I. L. R.,

5 Mad., 133; *Ram Dayal* vs. *Durga Singh*, I. L. R., 12 Alla., 209; but if neither the pleadings nor the decree state that he is a representative, then the point must be decided with reference to the nature of the debt or claim—*Laulat Ram* vs. *Mehr Chand*, I. L. R., 15 Cal., 70; 14 Ind. App., 187; *Hari Vithal* vs. *Jairam*, I. L. R., 14 Bom., 597; (but see *Suthuvayyan* vs. *Muthusami*, I. L. R., 12 Mad., 325; *Sankaran* vs. *Parvathi*, I. L. R., 12 Mad., 434); *Bissessur* vs. *Luchmessur*, 6 Ind. App., 233; *Nanomi* vs. *Modun*, 13 Ind. App., 1, the circumstances under which the suit was brought, the judgment and the decree passed—*Guruvappa* vs. *Thimma*, I. L. R., 10 Mad., 316; *Muttia* vs. *Virammal*, I. L. R., 10 Mad., 283, and the property directed to be sold—*Jotadhari Lall* vs. *Roghubir*, 12 C. L. R., 255; *Bissessur* vs. *Luchmessur Singh*, 6 Ind. App., 233; *Virayagavamma* vs. *Samudrala*, I. L. R., 8 Mad., 208; *Gurusami* vs. *Sadasiva*, I. L. R., 5 Mad., 37; but see *Sivagiri* vs. *Arunachela*, I. L. R., 7 Mad., 328. Thus if a debt is charged on the property, and decreed to be recovered out of it, then if the property be sold and the sale confirmed, it is not a mere sale of the right, title and interest of the debtor—*Bhagut Pershad* vs. *Girja Kooer*, 15 Ind. App., 99; and see *Balbir Singh* vs. *Ajudhia*, I. L. R., 9 Alla., 142.

Father's Debt.—A decree against a Hindu—*Bhagbut Pershad* vs. *Girja Koer*, I. L. R., 15 Ind. App., 99; *Mahabir Pershad* vs. *Rai Markunda*, 17 Ind. App., 11, or whoever is, after his death, in possession—*Kanakamma* vs. *Venkataratnam*, I. L. R., 7 Mad., 586, for his debt binds the estate as against his sons—*Sivasankara* vs. *Parvati*, I. L. R., 4 Mad., 96; *Girdharee Lall* vs. *Kantoo Lall*, 14 B. L. R., 187; 1 Ind. App., 321; but see *Trimbak* vs. *Narayan*, I. L. R., 8 Bom., 481; *Balbhadar* vs. *Bisesher*, I. L. R., 8 Alla., 495, and a decree against the son for his father's debts has the same effect unless the debts are immoral—*Muddun Gopal Lall* vs. *Mussamut Gomrunbutty*, 15 B. L. R., 265; 1 Ind. App., 128; *Suraj Bunsi Kooer* vs. *Sheo Pranad Singh*, L. R., 6 Ind. App., 88; *Muttayan Chettier* vs. *Sangili*, 9 Ind. App., 128; *Sivagiri* vs. *Toru Vengada*, I. L. R., 7 Mad., 339; *Nanomi* vs. *Modun*, 13 Ind. App., 1, p. 17; I. L. R., 13 Cal., 21; for a son is liable to pay the father's debt even if unnecessary—*Mahabir Pershad* vs. *Makunda*, 17 Ind. App., 11; *Mahabir Pershad* vs. *Moheshwar*, I. L. R., 17 Cal., 584; unless incurred for illegal or immoral purposes—*Bhagbat Pershad* vs. *Girja Koer*, 15 Ind App., 99, even though he be a minor and not a party—*Joiram* vs. *Joma Kondia*, I. L. R., 11 Bom., 361; or it is on a mortgage, and he had attained majority before the mortgage had been entered into, and he was no party to the suit—*Phul Chand* vs. *Man Singh*, I. L. R., 4 Alla., 309; but see the case of *Arunachala* vs. *Munisami*, I. L. R., 7 Mad., 39; and in Bombay if the father is separate at the date of the suit, he does not represent the sons—*Trimbak* vs. *Narayan*, I. L. R., 8 Bom., 481, and see *Ponappa* vs. *Pappuvayyangar*, I. L. R., 4 Mad., 1.

Debts for nautches are not immoral or illegal—*Baddree Lall* vs. *Kantee Lall*, 23 W. R., 260; *Cheyt Narain Singh* vs. *Bunwaree Singh*, 23 W. R., 395; *Mussamut Kooldeep Kooer* vs. *Ranjeet Singh*, 24 W. R., 231. See "APPELLATE DECREE" under this section.

Kurta.—A decree against the kurta of a family, or the guardian of a minor, binds the estate when the charge is one that a prudent owner would make in order to benefit the estate—*Hunooman Persad* vs. *Babooee Munraj Koonweree*, 6 Moore, 393; *Ratnam* vs. *Govinda*, I. L. R., 2 Mad., 339; *Hari* vs. *Jairam*, I. L. R., 14 Bom., 597; *Hari* vs. *Bhubaneshwari*, I. L. R., 16 Cal. 40; and in the case of a guardian, that in addition he has not exceeded the power given him by express enactment—*Dabee Dutt* vs. *Subodra*, 25 W. R., 449; *Chimmna Singh* vs. *Subran*, I. L. R., 2 Alla., 902. So it has been held that a decree for possession of land against a kurta, bound his adult nephew living with him—*Narayan Gop Habbu* vs. *Pandurang*, I. L. R., 5 Bom., 685. But the manager of an estate is not a guardian to bind a minor by a bond in Bengal—*Doorga Persad* vs. *Kesho*, 9 Ind. App., 27; or in Bombay—*Daji* vs. *Dhirajram*, I. L. R., 12 Bom., 18; compare *Ramraju* vs. *The Secretary of State*, I. L. R., 11 Mad., 309; *Subramaniyayyan* vs. *Subramaniyayyan*, I. L. R., 5 Mad., 125. Even in Bengal, the manager of a commercial concern can bind the members of his family interested in it—*Bemola Dossee* vs. *Mohin Dossee*, I. L. R., 5 Cal., 792; see also *Johura Bibee* vs. *Sree Gopal Misser*, I. L. R., 1 Cal., 470; *Ramlal Thakursidas* vs. *Luchmochand*, 1 Bom., App., 51, at p. 71; *Daulat Ram* vs. *Mehr Chand*, 14 Ind. App., 187; I. L. R., 15 Cal., 70; but in Madras, they should be made parties to any suit for a trade debt, even if they are sons and the debt has been contracted by their father—*Gurusami* vs. *Samurti*, I. L. R., 5 Mad., 37; *Arunachala* vs. *Sivagiri*, I. L. R., 7 Mad., 328; and see *Sathurayyan* vs. *Muthusami*, I. L. R., 14 Mad., 325. But where a decree directed mesne profits to be paid by a person who was manager—the decree did not show he was sued as manager—and two members of the family joined with him were exonerated, the decree did not bind the family—*Venkata* vs. *Kaveri*, I. L. R., 7 Mad., 201.

Karnavan.—A Karnavan represents the Tarwad, unless he has been guilty of fraud or breach of duty—*Thenju* vs. *Chimmu*, I. L. R., 7 Mad., 413; *Moidin* vs. *Krishnan*, I. L. R., 10 Mad., 323; *Subramanyan* vs. *Kali*, I. L. R., 10 Mad., 355; *Subramanyan* vs. *Gopala*, I. L. R., 10 Mad., 223; but this does not prevent a suit for an injunction to restrain the decree-holder from executing the decree against him—*Appu* vs. *Raman*, I. L. R., 14 Mad., 425.

Uralars.—A decree against Uralars is binding on all future representatives of the devasam, unless set aside on the ground of fraud—*Kelu* vs. *Paudel*, I. L. R., 9 Mad., 473.

Widow.—A Hindu widow will, as defendant, represent and protect her husband's as well in respect of her own as of the reversionary interest in any suit, the object of which is to recover or to charge an estate, and a decree against her will bar the reversioners—*Nugender Chunder* vs. *Sreemutty*, 8 W. R., P. C., 17; *Natha Hari* vs. *Jamni*, 8 Bom., 37; *Partab Narain* vs. *Trilokonath*, 11 Ind. App., 197. Thus, when a widow is sued for the debt of her husband, the decree, although not in terms against her as representative of her deceased husband or as guardian of his minor son, may be executed against the property of the deceased—*Ishan Chunder Mitter* vs. *Baksh Ali Sodagur*, Marsh., 514; *Sotish Chunder* vs. *Nil Comul*, I. L. R., 11 Cal., 45; *Jugol Kishore* vs. *Jotendro Mohun*, 11 Ind. App., 66; and if she adopts a son the result of a litigation which began before the adoption will bind the son though he is not a party and it is carried on in her name—*Hari Saran* vs. *Bhubaneswari*, I. L. R., 16 Cal., 40; compare *Subbanora* vs. *Venkata-krishna*, I. L. R., 11 Mad., 408; and where a minor son is substantially before the Court, and the proceedings show a clear intention on the part of the Court to bind the entire estate, no technical objection will be allowed—*Hari Saran* vs *Bhubaneswari*, I. L. R., 16 Cal., 40; *Hari* vs. *Narayan*, I. L. R., 12 Bom., 427; *Kunhammad* vs. *Kutti*, I. L. R., 12 Mad., 90; but if the existence of the minor son is completely ignored, and there is nothing on the face of the proceedings to show she was sued as representing him, he is not bound by the decree—*Akoba* vs. *Sakharam*, I. L. R., 9 Bom., 429; and see *Durga Persad* vs. *Kesho*, 9 Ind. App., 27.

A decree against "Mussamut Chooharoo Kooer, mother and guardian of Hurpershaud, the minor son and heir of Gourepershaud" for rent due in Gourepershaud's lifetime bound his estate—*Manager of the Raj Darbanga* vs. *Ramaput Singh*, 10 B. L. R., 295; and a decree passed against her husband but executed against her has the same effect—*Hari* vs *Minakshi*, I L. R., 5 Mad., 5; and this doctrine has been extended so far as to hold that, in cases of this kind, all that is necessary to see is for whose debt the decree has passed irrespective of whether the lady is heir—*Hulkhory* vs. *Sheo Churn*-24 W. R., 109; and a decree against a Hindu widow who had adopted a son, for contribution on account of money paid to preserve arrears, has been held to bind the estate—*Roop Monjooree* vs. *Ramlall*, 1 W. R., 145, p. 151; but see *Phoolbas Koonwur* vs. *Lal Jogeshur*, I. L. R., 1 Cal., 226; *Raijun Doobey* vs. *Brij Bhookun*, I. L. R., 1 Cal., 139 See "LEGAL REPRESENTATIVE," section 234, *post*.

Personal Debts.—As regards debts or charges contracted by a Hindu widow on the estate in her widowhood, it must be remembered that she possesses but a limited power of alienation—*Bhagbutti Dase* vs. *Bholanath Thakoor*, 24 W. R., 168. A personal decree against her, where no charge is declared on the estate, and the debt has been contracted in her widowhood, does not bind the estate, but only her life-interest—*Kisto Moyee* vs. *Prosunno Narain*, 6 W. R., 304; and see *Hurry Mohun* vs. *Gonesh*, I. L. R., 10 Cal., 823, p. 845; even though the debt could have been declared a charge on the estate—*Baijun Doobey* vs. *Brij Bhookun*, 24 W. R., 307; I. L. R., 1 Cal., 103; *Phorbas Koonwur* vs. *Lalla Jogeshur*, I. L. R., 1 Cal., 226; *Kristo Gobind* vs. *Hem Chunder*, I. L. R., 16 Cal., 511; for in such cases, the suit being against the widow for her own debt, she cannot be said to be defending as respecting the estate, but only as defending her own interest—*Mohima Chunder* vs. *Ramkishore*, 15 B. L. R., 155; but if an estate is sold under a decree for debts partly incurred by herself and partly by the late full owner the sale is good—*Debendro Narain* vs. *Coomar Chundernath*, 20 W. R., 30; and if she dies the heirs are liable for any debt incurred for the good management of the estate—*Hurry Mohun* vs. *Gonesh*, I. L. R., 10 Cal., 823.

Fraud.—Further if instead of protecting the estate, as she is bound to do, a Hindu lady seeks to destroy it by causing it to be sold for arrears of revenue, and a mortgagee with such knowledge saves it, he cannot bind the estate at all by any form of decree without making reversioners parties—*Nugender Chunder Ghose* vs. *Dossee*, 8 W. R., P. C., 21; and the same result ensues if it appears that she allowed a decree to pass for the property without a fair trial—*Brammoyee Dassee* vs. *Kristo Mohun Mookerjee*, I. L. R., 2 Cal., 222; *Sachit* vs. *Budhua*, I. L. R., 8 Alla., 429, or if a purchaser has with knowledge bought it in execution of such a decree—*Parekh* vs. *Vakhat*, I. L. R., 11 Bom., 119.

Charging Estate.—And, on the same principle, if a widow raises more money than she should, the estate cannot be destroyed under the decree—*Rajah Jha* vs. *Parbutty Ojhan*, W. R., 1864, p. 40, and the reversioners must get possession on paying the amount she could have raised with interest—*Phool Chund* vs. *Rughoobuns*, 9 W. R., 108; *Sadashiv* vs. *Dhakubai*, I. L. R., 5 Bom., 450; though in such a case the alienation or charge was a good charge—*Muteeram Kowar* vs. *Gopal Sahoo*, 20 W. R., 187; and as to the form of decree where the charge is only good in part, see *Rajaram Tewari* vs. *Luchmon Prasad*, 4 B. L. R. (A. C.), 118. The case of *The Collector of Masulipatam* vs. *Cavaly Vancata Narrainapah*, 8 Moore, 529, deserves particular mention. In it a decree was obtained against a widow for debts binding the estate; the decree charged the estate, and directed a sale. Subsequently, for the purpose of preventing the sale for the time, she mortgaged the property until the principal and interest should be paid to the mortgagee; the compromise was recorded and execution suspended, but owing to an order of

Court the mortgagee never got possession. It was held, apparently on the ground that the compromise effected a novation, the creditor had only a lien on the estate for the amount of the mortgage.

Court of Wards.—Quere, if sale under a decree for a debt incurred by a widow ward, with sanction of the Court, binds the reversioner—*Debendro Narain* vs. *Coomar Chundernath*, 10 W. R., 30; but see *Sarabjit* v. *Chapman*, 13 Ind. App., 44, p. 47; *Balkrishna* vs. *Maruma*, I. L. R., 5 Alla., 142.

Muhammadan.—See note under section 232, *post*. Where a suit was brought against "Khatima, deceased represented by her minor son represented by his guardian" and decree obtained for the debt of Khatima, it was held that a sale of her property in execution passed a good title of the whole to the purchaser, although there was another heir, and the latter could not impeach the sale unless on the ground that the debt was not due—*Khurshetbibi* vs. *Keso*, I. L. R., 12 Bom., 101. See also *Jafri Begam* vs. *Amir Muhammed*, I. L. R., 7 Alla., 822; *Bussunteram* vs. *Kamaluddin*, I. L. R., 11 Cal., 421 *Lutchmiput* vs. *Land Mortgage Bank*, I. L. R., 14 Cal., 464.

Consent Decree.—A decree by consent against one heir of a deceased Muhammadan debtor cannot bind the other heirs—*Assamathem Nessa Bibee* vs. *Asruff Ally*, I. L. R., 4 Cal., 142.

Money-Decree—It was not unusual for a mortgagee or pledgee to waive his right to follow the property and sue for a simple money-decree—*Fukeer Buksh* vs. *Chutturdharee*, 14 W. R., 209, unless he had deprived himself of the power by the original contract—*Webb* vs. *Rinchlden*, 14 W. R., 214. The effect of such a decree is not definitely settled, but it would appear that the lien is lost, it only gives a personal remedy—*Gouree Singh* vs. *Fuzl Hossein*, 15 W. R., 313; *Radha Coomar* vs. *Luchmee Chand*, 3 W. R., Mis., 16. Nor can the decree be executed as a mortgage-decree against the property, but the lien may be enforced in a separate action—*Gupinath Singh* vs. *Sheo Suhay*, B. L. R., (F. B.), 72; *Bir Chunder* vs. *Mahomed Asfaroodeen*, I. L. R., 10 Cal., 299; *Soobuns Singh* vs. *Ishur Dutt*, 21 W. R., 150; *Dheraj Mahtab Chand* vs. *Hurdeo Narain*, 16 W. R., 119; *Jongnejoy Mullick* vs. *Doosmoney Dossee*, I. L. R., 7 Cal., 714, for sale or foreclosure only. Whether a second suit will be allowed under the Code is not quite clear. See note on section 43, *supra*, and the Transfer of Property Act, 1882, section 99.

Difference in Form.—Whether a party having a lien on account of certain property belonging to another, and holding also a money-decree for the same debt which she could satisfy by attachment and sale of other property belonging to her judgment-debtor entered into a *kistbundi* with the latter, in which in consideration of other properties pledged by its terms, she gave up the right of executing the decree against any of the judgment-debtor's property: *Held*, that the *kistbundi* did not extinguish the original debt or do away with lien—*Ram Churn Lall* vs. *Rughoobeer Singh*, 11 W. R., 481.

As to the difference between a money-decree and a decree declaring a lien—*Hursukh* vs. *Meghraj*, I. L. R., 2 Alla., 345; *Debi Churn* vs. *Pirbhu Din Ram*, I. L. R., 3 Alla., 388. A declaration that plaintiff is entitled to obtain possession on payment of a certain sum, is a money decree in regard to that sum—*Ramanagra Singh* vs. *Ramyad*, 5 C. L. R., 176.

Decree for recovery of immoveable property.

207. When the subject-matter of the suit is immoveable property, and such property is identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

Act VIII of 1859, section 190. This section applies to H. C.

The decree should, on the face of it, shew distinctly and accurately the property affected by it—*Shristeedhur Bhattacharjee* vs. *Kalee Doss*, 21 W. R., 479: it should specify its boundaries—*Mahomed Ismail* vs. *Lalla Dhunder*, 25 W. R., 39 So a decree for 7 khadas, 14 pakees, 12 kanees of land, out of a larger plot, or for 6 kanees without boundaries, cannot be executed—*Darbaree Sayal* vs. *Falu Dhalee*, 23 W. R, 285, *Dwarkanath Roy* vs. *Jannobee Chowdhrain*, 19 W. R., 81.

Effect of Decree.—A party having obtained a decree for possession cannot bring a second action against the defendant for the same property unless upon a cause of action that has arisen after execution; he must execute his decree—*Mohunt Nursingh Doss* vs. *Moonshee Kumrooddeen*, 20 W. R., 412. See "DECREE," section 11, *ante*, "*Existing Decree*," section 11, *ante*; "EFFECT OF DECREE, section 206, *ante*. But a second suit will lie for possession against the defendant if the plaintiff has obtained formal possession under the first decree—*Shama Charan* vs. *Madhub Chandra*, I. L. R., 11 Cal., 93; *Juggobundhu* vs. *Purnanund*, I. L. R., 16 Cal., 521.

A decree for possession of land carries with it possession of the village account books and other papers relating to the management of the land — *Shri Bhavani* vs. *Devrao*, I. L. R., 11 Bom., 485, and the buildings erected on it—*Ramdhone* vs. *Ishanee*, 2 W. R., 123; unless they have been erected by the person in possession, and he is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title, when he is entitled either to remove the materials, restoring the land into the state it was in before the improvement was made, or to obtain compensation for the value of the building, if it is allowed to remain for the benefit of the soil, and the decree-holder has the option of either taking the building, or allowing the removal of the materials if the building has not been taken down by the losing party during the continuance of his possession—*In the matter of the Petition of Thakoor Chunder Paramanick*, B. L. R., F. B., 595; but this rule does not apply to Calcutta — *Juggut Mohinee* vs. *Dwarka Nath*, I. L. R., 8 Cal., 582. Good faith is more than the absence of bad faith. Nothing is done or believed in good faith which is done or believed without due care and caution. Where the reversioners of a Hindu widow sued a person claiming under her by purchase, it was held that defendant could not claim the buildings, as it was the first duty of a purchaser from a Hindu widow, or a purchaser from such a purchaser, to satisfy himself, as an ordinary prudent owner would do, as to her right to sell—*Ramdhone* vs. *Ishanee*, 2 W. R., 123.

If a member of a joint Hindu family builds a brick house on the ancestral land, and his coparceners sue for partition, they cannot claim any property in the house, and can only demand other similar land of equal amount—*Khoderam Surma* vs. *Trilochun*, 1 Sel. Rep., 35.

A decree for "possession and wasilat" merely without specifying the lands, and where no boundaries are given in the plaint, is a decree for possession of an undivided share—*Ram Lochun* vs. *Munsoor Ali*, 10 W. R., 96.

Plaintiff sued for one-third of certain plots, but the Munsif changed the nature of the suit and gave her a decree for one-third of all lands devolving under the same title, part of which were in her possession. In execution defendant objected that the plaintiff should first execute the decree in respect of the lands in his own possession; but it was held that he could execute it against all the land in the defendant's possession—*Radha Kristo Panjah* vs. *Bama Soondures*, 13 W. R., 9.

Decree for delivery of moveable property.

208. When the suit is for moveable property, if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative if delivery cannot be had.

Act VIII of 1859, section 191. This section applies to H. C. and P. S. C. C.

In a suit for partition of moveables, defendant objected to the accuracy of the list of moveables filed by the plaintiff, and the Judge, without determining whether the list was correct or not, decreed the claim, and declared that objections regarding any articles would be heard in execution of decree. It was held that he should have framed an issue and decided the question before he gave a decree—*Sheo Gobind* vs. *Sham Narain*, 7 Alla., 75.

The payment of money is only an alternative form of relief, and should not be enforced unless delivery cannot be had under the decree—*Kashee Nath Kooer* vs. *Deb Kristo Ramanooj*, 16 W. R., 240. The amount to be paid is generally the value of the property *plus* damages for the time the plaintiff has been kept out of it—*Bombay Trading Corporation* vs. *Mirzah Mahomed*, 19 W. R., 123; *Kashee Nath* vs. *Deb Kristo Ramanooj*, 16 W. R., 240.

Decrees for payment of money may order certain interest to be paid on principal sum adjudged.

209. When a decree is for the payment of money the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

Where such a decree is silent with respect to the payment of further interest on such aggregrate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

Act XXIII of 1861, section 10. This section applies to H. C. and P. S. C. C. The words "when the decree is for the payment of money" and the second paragraph have been introduced by Act VII of 1888, section 20.

Payment of Money.—See note under section 210, *post*.

Contract, Rate of—The rate agreed on must be awarded up to the date of suit—Act XXVIII of 1855, section 2; *Mangniram* vs. *Dhowtal*, I. L. R., 12 Cal., 569; even if it is compound interest—*Bandaru* vs. *Atchayamma*, I. L. R., 3 Mad., 125; unless fraud is established and the contract is set aside—*Shah Koondun Lall* vs. *Rajah Ameer Hussun Khan*, 11 Moore, 121, or the contracted rate is exorbitant, and the money was lent to a *parda-nisheen* lady by her own mokhtar—*Kamini Sundari* vs. *Kali Prosunno*, L. R., 12 Ind. App., 215; I. L. R., 12 Cal., 225; or unconscionable, such as 12½ per cent. per month—*Kuar Lachman* vs. *Pirbhu Lal*, 6 Alla., 359 (75 per cent. yearly is not—*Omda Khanum* vs. *Brojendro*, 12 B. L. R., 477), or amounts to a penalty, or is compound interest at the rate of 2 per cent. per month, and the loan has been taken under pressure—*Madho Singh* vs. *Kashi Ram*, I. L. R., 9 Alla., 228, or it has been agreed to by an ignorant cultivator who did not understand the nature of the bargain—*Lalli* vs. *Ram Prasad*, I. L. R., 9 Alla., 74.

Mortgages Limitation. Quære.—Has a mortgagee who has sold under a power of sale a right to retain interest barred?—*Marshfield* vs. *Hutchins*, 34 C. D., 721.

Penalty.—An agreement for enhanced interest from date of default is not a penalty—*Mackintosh* vs. *Crow*, I. L. R., 9 Cal., 689; *Dip Narain* vs. *Dipan*, I. L. R., 8 Alla., 185; *Balkishen* vs. *Run Bahadur*, I. L. R., 10 Cal., 305; *Behary* vs *Tej*, I. L. R., 10 Cal., 765; *Jaganadham* vs. *Ragunadha*, I. L. R., 9 Mad., 276, *Chhab Nath* vs. *Kamta*, I. L. R., 7 Alla., 333, unless coupled with compound interest—*Dip Narain* vs. *Dipan*, I. L. R., 8 Alla., 185, though if from date of bond it is—*Muthura Persad* vs. *Luggun*, I. L. R., 9 Cal., 615; *Sungut* vs. *Baijnath*, I. L. R., 13 Cal., 165; *Kalachand* vs. *Shib Chunder*, I. L. R., 19 Cal., 392; unless the bond does not provide for interest except on default—*Arjan Bibi* vs. *Asgar Ali*, I. L. R., 13 Cal., 200; but see—*Nanjappa* vs. *Nanjappa*, I. L. R., 12 Mad., 161; *Gopal Ram Chandra* vs. *Gangaram*, I. L. R., 14 Bom., 72, p. 77; *Daudbhai* vs. *Daudbhai*, I. L. R., 14 Bom., 113; *Sajaji* vs. *Maruti*, I. L. R., 14 Bom., 274.

Decree.—The doctrine of penalties does not apply to stipulations in decrees—*Shirekuli* vs. *Mahallya*, I. L. R., 10 Bom., 435. As to consent decrees, see *Balkishen* vs. *Run Bahadur*, I. L. R., 10 Cal., 305; *Nanjappa* vs. *Nanjappa*, I. L. R., 12 Mad., 161; *Sajaji* vs. *Maruti*, I. L. R., 14 Bom., 274.

A condition in a decree payable by instalments that in default of payment of any two instalments, the whole amount due and *increased* interest should be at once recoverable is not a penalty—*Run Bahadoor* vs. *Roy Narain*, 7 C. L. R., 82.

Interest greater than Principal.—Interest greater in amount than the principal cannot be recovered in a suit between Hindus in Madras—*Kakarlapudi* vs. *Uppalapadi*, 1 Mad., 5; or Bombay—*Ganpat* vs. *Adarji*, I. L. R., 3 Bom., 312, unless the defendant is not a Hindu—*Nanchand* vs. *Bapusaheb*, I. L. R., 3 Bom., 131; or in Calcutta—*Nobin* vs. *Romesh*, I. L. R., 14 Cal., 781; and the rule applies to mortgages where no account of rents and profits has to be taken—*Balkrishna* vs. *Hari*, I. L. R., 15 Bom., 84; see also *Umes Chunder* vs. *Zahoor*, 17 Ind. App., 201, p. 213, I. L. R., 18 Cal., 164; otherwise in Bengal outside Calcutta—*Het Narain* vs. *Ram*, I. L. R., 9 Cal., 871, and in the North-West—*Kuar Lachman* vs. *Pirbhu Lal*, 6 Alla., 359.

After Suit.—In an ordinary suit for money, the rate of interest after plaint and before decree is in the discretion of the Court, whether there is a stipulated rate or not, and even if the bond is a mortgage-bond; but if the suit is for foreclosure and sale under sections 85, 86 of Act IV of 1882, the stipulated rate should be given—*Mangniram* vs. *Dhowtal Roy*, I. L. R., 12 Cal., 569, and so in Bombay the rate is in the power of the Court—*Carvalho* vs. *Narbibi*, I. L. R., 3 Bom., 202; unless in a suit to redeem—*Dhaudbhai* vs. *Dhaudbhai*, I. L. R., 14 Bom., 113; but in Madras the stipulated rate must be given up to decree—*Bundaru* vs. *Atchayamma*, I. L. R., 3 Mad., 125; *Ramchandra* vs. *Deva*, I. L. R., 12 Mad., 486. See on this point—*Umes Chunder* vs. *Zahoor*, 17 Ind. App., 201; I. L. R., 18 Cal., 164.

After Decree.—Interest if not given in the decree is taken to have been refused—Clause 2, *supra*. After the decree the contract ceases, becomes merged in the decree, and the plaintiff recovers only such interest as according to the course and practice of the Court is

allowed on debts for which the creditor has the security of its decree—*Rashessur Surmah* vs. *Kaleekanath*, 11 W. R., 455. Interest on the amount decreed, namely, principal, interest, and costs cannot be objected to on the ground that it is compound interest—*Joodonath Roy* vs. *Dwarkanath*, 1 W. R., Mis., 15, 3 H. Ct. Cir., 1866. See on this point *Ex-parte Fewings*, 25 C. D., 338.

Mercantile Usage—Where there is no express agreement to pay interest, it may be awarded if there is any such mercantile usage, such as 9 per cent. on all book debts in Bombay—*Ram Lal* vs. *Dulab Dass*, Perry's O. C., 220; 5 Moore, 136; otherwise in Calcutta—*Joy Narain* vs. *Kashee Chowdhry*, 16 W. R., 148; *Juggomohun Ghose* vs. *Kaisreschund*, 9 Moore, 260, see, however, *Juggomohun* vs. *Manickchund*, 7 Moore, 263, as to the nature of the evidence sufficient to prove mercantile usage. Interest runs on hoondees drawn at 111 days' sight in Moorshidabad—*Dhunput Singh* vs. *Jugut Indur*, 4 W. R., 85.

Interest after due date no Contract.—When a rate of interest is not stipulated for till realization, but to a certain date, if the money is not paid on the fixed day, the principal and interest become from that time a debt, which, when recovered by process of law, may, in the discretion of the Court, be made the subject of an additional penalty for the breach within six years—*Gudri Koer* vs. *Bhubaneswari*, I. L. R., 19 Cal., 19; but there is no implied contract for the continuance of the same rate of interest—*Deen Doyal Lal* vs. *Het Narain Singh*, I. L. R., 2 Cal., 41; *Bishen Dyal* vs. *Udit*, I. L. R., 8 Alla., 486, and there is no distinction on this point between an ordinary bond and a mortgage—*Niwas Ram* vs. *Udit Narain*, I. L. R, 13 Alla., 330; as to the case of vendor and purchaser see *Ghousiah* vs. *Rustumjah*, I. L. R., 13 Mad., 158. If the debtor has continued to pay the same rate of interest after the due date, this will be evidence in support of holding that interest is a fair measure of the damages suffered by the creditor —*Mirza Mohamed Hossein* vs. *Tuqueeroodeen*, 15 W. R., 284; but if there is no fixed rate, and the contracted rate be exorbitant, the Court should only allow a fair and reasonable rate after the day on which the money has become due—*Moizoodey Shaikh*, Petitioner, 14 W. R., 450.

Given by Law.—By Act XXXII, 1839, it is enacted "that, upon all debts or sums certain payable at a certain time or otherwise, the Court, before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable; if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when the demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment."—This is an enabling Act, and does not restrain a Court from allowing interest in other cases in which interest was allowed before the Act—*Golam Ahmed Shah* vs. *Beharyloll*, Marsh., 239; as, for example, suits for contribution, where it has always been allowed, unless plaintiff has slept over his rights—*Bistoo Chunder* vs. *Nithore Monee*, 19 W. R., 98; *Nullit Biswas* vs. *Prosunno Moyee*, 17 W. R., 179.

The Act extends to debts of sums certain, but not to unascertained balances—*Hill* vs. *South Staffordshire Railway Co.*, L. R., 18 Eq., 154; but not to debts contingent as to amount and time of becoming due—*Juggomohun Ghose* vs. *Manickchund*, 7 Moore, 263; nor where the parties have regulated the amount of interest by contract, for then interest is as much payable as the principal—*Bunwaree Lall* vs. *Moheshur Singh*, Marsh., 544; but it applies to cases in which the date is made certain with reference to a certain time or event, the date of which can be ascertained afterwards, and it does not require that the day of payment should be mentioned in the instrument—*Duncombe* vs. *The Brighton Club and Norfork Hotel Co.*, L. R., 10 Q. B., 371; followed in *London, Chatham and Dover Ry.* vs. *South Eastern Ry.*, 1 Ch. (1892), 141; though, on the other hand, it has been held not to cover a note payable on demand—*The Bank of Hindustan and China* vs. *Wilson*, 1 B. L. R., 41.

A summons is a demand within the section—*Ex-parte Alison*, L. R., 15 Eq., 394, and where no previous demand has been made, interest can only be given from the date of the suit—*Patsahee Dobain* vs. *Hurdeo Narain*, 24 W. R., 457; and then the amount is within the discretion of the Judge—*Mangniram* vs. *Dhowtal*, I. L. R., 12 Cal., 569, and see "AFTER SUIT," *supra*.

"Interest," Allowed.—Interest has been allowed when the plaintiff has been opposed in following a sum in execution—*Parbutty Churn Soor* vs. *Promothonath Ghose*—W. R., 1864, p. 174; or deprived of money actually making interest—*Miller* vs. *Barlow*, 14 Moore, 233; to a mortgagee on account of putni rents paid by him—*Brojonath Singh* vs. *Bhugobutty Dasee*, 1 W. R., 133; from a mortgagee retaining possession after payment—*Esree Singh* vs. *Sheo Sahoy*, S. D., N. W., 1864, p. 438; and on the surplus proceeds in his hands when he has sold under a power of sale—*Haji Abdul* vs. *Haji Noor*, I. L. R., 16 Bom., 141; but not from an agent retaining money not demanded—*Turner* vs. *Burkinshaw*, L. R., 2 Ch. App., 488. Interest has been allowed on rents exacted contrary to a decree—*Tara Monee* vs. *Mackintosh*, 9 W. R., 272; on money ordered to be deposited

and no deposit made, from the date of order—*Ramdass* vs. *Prosunno Moyee*, 16 W. R., 297; on the interest of Government promissory-notes improperly retained—*Tarucknath Mookerjee* vs. *Gouree Churn*, 3 W. R., 147; and even if no mention is made of interest in the document, yet if the parties have treated the same as bearing interest, the party who has paid it may be estopped from denying it is due—*Gunga Phul* vs. *Gopal Oophadhaya*, 1 W. R., 136; on the other hand, if a person is entitled to interest under a decree, he does not lose it by agreeing to take payment in instalments—*Mohanund Moojoomdar* vs. *Purtab Chunder*, 6 W. R., Mis., 121; and where there was an agreement to pay interest at 5 per cent., and A subsequently verbally agreed to give 8 per cent., and voluntarily debited himself at 8 per cent. instead of 5, it was held 8 per cent. could not be enforced, as the agreement was a *nudum pactum*—*Guthrie* vs. *Lister*, 11 Moore, 129; 6 W. R., P. C., 59. But see *Sheo Golam* vs. *Bano Prosad*, 4 C. L. R., 29.

Payment, Tender.—An offer of part-payment will not stop interest—*Kunhya Singh* vs. *Tooydun Singh*, 7 W. R., 20; nor will a payment into Court by way of security until final decision which cannot be withdrawn by the plaintiff—*Barrow's case*, L. R., 3 Ch. App., 787; for the present law, see sections 376 9, *infra*; nor will a tender of a portion without payment into Court—*Haji Abdul* vs. *Haji Noor*, I. L. R., 16 Bom., 141; *Chunder Kant* vs. *Judoo*, 1 C. L. R., 470.

As to what is a sufficient tender to stop interest after decree, see *The Administrator-General* vs. *Mirza Ahmed*, I. L. R., 9 Cal., 33.

Interpretation—A note of hand promised repayment with interest at 5 per cent. without either stating whether it was per mensem or per annum: *Held*, the ambiguity might be explained by previous transactions between the parties and by custom—*Mahomed Shamsoodeen* vs. *Abdool Haq*, W. R., 1864, p. 379.

Rent.—By law, arrears of rent are liable to interest at 12 per cent. from the end of the year. It is not allowed on arrears at enhanced rates, the rates being determined by the Court—*Sumsera Khatoon* vs. *Gopal Lall Tagore*, 1 W. R., 58. The right to interest is not lost by not claiming it for broken periods—*Rutty Kant Bose* vs. *Gungadhur Biswas*, W. R., F. B., 13.

Delay.—Interest should not be allowed after the time the plaintiff might or ought to have put up the property for sale, and possibly might have realized the whole amount due—*Ramanund Coondoo* vs. *Chowdhry Somder Narain Sarungy*, P. C., Nov., 1878.

Interest Disallowed.—Defendants as nearest of kin had assumed charge of a minor's estate, carried on his banking business with his capital and kept a strict account of profit and loss. *Held*, the minor was not entitled to interest on the capital, but only the profit, actually realized, and they could not charge commission—*Mohun Lall* vs. *Moolchun*, S D., N. W, 1862, p. 212.

Interest has not been allowed on a bond specially registered; unless it expressly states that it carries interest after due date; it is to be enforced as a decree—*Kallooram Baboo* vs. *Doorganath*, 10 W. R., 175; nor can it be realised from a defaulting purchaser under the Code on the difference between the first and second purchase-moneys—*Soorj Buksh* vs. *Sreekishen*, 9 W. R., 500; nor is it allowed on money deposited, under a decree subsequently reversed, where the suit is not improper or vexatious—*Ashruffunnissa* vs. *Khanum Jaun*, 6 W. R., 285.

Charge.—Where a decree treats an estate as primarily liable to discharge a debt with interest, the proprietor (or his heirs) has a perfect right to pay the money into Court to protect himself from being made responsible to indemnify the sureties; and, if the money is deposited, it is unnecessary for the Court to enquire whether it was deposited under authority from the proprietor or his heirs—*Bisseshur Singh* vs. *Nim Chand*, 12 W. R., 505.

Decree may direct payment by instalments.

210. In all decrees for the payment of money the Court may, for any sufficient reason, order that the amount shall be paid by instalments, with or without interest;

Order, after decree, for payment by instalments.

And after the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that the amount decreed be paid by instalments on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him, or otherwise, as it thinks fit:

Save as provided in this section and section 206, no decree shall be altered at the request of parties.

Act VIII of 1859, section 194. This section applies to H. C. and P. S. C. C.

Decrees for the Payment of Money.—This section applies to cases referred to in section 58, Act VIII of 1869—*Guresbullah Sircar* vs. *Mohun Lall*, I. L. R., 7 Cal., 127; 8 C. L. R., 409. It does not refer a suit for the recovery of a bond debt by sale of the immoveable property pledged—*Hardeo Das* vs. *Hukam Singh*, I. L. R., 2 Alla., 320; *Shankarapa* vs. *Danapa*, I. L. R., 5 Bom., 604; *Mahadaji* vs. *Hari*, I. L. R., 7 Bom., 333; nor to a suit to enforce a lien on an annuity called *nunkur*—*Bachchu* vs. *Madad Ali*, I. L. R., 2 Alla., 649.

This section confers no authority on the Courts to relieve a contracting party from an express stipulation, in a bond payable by instalments, as to the consequence of default in punctual payment of the instalments—*Ragho Govind* vs. *Dipchund*, I. L. R., 4 Bom., 96.

The Court.—That is to say the Court which passed the decree—*Gandharap* vs. *Sheodarshan*, I. L. R., 12 Alla., 571.

Instalment.—*Quære:* Whether postponing the payment of the whole decree is within this section?—See *Bachchu* vs. *Madad Ali*, I. L. R., 2 Alla., 649. See, however, *Tata Charlu* vs. *Konadala*, I. L. R., 7 Mad., 152. As to the interpretation of "instalment," see the cases of *Chunder Komul Doss* vs. *Bissesswaree*, 13 C. L. R., 243; *Asmuthulah* vs. *Kally Churn*, I. L. R., 7 Cal., 56; *Mon Mohun* vs. *Durga Churn*, I. L. R., 15 Cal., 502; *Buddhu Lal* vs. *Rekhab*, I. L. R., 11 Alla., 482.

Sufficient Reason.—If sufficient reason has been shewn, the Court may decree that the amount shall be paid by instalment, and this procedure should be adopted when the defendant shews *bonâ fides*, by offering to pay anything like a fair proportion of his debt at once—*Subatollah Sircar* vs. *Thompson*, 1 Hyde, 98; or his inability to pay arises from civil disturbances and not the ordinary vicissitudes of trade—*Khoda Buksh and others* vs. *Abdool Rahman*, S. D., N. W., 1863, p. 489; otherwise, if the judgment-debtor has failed to fulfil his ordinary engagements, for then *primâ facie* he is deserving of no further indulgence—*Jafree Begum* vs. *Ahmed Hossein*, 1 Agra, 270.

The power given under this section should be exercised with a due consideration for the interests of the creditor as well as those of the debtor. Thus an order allowing nine years to pay a debt of Rs. 440 has been reversed in special appeal, and the period reduced to 4½ years—*Koower Kain and others* vs. *Kishun Lall*, S. D., N. W., 1861, p. 656; and so a decree, directing the payment of Rs. 408 in yearly instalments of Rs. 50, was varied to a yearly payment of Rs. 70 on Rs. 293, with a provision that, in default of two payments, the decree-holder would be at liberty to take out execution for the whole debt—*Hur Gobind* vs. *Hurkho*, 1 Agra, 116.

Modification by Consent of Parties.—See section 257A, *post*.

After Decree.—After decree no declaration to pay in instalments can be made unless by consent and where a judgment-debtor on security obtained an *ex-parte* order modifying a decree and enabling him to pay in instalments without the decree-holder's consent, it was held that the order did fall under this section—*Chandan* vs. *Terkha*, I. L. R., 3 Alla., 808.

Evidence of Consent.—In some cases petitions containing the result of a compromise have been looked upon as not containing the agreement, but as only evidence of a previous oral contract. For a list of these cases, see *Surju Prosad* vs. *Bhawani Sahai*, I. L. R., 2 Alla., 481. Cases, no doubt, will arise where, though the decree has not been altered, the parties have entered into a private *kistbundi*, and payments have been made under it. The rule in such cases seems to be that such payments are payments under the decree, unless it is clear that it was the intention of the parties that the decree should be satisfied by the *kistbundi*—*Bishto Chunder* vs. *Woomanath Roy*, 15 W. R. 459; *Bhoobunessuree Debia* vs. *Dinonath*, 11 W. R., 233.

Substantial Compliance with Section.—The debtor petitioned that he had come to an arrangement to pay by instalments and had got two months' time to pay. The application was registered and the execution-proceedings struck off: *Held*, an order under the second clause of this section—*Jhoti* vs. *Bhubon*, I. L. R., 11 Cal., 143; but see *Abdul Rahaman* vs. *Dullaram*, I. L. R., 14 Cal., 348. Where a debtor applied for time to pay, and notice was served on the decree-holder, who did not object, the order was made absolute: *Held*, good—*Tata Charlu* vs. *Konadala*, I. L. R., 7 Mad., 152; but where a debtor asked for fifteen days to pay his creditor and the order was "let the petition be filed," it was not considered to be an order to pay in fifteen days—*Jogobundhoo* vs. *Hori*, I. L. R., 16 Cal., 16.

Limitation.—A decree directing payment by instalments can be executed to the extent of the instalments not barred by limitation. Since the command of the Judge prescribes a term for the performance of the different parts of the order, it is to be construed as becoming a judgment for the purposes of limitation as to each instalment only on the date when the payment is made.—*Sokharam* vs. *Ganesh*, I. L. R., 3 Bom., 193; *Kachan Singh* vs. *Sheo Pershad*, I. L. R., 2 Alla., 291; *Lakshmibai* vs. *Madhavrav*, I. L. R., 12 Bom., 65; but where a decree makes a sum payable by instalments on certain dates and provides that on default of payment of one of the instalments the whole money shall become due and payable and recoverable in execution, limitation runs from the first default; but if the right to enforce the whole sum is waived the parties are remitted to the same position as if no default had occurred—*Mon Mohun* vs. *Durga Churn*, I. L. R., 15 Cal., 503; *Buddhu Lal* vs. *Rekhab*, I. L. R., 11 Alla., 482; *Karakavalasa* vs. *Karanam*, I. L. R., 3 Mad., 256; *contra*—*Dulsook* vs. *Chugon*, I. L. R., 2 Bom., 356.

Can Limitation be modified by Consent?—In the case of *Kristo Comul Singh* vs. *Huree Sirdar*, 13 W. R., F. B., 44; 4 B. R., F. B., 101. Peacock, C. J., delivering the opinion of the majority of the Judges, said: "It appears to me that a Court of execution has no power to alter a decree of the Court which passed it, and that parties cannot alter the law or a decree of the Court itself . . . . . ; if a man binds himself not to execute a decree within a certain period, he must take care, if he wish to execute it at all, not to bind himself, not to execute the decree for a longer period than that within which the law would allow him to execute it." This case then decided that parties, by agreement, could not alter the Statute of Limitations, and threw out the opinion, not necessary for the decision of the case, that a decree could not be varied by consent of parties; and it is now clear that parties cannot by agreement avoid the effect of the Statute of Limitations—*Stowell* vs. *Bellings*, I. L. R., 1 Alla., 350; *Heera Lall* vs. *Roy Dunput*, 24 W. R., 283; but an action for damages will lie for breach of an agreement not to take advantage of the Statute—*The East India Company* vs. *Odit Churn Paul*, 5 Moore, 43.

Limitation for Application to pay in Instalments by Consent.—Six months from date of decree—*Abdul Rahaman* vs. *Dullaram*, I. L. R., 14 Cal., 348.

Interest.—Instalments should, as a rule, carry interest, but if such be the intention, it should be expressly declared, otherwise it cannot be allowed in execution, even though on particular occasions it has been claimed and allowed—*Surno Moyee* vs. *Kishen Coomaree*, 14 W. R., 324; but if interest is allowed and default is made, the Court should sell the property of the defendant or his surety, and not adopt the tedious process of realization through a receiver—*Surno Moyee* vs. *Kishen Coomaree*, 14 W. R., 324. Where a judgment-debtor agreed, in order to avoid execution, to give a higher rate of interest than that allowed by the decree, held he was estopped from objecting that the Court on a subsequent execution could not go beyond the decree and award interest at the higher rate—*Sheo Golam Lall* vs. *Bani Prosad*, 4 C. L. R., 29; but see *Guthrie* vs. *Lister*, 11 Moore, 129; 6 W. R., P. C., 59.

In decreeing instalments, the Court is not bound to direct that they shall carry the stipulated rate of interest—*Carvalho* vs. *Nurbibi*, I. L. R., 3 Bom., 202.

Usual Interest.—If the amount of interest is not specified, the usual Court rate at the date of decree is allowed—*Madhub Lal* vs. *Noyan*, 6 C. L. R., 231.

In suits for land, Court may decree payment of mesne profits with interest.

211. When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs), with interest thereupon at such rate as the Court thinks fit.

Explanation.—'Mesne profits' of property mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom, together with interest on such profits.

Act VIII of 1859, section 196. This section applies to H. C.

Application of this Section.—This section only applies to suits of the nature described in the text, for land or other property in which the plaintiff has a specific interest and not to a suit for partition where he has no specific interest until decree—*Pirthi Pal* vs. *Jewahir Singh*, 14 Ind. App., 37, p. 59; but if the members of a Hindu family are living together as a joint family and in commensality, but are still living under an agreement that the members are entitled to specific shares, then any member who is disturbed in the enjoyment of his share can sue for profits as well as partition—*Shankar* vs. *Hardeo*, 16 Ind. App., 71, p. 83.

A suit for mesne profits, not being a suit "for land or other property yielding rent," cannot be brought under this section—*Chaku Modan Isana* vs. *Dullabh Dwarka*, 9 Bom., 7. So a decree declaring plaintiff's right to a certain share in a business should direct an account to be taken, otherwise nothing can be done in the execution department—*Ram Lapit Ram* vs. *Chooaram*, 4 C. L. R., 97.

Court-Fees' Act Stamp.—Section 11 of the Court-Fees' Act contemplates and claim for mesne profits for which an amount can be and has been claimed in the plaint and in respect of which some fee has been actually paid. Where plaintiff claimed possession of property with mesne profits from date of suit to obtaining possession, and the decree directed that they should be determined in execution, it was held that no Court-fee was necessary on the amount awarded—*Ram Krishna* vs. *Bhimabhai*, I. L. R., 15 Bom., 416. As to the fees in a case for possession and mesne profits, see *Mohini Mohan* vs. *Satis Chandra*, I. L. R., 17 Cal., 704.

Form of Decree.—See *Kali Krishna* vs. *The Secretary of State*, I. L. R., 16 Cal., 173, p. 183.

Interpretation of Decree—Where a decree is silent as regards mesne profits subsequent to the filing of the suit, they cannot be given in execution—*Sadasiva Pillai* vs. *Ramalinga*, 24 W. R., 193; 2 Ind. App., 219; *Fokaruddin Mahomed Ahsan* vs. *Official Trustee*, 8 Ind. App., 197; I. L. R., 8 Cal., 178; but a separate suit will lie even if they were asked for in the plaint—*Mon Mohun* vs. *The Secretary of State*, I. L. R., 17 Cal., 968; *Bujnath* vs. *Badhoo*, 10 W. R., 486. Thus, if the decree only gives mesne profits up to the institution of the suit, the plaintiff cannot get them for any subsequent period in execution—*Janokee Nath Mukerjee* vs. *Raj Kristo Singh*, 15 W. R., 292; but in another case, in which the decree did not specify the amount or the period, it was held that everything was left to be settled in execution, and plaintiff was entitled to mesne profits within the period of limitation—*Hureehur Mukerjee* vs. *Abdoolbur*, 17 W. R., 209.

Up to Possession.—A decree for possession and wasilat from the date of suit, without specifying the period for which the calculation should be made, means up to possession being delivered—*Fokaruddin Mahomed Ahsan* vs. *Official Trustee*, 8 Ind. App., 197.

New Suit Barred.—The plaintiff is bound to put forward his whole claim for mesne profits before suit. Thus where plaintiff who had sued for possession and mesne profits from the date of institution till she should get possession, and, obtaining a decree, subsequently sued for mesne profits before institution, the suit was dismissed—*Ram Rutton* vs. *Ram Chunder*, 25 W. R., 113. See "NEW SUIT BARRED," section 212, *infra*, and notes to section 43, *ante*.

Determination of Mesne Profits : Continuation of Suit.—The determination of mesne profits under this section is an essential part of the decree, and as such must be made by the Court trying the case; it cannot be left to another Court, *e.g.*, the Court that will execute the decree—*Meheer Jan* vs. *Gerda*, 25 W. R., 270; nor can the duty be deputed to an Amcen—*Indurjeet Singh* vs. *Radhey*, 21 W. R., 269. It is in short a continuation of the suit between the parties and no final decree exists to appeal from, until it is closed—*Dildar* vs. *Mujeedunnissa*, I. L. R., 4 Cal., 629; *Krishnan* vs. *Nilakandan*, I. L. R., 8 Mad., 137; *Anando* vs. *Anando*, I. L. R., 14 Cal., 50; *Radha Prasad* vs. *Lal Sahab*, I. L. R., 13 Alla., 53, p. 65; 17 Ind. App., 150; See "MEANING OF SECTION," section 212, *infra*.

Effect of Declaration.—A decree declaring the liability for mesne profit but not determining the amount if worked out after the death of a defendant does not bind the heirs not parties—*Radha Prasad* vs. *Lal Sahab*, I. L. R., 13 Alla., 53, p. 65; 17 Ind. App., 150.

Limitation.—The enquiry is not affected by any period of limitation—*Puran Chand* vs. *Roy Radha*, I. L. R., 19 Cal., 132; but if either party, upon being duly summoned to appear and prosecute the proceedings, fails to do so, the Court should either dismiss them for default and not resume them again—*Fuzeelun* vs. *Keramut Hussein*, 21 W. R., 212, or decree them *ex-parte*—*Punchanun Bose* vs. *Ocmanat Roy*, 14 W. R., 160.

Practice.—The defendant should not be called upon to answer until the plaintiff has started his case by giving *primâ facie* evidence of the damage he has sustained by loss of mesne profits; he must fix the liability of the defendant and the amount he is liable for—*Indurjeet Singh* vs. *Radhey*, 21 W. R., 269. Once the liability of a party is fixed in the Appellate Court, the Lower Court must confine its enquiry to assessing the amount

of damages—*Dwarka Lall* vs. *Nirunder Narain*, 22 W. R., 461. In calculating wasilat, the party in possession is generally called on to produce his accounts, and they are compared by an Ameen with the pottahs and dakhilas in the ryot's possession; settlement papers thirty years old are useless as a basis to work on—*Puran Chunder Roy* vs. *Juggessur*, 17 W. R., 298.

As a matter of practice, the Courts in the North-West accept the papers filed by the patwaris under the zemindar's supervision as *primâ facie* evidence of the profits of the estate—*Deonarain Singh* vs. *Nasik Pershad*, 2 Alla., 217.

Court may determine amount of mesne profits prior to suit, or may reserve inquiry.

212. When the suit is for the recovery of possession of immoveable property and for mesne profits which have accrued on the property during a period prior to the institution of the suit, and the amount of such profits is disputed, the Court may either determine the amount by the decree itself, or may pass a decree for the property and direct an inquiry into the amount of mesne profits, and dispose of the same on further orders.

Act VIII of 1859, section 197. This section applies to H. C.

New Suit Barred.—A sued for possession of property and obtained a decree. He made no claim for mesne profits: *Held*, a subsequent suit for mesne profits prior to the first suit would not lie—*Venkoba* vs. *Subbanna*, I. L. R., 11 Mad., 151. Compare *Ramabhadra* vs. *Jagannatha*, I. L. R., 14 Mad., 329, and *Mon Mohun* vs. *The Secretary of State*, I. L. R., 17 Cal., 968; and the order in *The Marianna*, 1 P. (1891), 180; *Jagatjit* vs. *Sarabjit*, I. L. R., 19 Cal., 159. See "NEW SUIT BARRED," section 211, and notes to section 43, *ante*.

Meaning of Section.—Like the previous section this section is only applicable to suits for mesne profits and immoveable property, and does not refer to ordinary suits for damages—*Ramtuhul Lall* vs. *Sheo Nath*, 1 Alla., 22; *Bhenuck Singh* vs. *Tugger Singh*, 10 W. R., 299.

Proceedings after the original decree for possession for the purpose of determining the amount of mesne profits are in effect proceedings in continuation of the suit, and until those proceedings are brought to a close and an assessment of mesne profits come to, it cannot be said that any decree for a specific sum of money exists for which application in execution can issue—*Didar Hossein* vs. *Mujeedunissa*, I. L. R., 4 Cal., 629. Also see "**Continuation of Suit**," section 211, *ante*.

Enquiry into the Amount.—For form of decree under this section see *Jagatjit* vs. *Sarabjit*, I. L. R., 19 Cal., 159, p. 173.

Ear-marking.—It is very doubtful if a Court of Equity would ear-mark the profits of a trespasser invested in real property and follow it—*Rau Bijai* vs. *Jagatpal*, I. L. R., 18 Cal., 41, p. 119.

Amount Allowed.—A decree for a larger amount of wasilat than has been estimated for, or covered by the plaint, may be given in some cases; the amount demanded is merely an approximation,—section 50, *ante*; *Jadoomony Dabee* vs. *Hafez Mahomed*, I. L. R., 8 Cal., 295; *Fokaruddin* vs. *Official Trustee*, 8 Ind. App., 197; *Gouri Proshad* vs. *Reily*, 12 C. L. R., 41; I. L. R., 9 Cal., 112; but the decree cannot be executed until stamp-duty has been paid on the excess—section 11, Act VII of 1870; *Lukhee Kant* vs. *Deen Dyal*, 14 W. R., 82. But in the case of *Gooroo Doss Roy* vs. *Bunshee Dhur Sen*, 15 W. R., 61, it was decided that section 11 of Act VII only provides for those cases where a plaintiff has no means of knowing how long a suit would last, or what would be realized by the plaintiff while the suit was pending, and does not interfere with the ordinary rule that a plaintiff is not entitled to greater damages than he has claimed in his plaint; and see *Baboojan* vs. *Bujnath*, I. L. R., 6 Cal., 472.

Sums Actually Received.—A person who has not received the mesne profits, but come into the estate afterwards, on its release from management by Government, is only liable for sums actually received—*Kisnanand* vs. *Kunwar*, I. L. R., 10 Cal., 785.

Mesne Profits how Calculated.—The definition of mesne profits in section 211 follows the case of *Dwarkanath Mitter* vs. *Ramdhun*, 8 W. R., 103.

Rent.—Thus, a person not actually cultivating, but receiving rents, is accountable not only for the sums actually collected, but for what it might be reasonably supposed

he could have collected—*Thakoor Doss Roy* vs. *Nobin Kristo*, 22 W. R., 127; *Baboo Lucky Narain Roy* vs. *Kally Puddo*, 4 C. L. R., 60; I. L. R., 4 Cal., 883; and the usual rule is to ascertain what would be a fair and reasonable rent for the land if the same had been let to a tenant during the period of the unlawful occupation of the wrong-doer—*Rugho Nath Dobey*, 1 Agra, 17; but see *Soudaminee Dabee* vs. *Anund Chunder*, 13 W. R., 37, and this, indeed, is the only rule on which to proceed where the person in wrongful possession has himself occupied and cultivated it, specially if the cultivation is carried on at a great risk—*Asmut Koer* vs. *Inderjeet Koer*, F. B. R., 1003; *Gunga Prosad* vs. *Gojadhar Prosad*, I. L. R., 2 Alla., 651.

Profits.—But in other cases *mesne profits* were held to cover whatever profits the wrong-doer might, with ordinary diligence, have received from an occupation similar to that of the party wrongfully dispossessed—*Teluck Chand* vs. *Soudaminee Dossee*, 23 W. R., 108; *Rookumee Kooer* vs. *Ram Tuhul*, 17 W. R., 156, whether it be that of a cultivating ryot—*Nursingh Roy* vs. *Anderson*, 19 W. R., 125; *Gooroo Dyal* vs. *Gopal Singh* 24 W. R., 271, landlord or zemindar—*Bhurub Chunder Mozoomdar* vs. *Huro Prosunno*, 17 W. R., 257 (but see *Madhub Chunder Dutt* vs. *Haradhun Paul*, 14 W. R., 294); and to determine the amount it would be sufficient to shew the profits for the years preceding dispossession or afterwards—*Bhawaneedeen Sahoo* vs. *Mohun*, 1 Alla., 273.

Annual Rents.—Where the rents are taken as the test, then, unless the tenant's leases contain a contract to pay rent by defined instalments which, independently of any failure to pay on demand, might be made the subject of an action at a certain date within the year, the rents (*i.e.*, mesne profits) must be taken to fall due annually and at the end of the year—*Thakoor Doss Roy* vs. *Nobin Kristo*, 22 W. R., 126; *Thakoor Doss Archarjee* vs. *Shoshee Bhooshun*, 17 W. R., 203; *Bujnath Pershad* vs. *Badhoo Singh*, 10 W. R., 486; for the right to mesne profits accrues only from the date on which the plaintiff would have received them if he had not been dispossessed—*Lukhee Kant Doss* vs. *Deen Dyal*, 14 W. R., 82.

Deductions.—Deductions, usually 10 per cent., are made for collection expenses—*Gooroo Doss Roy* vs. *Anund Moyee*, 15 W. R., 203; but see *Attaf Ali* vs. *Lalji*, I. L. R., 1 Alla., 518, and also for Government revenue, losses by desertion and death of ryots, brought, &c.—*Dinobundhoo Nundee* vs. *Keshub Chunder*, 3 W. R., Mis., 25; but charges for management are not allowed, unless the party accounting has *bonâ fide* believed himself to be in rightful possession—*Shitab Dei* vs. *Ajudhia*, I. L. R., 10 Alla., 13; see, however, *McArthur* vs. *Cornwall*, App. Cas. (1892), 75. Lands of such a nature as would, under ordinary circumstances, yield no profit, should not be taken into account, unless it has been shewn that the judgment-debtor could have gained a profit from them—*Becharam Doss* vs. *Brojonath*, 9 W. R., 369.

Where there are cross-demands for wasilat under the same decree, the entire profits should be calculated and divided rateably, and then there should be a set-off to the extent of the profits actually received by each sharer, and the deficit in each year on any share made up by the party who received the excess—*Bijoy Gobind* vs. *Kalee Prosunno*, 16 W. R., 294.

A got a decree for possession and wasilat of an estate consisting of villages, and in execution it was found that five of these villages were in one district and two in another, and the Court, unable to apportion the Government revenue, determined the wasilat for the two villages outside its jurisdiction, as well as for the five within it. It was held that the Court was wrong in determining the wasilat of the two villages, but a deduction of the whole Government revenue was allowed, with a declaration that when execution would be taken out in the proper Court for the two villages, no deduction should be made for Government revenue—*Puran Chunder* vs. *Juggesur Mukerjee*, 17 W. R., 298. As to the present law, see section 19, *ante*, and section 223, *post*.

From what date Allowed.—The general rule is, that mesne profits are demandable from the date on which they become annually due—See *Kooer Ramaput* vs. *Furlong*, 3 W. R., 38; and each sum gives a separate cause of action—*Surnomoyee* vs *Unonda Gobind*, W. R., 1864, p. 163. To this there is an exception: a purchaser for valuable consideration without notice of plaintiff's title is not liable for mesne profits from any date earlier than the institution of the suit, if the plaintiff has been guilty of laches—*Juggurnath Sahoo* vs. *Shah Mahomed Hossein*, 14 B. L. R., 386; though slight delay in bringing the suit will of itself be insufficient to remove the liability—*Kalesnath Doss* vs. *Rajah Meah*, 22 W. R., 406; and see on this point the following cases in which mesne profits were only allowed from the date of suit—*Shere Bahadur Singh* vs. *Darioa Kuar*, I. L. R., 3 Cal., 645; *Raghunadha* vs. *Brozo Kishoro*, 3 Ind. App., 154; *Sarkies* vs. *Prosonomoyee Dossee*, I. L. R., 6 Cal., 794; *Juggurnath Sahoo* vs. *Shah Mahomed Hossein*, 14 B. L. R., 386, or from notice of claim—*Shumboo Chunder Surmah* vs. *Issur Chunder*, 2 Sev., 4.

Proof Necessary.—To establish a claim for wasilat, the plaintiff must shew that he was entitled to possession—*Radha Churn* vs. *Zumuroonissa*, 11 W. R., 83; and that he was wrongfully kept out of it by the defendant—*Dwarkaram Misser* vs. *Jogessur*, 21 W. R., 276; *Ghooghly Sahoo* vs. *Chundee Pershad*, 21 W. R., 246; but a declaratory

decree stating that a person is entitled to property without previous possession is not sufficient—*Kalidas* vs. *Vallabhdas*, I. L. R., 6 Bom., 79. Thus a lessor preventing ryots from paying his lessee is liable—*Bheekumber Singh* vs. *Raj Chunder*, 15 W. R., 196; *Shama Sunkur Chowdhry* vs. *Sreenath Banerjee*, 12 W. R., 354; so a mortgagor who, after the mortgagee had foreclosed and got a decree, neither gave up possession to the mortgagee, nor told his lessee to pay the latter rent, was cast in mesne profits—*Surrup Chunder Roy* vs. *Mohender Chunder*, 22 W. R., 539; but the Court in execution cannot go beyond the decree or execution-proceedings to ascertain the lands—*Gobinda Chunder Gooha* vs. *Bella D'Silva*, 1 Shome, 154.

Entry Unnecessary.—All parties in wrongful possession, irrespective of how they got in, are liable—*Pearun* vs. *Ahmed Ali Khan*, 4 W. R., Mis., 7; *Suttyo Nundo* vs. *Suroop Chunder*, 14 W. R., 76. Thus an auction-purchaser whose purchase is declared invalid—*Roy Narain* vs. *Sheik Forabun*, 4 Agra, 216, a mortgagor after the year of grace —*Suroop Chunder* vs. *Mohender Chunder*, 22 W. R., 539; but see *Raisuddin* vs. *Khodee Newaz*, 12 C. L. R., 479, a *bonâ fide* holder—*Gugun Chunder* vs. *Surbessur*, 8 W. R., 479; *Bijnath Persad* vs. *Badhoo Singh*, 10 W. R., 486, an izaradar with his zemindar—*Biddya Moyee* vs. *Ram Lall Misser*, 17 W. R., 148, an under-tenant is liable for mesne profits—*Ram Chunder Surmah* vs. *Ram Chunder Pal*, 23 W. R., 226; but ryots are not bound to pay rent before the decree-holder is put in possession—*Woomesh Chunder* vs. *Markund Mookerjee*, 12 W. R., 35. See note under section 258, *post*.

Enjoyment of Profits.—It is also unnecessary to show that the defendant has enjoyed the mesne profits, instead of the plaintiff. It is enough to shew that he has been active in keeping the plaintiff out of possession and enjoyment of the property. If he has done so wrongfully, he is bound to pay to the plaintiff consequential damages, whether he derived any profit himself from the possession of the land or not—*Ghooghly Sahoo* vs. *Chundee Pershad*, 21 W. R., 246.

Effect of a Decree for Mesne Profits.—The decisions declaring the incidents of the liability imposed by a decree for wasilat are not uniform. In a suit for damages against several persons for keeping plaintiff out of possession, they are all equally liable to him, and no one can restrict his liability to that portion of the property in his possession—*Jhoonkee Pauree* vs. *Ajoodhya*, 19 W. R., 218; but if the plaintiff abstains from suing any one of them, probably a decree against the others would bar a new suit against him, though in one case it was held that, unless the plaintiff sued all the defendants under a decree for possession, this suit would be dismissed, because if he did not do so, the parties cast would have no remedy against the other wrong-doers, whereas this would not be the case if the decree bound them all, and only some of them paid—*Suttya Nundo* vs. *Suroop Chunder*, 14 W. R., 76.

Contribution—Form decree.—In some cases in an action for damages, the whole liability has been divided in proportion to the amount of profits that each has derived from the wrongful possession—*Fuzul Mahomed* vs. *Raj Coomaree*, 6 W. R., 113; and this rule has been followed, even though there was no such limitation in the decree—*Bulwunt Singh* vs. *Sheo Sahoy*, 2 W. R., Mis., 52, on the ground that a person's "liability to satisfy a joint and common decree would in equity extend no further than to the particular land" he was in possession of—*Gunesh Dutt* vs. *Bulwunt Singh*, 14 W. R., 175.

Interpretation.—A decree for interest on mesne profits from the date they are ascertained means the date they have been ascertained by the Court and not by the Ameen —*Doorga Sundooree Debia* vs. *Sibessuree Dabia*, 10 W. R., 391.

Shebait.—A decree for mesne profits against a person who claimed the lands as shebait of a Hindu idol, where the profits of the lands had gone into the idol's treasury, has been held not to be a decree against the person as an individual, but as shebait, and to be satisfied out of the idol's property—*Shibeshuree Debia* vs. *Mothoornath Acharjee*, 5 W. R., 202; the necessary expenses of the idol must be allowed—*Thakoor Doss* vs. *Shoshee Bhoosun*, 17 W. R., 208.

Interest—As to the distinction between mesne profits and interest thereon see *Hurro Doorga* vs. *Surut Soondari*, 9 Ind. App., 1; I. L. R., 8 Cal., 332; *Brojendro Coomar* vs. *Madub Chunder*, I. L. R., 8 Cal., 343.

General Rule.—The general rule in Bengal is that interest may be awarded as a matter of course from the date of suit, but if awarded from an earlier or later date, special reasons should be given—*Hurro Persaud Roy* vs. *Shampersaud Roy*, I. L. R., 3 Cal., 654, and see 4 C. L. R., 60; and this is in accordance with the latest decision of the Privy Council—namely that there is no rule obliging the Court to allow interest, but it is a matter of discretion to be granted or not according to the circumstances of the case—*Krishna Nund* vs. *Kunwar*, 11 Ind. App., 88, p. 93.

Bengal.—In practice, interest has been allowed annually—*Hurroduga* vs. *Sharrut Soondari*, 3 C. L. R., 517; I. L. R., 4 Cal., 674. No difference should be made as regards

interest between wasilat paid in kind and paid in money—*Roye Kishore* vs. *Bonomally Churn*, 10 W. R., 209. In the following cases interest was not given before assessment—*Bengal Coal Co.* vs. *Darumbah*, Marsh., 105; *Mobaruk Ali* vs. *Boistub Churn*, 11 W. R., 25.

Bombay.—Interest is allowed on wasilat in Bombay where the case falls under section 211, but not otherwise—*Chaku Modan* vs. *Dullabh*, 9 Bom., 7; *Gundo Anandrav* vs. *Krishnarav*, 4 Bom., 55. In the former case the Court expressed a doubt whether interest could be given on wasilat from the date of possession to the date of payment; though in the Privy Council case of *Kirkland* vs. *Modee Pestonjee Khoorseojee*, 3 Moore, 220, it was held that a sum found due for mesne profits was looked on in Bombay as a judgment-debt, and carried interest by its own force, and their Lordships declared that such a practice was neither unreasonable nor unlawful. Where a purchaser was kept, for upwards of 20 years, out of the annual payment of a toda garashuk (a hereditary tenure in Bombay), their Lordships of the Privy Council decreed simple interest on each annual payment from when it became due—*Sumbhoolall* vs. *Collector of Surat*, 8 Moore, 1.

Administration-suit.

213. When the suit is for an account of any property and for its due administration under the decree of the Court, the Court, before making the decree, shall order such accounts and inquiries to be taken and made, and give such other directions, as it thinks fit.

In the administration by the Court of the property of any person who dies after this Code comes into force, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being with respect to the estates of persons adjudged insolvent;

and all persons who in any such case would be entitled to be paid out of such property may come in under the decree for its administration, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

38 and 39 Vic., C. 77, section 10. This section applies to H. C. The last paragraph of this section was repealed by Act IV of 1886, section 2, which is in force in the town of Mandalay—See Act XX of 1886, section 6, and Schedule II, Part II.

The second paragraph of this section was passed in England to assimilate the practice in Chancery to that in Bankruptcy. In Chancery a secured creditor could, in an administration-suit, prove for the full amount of his debt; in Bankruptcy he must realize his security and prove for the balance. This is now the law—*In re Coal Consumers' Association*, 4 C. D., 625; *Kellock's* case, L. R., 3 C. D., 769. A creditor may sue for the administration of the estate of his deceased debtor, but he must bring the suit on behalf of himself and the other creditors—*Worraker* vs. *Pryer*, 2 C. D., 109. See as to parties—*Dowdeswell* vs. *Dowdeswell*, 9 C. D., 294; as to costs, *In re Jones*, 10 C. D., 40; executor's expenses—*Sharp* vs. *Lusk*, 10 C. D., 468; as to subsequent action after administration judgment—*Laming* vs. *Gee*, 10 C. D., 715; as to right of relatives—*Richmond* vs. *White*, 10 C. D., 727.

Insolvent.—See *Soobul Chunder* vs. *Russick*, I. L. R., 15 Cal., 202, p. 208.

Stamp.—For the stamp on such an application, see *Ladhubhai Premchand* vs. *Revichand Venichand*, I. L. R., 6 Bom., 143; *Bhogilal* vs. *Popatbhai*, I. L. R., 7 Bom., 125; *Erakshah* vs. *Adarji*, I. L. R., 7 Bom., 535.

Decree.—See Forms 130, 131, Schedule IV, *infra*.

Suit to enforce right of pre-emption.

214. When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid the suit shall stand dismissed with costs.

This section applies to H. C.—See note under section 11, *ante*, and 221, *post*.

Practice.—It is the practice of the Courts to allow claims to pre-emption to be asserted on the grounds both of contract and custom in one and the same suit—*Nehchul* vs. *Than Singh*, 2 Alla., 222; but the claim must be, if possible, for the whole of the property included in the sale, and if a claimant is disqualified to sue as to part he cannot claim the remainder—*Mahommed Welayut Ali* vs. *Abdul Rab*, I. L. R., 11 Alla., 108.

Where a party, through an execution-proceeding, obtains possession of land which is bound by right of pre-emption, he ought to have the benefit of the purchase-money which the pre-emptor is to pay—*Buksha* vs. *Ali Tofer Ali*, 20 W. R., 216, and if the right is based on contract, it does not arise where the sale is not by the contracting party, but by a third person under a decree—*Shaikh Ferasut Ali* vs. *Ashootosh Roy*, 15 W. R., 455.

A and others held land at a fixed rent, the malikana of which was paid to other parties as proprietors: A sold some land to B; C claimed by pre-emption, obtained a decree, and paid the money, which was handed over to B. In the meantime, the land was resumed, and a settlement made with the proprietors, thus ousting the several parties to the pre-emption transaction. *Held*, C could not recover the purchase-money from B—*Sheik Soopun*, Petitioner, S. D. Sum. Decis., May 4, 1841.

One coparcener has no right of pre-emption against another—*Lalla Nowbat Lal* vs. *Lalla Jewan Lall*, I. L. R., 4 Cal., 831. See, however, *Digambur Misser* vs. *Ram Lal*, I. L. R., 14 Cal., 761; *Saligram* vs. *Raghu Zardyal*, I. L. R., 15 Cal., 224.

Purchase-money.—See as to the amount of it *Ajaib Nath* vs. *Mathura Prasad*, I. L. R., 11 Alla., 104, and the cases cited. The plaintiff may deduct his costs—*Ishri* vs. *Gopal*, I. L. R., 6 Alla., 352.

As to the right to the accruing profits, see *Deokindan* vs. *Sri Ram*, I. L. R., 12 Alla., 234.

Payment.—A person obtained a decree declaring him to be entitled to certain lands by pre-emption and ordering payment of the purchase-money within one month. He paid the money into Court, at the same time petitioning that it should be held by the Court and not made over to the defendant until mutation of names in the Government Registry had taken place. This prayer was allowed. Subsequently defendant refused to accept the moneys deposited, on the ground that the payment was clogged with a condition. It was held that, though the petition asked that the money might be held in deposit until mutation of names had been made, still it could not be said that he payment was saddled with a condition precluding payment before mutation, and that the objection could not prevail—*Ajhoodhia Shookool* vs. *Jewbood Shookol*, 6 Alla., 46.

Time.—The Appellate Court can extend the time allowed to deposit the price—*Parshadi Lall* vs. *Ram Dial*, I. L. R., 2 Alla., 744; *Kodai Singh* vs. *Jaisri Singh*, I. L. R., 13 Alla., 376; but where the decree-holder failed to deposit the money within the time prescribed, a subsequent application with a tender of the money was refused—*Shah Ahmed Ali*, Petitioner, S. D. Sum. Decis., December 26, 1840.

The question whether the plaintiff has paid the purchase-money in time is not a matter relating to the execution of a decree under section 244, *post*—*Muhammad Ali* vs. *Debi*, I. L. R., 4 Alla., 420. Where a decree gave two months' after the decree became final, and the Appellate Court was closed on the day on which the period for appeal expired, *held*, the appeal could be filed on the first day it opened, and that the decree did not become final till then—*Ram Sahu* vs. *Gaya*, I. L. R., 7 Alla. 107; and even when after the period had expired an appeal was filed which was dismissed and no fresh period for payment expressly allowed, it was held that the period would run from the date of this appellate decree.—*Supchand* vs. *Shamsh-ul-Jehan*, I. L. R., 11 Alla., 346.

Appeal.—As to the effect of non-payment within time on the grounds of appeal, see *Kodai Singh* vs. *Jaisri Singh*, I. L. R., 13 Alla., 376.

Form of Dec ee.—This section lays down no rules as to the form of the decree in cases where rival pre-emptors possessing equal rights of pre-emption come forward to enforce the right in respect of the same sale, or where one rival pre-emptor possesses a superior right of pre-emption over the other, and in such cases both claims should be decreed against the purchaser for the whole property, but in the weaker case, there should be a statement that the decree should not take effect if the superior pre-emptor should enforce the right decreed him—*Kashi Nath* vs. *Mukta Prosad*, I. L. R., 6 Alla., 370; *Hulahsi* vs. *Sheo Prosad*, I. L. R., 6 Alla., 455; *Ajaib Nath* vs. *Mathura*, I. L. R., 11 Alla., 164.

As to the case of several pre-emptors, each entitled to a share, see *Arjun Singh* vs. *Surfaraz*, I. L. R., 10 Alla., 182.

Execution.—The right is personal, and where a pre-emptor has transferred the property in any manner inconsistent with the object of the suit, his claim should be dismissed —*Rajo* vs. *Lalman*, I. L. R., 5 Alla., 180, and the transferree of a pre-emption decree cannot execute it—*Sarja Prasad* vs. *Jamna Prasad*, I. L. R., 7 Alla., 109; but the pre-emptor can execute the decree for the benefit of a vendee of the property after decree—*Ram Sahi* vs. *Gaya*, I. L. R., 7 Alla., 107.

Suit for dissolution of partnership.

215. When the suit is for the dissolution of a partnership, the Court before making its decree, may pass an order fixing the day on which the partnership shall stand dissolved, and directing such accounts to be taken and other acts to be done as it thinks fit.

This section is new. It applies to H. C.

Decree.—The usual forms of decree in such a suit are given in Forms 132 and 133, schedule IV, *post*.

Suit for account between principal and agent.

215A. When a suit is for an account of pecuniary transactions between a principal and agent, and in all other suits not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before making its decree, pass an order directing such accounts to be taken as it thinks fit.

Decree when set-off is allowed.

216. If the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount (if any) is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Effect of decree as to sum awarded to defendant.

The decree of the Court, with respect to any sum awarded to the defendant, shall have the same effect, and be subject to the same rules in respect of appeal or otherwise, as if such sum had been claimed by the defendant in a separate suit against the plaintiff.

The provisions of this section shall apply whether the set-off is admissible under section 111 or otherwise.

Act VIII of 1859, section 195. This section applies to H. C. and P. S. C. C.

The words from "if" to "plaintiff" in the first paragraph have been substituted, and the whole of the last paragraph has been added by Act VII of 1888, section 7.

As to previous law, see *Tiluck Chand* vs. *Soudaminee Dassee*, 25 W. R., 275.

Certified copies of judgment and decree to be furnished.

217. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

Act VIII of 1859, section 198. This section applies to H. C. and P. S. C. C.

The parties are entitled to receive copies of the judgment, and not merely translations of them—*Vâjivan* vs. *Aji Daji*, 1 Bom., 165.

The practice of furnishing copies free of cost, on supplying the proper stamp, has been set aside. See the case of *Nil Monee Singh* vs. *Chinibash*, 20 W. R., 405.

CHAPTER XVIII.

OF COSTS.

Costs of applications.

218. When disposing of any application under this Code, the Court may give to either party the costs of such application, or may reserve the consideration of such costs for any future stage of the proceedings.

Order.—An order under this section is not a decree—*Shanks* vs. *The Secretary of State*, I. L. R., 12 Mad., 120. When one of the parties to a partition pays all the costs, and the others do not pay their respective shares, the party paying cannot execute without an order for payment being made by the Court—*Brojolall* vs. *Mohendronath*, I. L. R., 18 Cal., 199.

When costs of an interlocutory proceeding have been disposed of, the award of general costs of the suit does not interfere with that interlocutory order—*Radha* vs. *Ram Purmeswar*, 10 Ind. App., 113; I. L. R., 9 Cal., 797.

Appeal—An appeal for costs only lies in regard to appealable orders where a matter of principle is involved—*The Secretary of State* vs. *Marjum Hosein*, I. L. R., 11 Cal., 359; *Moshingan* vs. *Mozari*, I. L. R., 12 Cal., 271; *Bunwari Lall* vs. *Chowdhary*, I. L. R., 12 Cal., 179. So if the order is appealable as affecting the jurisdiction of the Court or the merits of the case, an appeal will lie from that part of the order which relates to costs —*Balkissen Dass* vs. *Luchmeeput*, I. L. R., 8 Cal., 91; and see *Kamat* vs. *Kamat*, I. L. R., 8 Bom., 368; *Caivalho* vs. *Nurbibi*, I. L. R., 3 Bom., 202; even though that portion of the appeal not referring to costs has been abandoned at the hearing—*Vasudev* vs. *Bhuvan*, I. L. R., 16 Bom., 241. See *Huxley* vs. *The West London Ry.*, 17 Q. B. D., 373; 14 App. Cas., 26. Under the law in force previously 'the question of costs' should, in Bengal and Bombay, be raised in regular appeal, since no special appeal would lie, unless the order made was illegal—*Futeek Parooee* vs. *Mohender Nath*, I. L. R., 1 Cal., 385; *Desaji Lakhmaji* vs. *Bhavanidas*, 8 Bom., 100; but it was otherwise in Madras—*Sri Duntuluri Narayana Gajapathi Raznoaru* vs. *Saruppa Raza*, 3 Mad., 113; and see *Mussamut Keemee Baee* vs. *Luchmun Dass Narain Dass*, 5 W. R., P. C., 59.

Suit.—No suit will lie for costs where the Court has power to grant them in the original proceeding—*Mohram Dass* vs. *Ajudhia*, I. L. R., 8 Alla., 452.

Defendant cannot sue plaintiff for costs incurred in successfully resisting a claim. It is only when the costs are made part of the order that a party can enforce their payment, and then only in execution—*Referred Case*, 3 Mad., 341.

Lien of Solicitor.—See *Deb Kabai* vs. *Jeffersin*, I. L. R., 10 Bom., 248.

Heirs.—A solicitor cannot enforce under a rule of Court his taxed costs against an heir or legal representative—*Assur* vs. *Ruttonbai*, I. L. R., 15 Bom., 152.

Judgment to direct by whom costs to be paid.

219. The judgment shall direct by whom the costs of each party are to be paid, whether by himself or by any other party to the suit, and whether in whole or in what part or proportion.

Act VIII of 1859, section 187. This section applies to H. C.

Witness.—Witnesses cannot get cost of appearing by counsel—*In re Brown & Co.*, I. L. R., 14 Cal., 219.

Parties—A Court is bound to decide by which of the parties costs shall be borne; it cannot declare that they shall be borne by the unsuccessful party in a suit to be subsequently instituted—*Kashee Chunder* vs. *Bungshee Buddun*, 23 W. R., 89. Only parties can be made liable under the Code—*Jointee Chunder* vs. *Anundo Lall*, 14 W. R., O. A., 1; but this is the only limitation, and though a defendant should not ordinarily be held liable for his co-defendant's costs, yet if he has colluded with the plaintiff and induced him to bring the suit, he may not only be made to pay his co-defendant's cost, but refused his own—*Bhyroo Raroot* vs. *Anooroodeb Deo*, Marsh., 608; *Ram Chunder Mitter* vs. *Kisto Kaminee Dassee*, 10 W. R., 194. In a suit brought against several parties, some admitted the debt and partnerships, but others denied them: *Held*, the defendants who disputed the claim, should pay the costs of those who admitted it—*Juggut Chunder* vs. *Roop Chund*, I. L. R., 6 Cal., 811.

Representative.—An estate, and not the manager thereof, is liable for the costs of a suit instituted in perfect good faith for the benefit of the property—*Ram Kishore Acharjee* vs. *Luckhee Dabia*, 1 W. R., Mis., 1; *contra*—*Pooley's Trustee* vs. *Whetham*, 28 C. D., 38, p. 41; but where the widow of a deceased proprietor applied for a certificate under Act XL of 1858, and asserted she was in possession of all his property, and mentioned as among her property a certain pergunnah, it was held that she must pay the costs of a party who could object to her taking out a certificate for that pergunnah, although she had not asked for a certificate for it—*Feda Hossein* vs. *Khajoorunnissa*, 9 W. R., 459. A suit for contribution will lie where one has paid more than his share of costs on a joint decree—*Kisto Coomar* vs. *Anund Moyee*, 7 W. R., 300.

Trustee.—An order in regard to trustee's costs, charges and expenses not being costs of suit, is not an order under this section.—*In re Chennel*, 8 C. D., 492. See *ex parte Wainright*, 19 C. D., 140; see p. 218, *post*.

Redemption.—Defendant in a redemption suit should get his costs, unless he has refused the amount tendered, or misconducted himself in the course of the suit—*Dhondo* vs. *Balkrishna*, I. L. R., 8 Bom., 190, as between attorney and client—*Obhoy Churn* vs. *Mullick*, 8 C. L. R., 437.

High Court.—When an action is brought on contract in the High Court, and the amount decreed is within the jurisdiction of the Small Cause Court, the plaintiff cannot get costs unless the Judge trying the case certifies that it was fit to be brought in the High Court—*Sabapati* vs. *Narranaiyan*, 1 Mad., 115; but it is otherwise if the suit is for interest and principal due on a mortgage, for in such a case the Small Cause Court has no jurisdiction—*Mirtunjoy Dutt* vs. *Cameenee Dassee*, 1 Ind. Jur., N. S., 95. On this point, see also *Chunder Kant* vs. *Judoo Nath*, 1 C. L. R., 470.

Power of Court as to costs.

220. The Court shall have full power to give and apportion costs of every application and suit in any manner it thinks fit, and the fact that the Court has no jurisdiction to try the case is no bar to the exercise of such power:

Provided that, if the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing.

Every order relating to costs made under this Code and not forming part of a decree may be executed as if it were a decree for money.

Act VIII of 1859, section 187. This section applies to H. C. and P. S. C. C.

Full Power to Give—Where under a mortgage security the mortgagor is not personally liable for the principal and interest, he may still be made personally liable for costs.—*Rutnessur Sein* vs. *Jusoda*, I. L. R., 14 Cal., 184; *Damodar Das* vs. *Budh*, I. L. R., 10 Alla., 179.

Entered in Decree.—The decree must direct by whom and in what proportion the costs should be paid. Any omission to do so is not a mere clerical error and must be rectified by review—*Ram Sahoy* vs. *Rookhoo*, 15 W. R., 414, provided the applicant has not delayed too long, say 3½ years—*Oodoy Tara* vs. *Jonab Ali*, 17 W. R., 358; or the judgment

has been appealed against, and a final decree passed by the superior Court—*Bilao Singh* vs. *Salig Ram Singh*, S. D., N. W., 1861, p. 460.

Execution.—No objection as to the amount of costs allowed in the suit can be raised in execution of decree—*Hursenath Banerjee* vs. *Doybo Chunder*, 5 W. R., Mis., 4. Interest on costs cannot be allowed in execution, unless it is inserted in the decree—*Forester* vs. *The Secretary of State*, I. L. R., 3 Cal., 161.

General Rule.—The general rule is that, if a plaintiff recovers a less amount than he claimed in his plaint, his costs should be apportioned according to the amount recovered, and not to the sum claimed—*Mudhun Mohun* vs. *Gokul*, 10 Moore, 503; that is to say, that costs follow the result of the case, unless there are equitable reasons to the contrary, so that where the plaintiff has failed in part and succeeded in part, the costs are apportioned so as to give to each party the costs applicable to the matter upon which he has succeeded—*Tarachand Mookerjee* vs. *Jadoonath*, Marsh., 79; but this is not an invariable rule; and if a plaintiff mainly succeeds in his claim and it is an honest one, he may be allowed full costs—*Sheo Dyal Tewaree* vs. *Bishonath*, 9 W. R., 61; but see *Heera Ram* vs. *Ashruf Ali*, 9 W. R., 103.

Follow the Event.—This means follow the result of the decision—*Garnet* vs. *Bradley*, 3 App. Cas., 944; See *Lund* vs. *Campbell*, 14 Q. B. D., 821; *Hawke* vs. *Brear*, 14 Q. B. D., 841, and if the act of the defendant is wrong and there is no fund out of which the plaintiff can receive costs the defendant should not be excused from paymont —*Upmann* vs. *Forester*, 24 C. D., 231.

A suit was dismissed in the first Court as beyond jurisdiction. On appeal this decision was reversed and the plaint returned. *Held*, defendant was entitled to his costs in appeal to the High Court on that ground—*Moshigun* vs. *Mozari*, I L. R., 12 Cal., 271. If the appeal is dismissed it is sufficient to deprive the respondent of his costs that the appeal was dismissed on a preliminary objection of which the appellant had not notice —*Imtiaz Bano* vs. *Latafatunnissa*, I. L. R., 11 Alla., 328.

Costs Given.—A person wrongly made a party—*Bishen Dayal* vs. *The Bank of Upper India*, I. L. R., 13 Alla., p. 295, or respondent should get his costs—*Sheo Pershad* vs. *Lailjee*, S. D., N. W., 1863, p. 1; and so should a party who has not opposed plaintiff's claim—*Government* vs. *Sanoola*, 3 W. R., 23, or disclaims *Shunt Bhuksh* vs. *Lalla Nund*, 11 W. R., 481, or has no interest in the suit, and has unnecessarily been made a party—*Collector of Dacca* vs. *Kumala Kant Mookerjee*, 2 W. R., 33, and would have suffered some injury if he had not appeared—*Collector of 24-Pergunnahs* vs. *Wilkinson*, 12 W. R., 444. And if a person is entitled to costs, he should not lose them on account of the mode in which counsel argues the case, or because counsel may claim more than he is entitled to—*Most* vs. *Pickering*, 8 C. D., 372.

No Costs.—But a party will not get costs if he has induced plaintiff to sue him—*Lalla Bhugwan Doss* vs. *Syed Akbar*, 1 Ind. Jur., N. S., 390, or does not raise the defence on which he succeeds till special appeal—*Nobeen Kishen* vs. *Shib Pershad*, 7 W. R., 490; and see *Aukhil Chunder* vs. *Mohesnee Mohun*, 4 C. L. R., 491.

Where a party has acted with malice and malevolence—*Kalee Pershad* vs. *Ram Pershad*, 18 W. R., 14, as distinguished from mere hardness in exercising a civil right—*Muddun* vs. *Allopudeen*, S. D., N. W., 1861, p. 569, or the defence is false and unscrupulous, costs will not be allowed—*Ram Gopal* vs. *Bhoobun Mohun*, Coryton, 126. And in a suit where plaintiff, after prolonged and harassing litigation, only obtained nominal damages, it was declared that the rule of proportion should not be followed—*Moseehun* vs. *Munoorun*, 24 W. R., 69.

Plaintiff gets no costs where the defendant does not possess sufficient moveable property to satisfy a Small Cause Court decree, and plaintiff failing to execute in full, sues in the High Court—*Mohendra Nath Ash* vs. *Beedebodun Dutt*, 1 Ind. Jur., N. S., 220; and a defendant has been refused costs when plaintiff withdrew his suit, without sanction before being called on for trial—*Brass* vs. *Tiruven Gada Pillai*, 1 Mad., 247, but now see section 373.

Salvage.—Costs in case of excessive bail—*In the matter of the Ship "Champion* I. L. R., 17 Cal., 83, p. 114.

Set-Off.—As to costs in cases of set-off under section 111, *ante*, see *Stroke* vs. *Taylor*, 5 Q. B. D., 586; *Baines* vs. *Bromley*, 6 Q. B. D., 691; *Brijanath Dass* vs. *Jaggarnath Dass*, I. L. R., 4 Cal., 742; *Ishri* vs. *Gopal*, I. L. R., 6 Alla., 351.

Payment into Court.—On the Original Side of the High Court, when defendant pays into, and plaintiff draws money out of, Court, the latter is entitled to costs incurred before the money was paid in—*Ardesir Limji* vs. *Sorabji*, 1 Bom., 70.

Administration.—Where an estate or fund is administered by a Court, the costs of all the necessary parties are a first charge—*Ford* vs. *Lord Chesterfield*, 21 Beav., 426.

See as to costs of appearing in Chambers in an administration suit—*Sharp* vs. *Lush*, 10 C. D., 468.

Administrator-General.—*Amir Jan* vs. *Rivett-Carnac*, I. L. R., 10 Bom., 350.

Divorce.—As to the person who should bear the costs in suits for judicial separation and divorce cases—See *Fowle* vs. *Fowle*, I. L. R., 4 Cal., 260 (but see *Natali* vs. *Natali*

I. L. R., 9 Mad., 127); *Proby* vs. *Proby*, I. L. R., 5 Cal., 357; *Thomson* vs. *Thomson*, I. L. R., 14 Cal., 580.

Trustees, &c.—Trustees, executors and administrators are entitled to their costs out of, or charged upon the estate except in cases of vexatious conduct, or where by their neglect or misconduct, they have occasioned the institution of the suit—*Simpson* vs. *Bathurst*, L. R., 5 Ch. App., 193; *In re Chennell*, 8 C. D., 492; *Ex-parte Wainright*, 19 C. D., 140.

Construction of Will.—In suits to determine the construction of a will, when a reasonable doubt exists as to the meaning of the bequest or devise, costs are usually paid out of the residuary personal estate—*Wilkinson* vs. *Lindgren*, L. R., 5 Ch. App., 570; *Kristomoney* vs. *Norendro Krishna*, 16 Ind. App., 29, p. 43; *Taracharn* vs. *Suresh Chunder*, 16 Ind. App., 166, p. 174.

Consent Order.—Effect of, on costs—*Malchus* vs. *Broughton*, I. L. R., 13 Cal., 193.

Separate Costs.—Where the interests of the parties are separate and distinct, separate costs should be allowed to each—*Kossella Koer* vs *Beharee*, 12 W. R., 70; thus, where one defendant pleaded that he had nothing to do with the property sued for and proved it conducting his defence by a separate pleader, he was allowed his costs—*Ram Chunder* vs. *Mutty Lall*, 11 W. R., 19; and if the defendants are zemindar and patnidar, and the suit is for possession of land—*Gobind Nath* vs. *Luchmee Koomaree*, 11 W. R., 36, or the defendants have been charged with jointly misappropriating property—*Nilkanth Surmah* vs. *Soosela*, 6 W. R., 324, or in any case if they represent different interests and live so far from each other that it could not be reasonably expected that they would employ the same pleader, separate costs should be allowed—*Choonee Laul* vs. *Gopaul Chunder*, S. D., N. W., 1859, p. 1.

Not Given.—But where the defence is common to all—*Francisco De Assis* vs. *Doss Anjos*, 17 W. R., 188, or their interests are the same as if they are joint-holders—*Brindabun Chunder* vs. *Ram Coomar*, 1 W. R., 139, or if they are representatives of a mortgagee—*Shah Mukhun Lall* vs. *Kishen Singh*, 12 Moore, 157; but see *Bhup Singh* vs. *Zainulabdin*, I. L. R., 9 Alla., 205, or if they are members of the same family, living in the same p give the same answer, and the suit is for damages on account of their joint act—*Kassee Nauth Roy* vs. *Hullodhur*, 2 W. R., 60, or they are co-sharers suing separately on a joint cause of action, and the actions were from the first tried together—*Pearee Mohun* vs. *Mirza Gazee*, 11 W. R., 270, or if from any cause defendants file separate defences unnecessarily, only one set of costs should be awarded—*Juggu Lall* vs. *Biharee Lall*, S. D., N. W., 1859, p. 349.

In Appeal.—When an Appellate Court decrees an appeal and give costs of its own Court, the costs of the first Court should be included in the decree—*Shaikh Mahomed* vs. *Ram Kant*, 16 W. R., 266, and a decree for "usual costs and interest" means all costs which the successful party has incurred from the commencement of the suit until the date of the final decree with interest at (now) 6 per cent. from the date of decree—*Broughton* vs. *Perlad Sein*, 19 W. R., 152; *Madhub Lal* vs. *Noyan Ghose*, 6 C. L. R., 231; and "The respondent should pay to the appellants the costs incurred by them in the Lower Court" in a decretal order mean the costs specified in the decree appealed against as the costs incurred by the appellants—*Ram Chunder Sen* vs. *Koomar Durga Nath Roy*, 1 Shome, 143. Where a decree under which costs have been recovered is set aside in appeal an express order is not needed for a refund of the costs with interest—*Dorab Ally* vs. *Abdool Azeez*, I. L. R., 4 Cal., 229; *Rodger* vs. *Comptoir d' Escompte de Paris*, L. R., 3 P. C., 465; *Forester* vs. *The Secretary of State*, 4 Ind. App., 137.

Limitation.—An order for costs made in the High Court on appeal is barred after three years—*Hurbuns Lall* vs. *Sheo Narain Singh*, 21 W. R., 391.

Privy Council.—Though costs are in the discretion of the Court, the rule of the Privy Council is that a successful appellant is, as a rule, entitled to his costs—*In re Wilson*, 1 C. D., 113; *Kali Krishna* vs. *The Secretary of State*, 15 Ind. App., 186.

No Costs.—Costs are not allowed where the parties contend for much more than they are entitled—*Ram Koomar* vs. *Kali Krishna*, 13 Ind. App., 122; or the appellant has failed in part of his appeal—*Rajrup Koer* vs. *Abdul Hossein*, I. L. R., 6 Cal., 394; or has used forged documents—*Coomari* vs. *Manroop*, 13 Ind. App., 31; nor are the costs incurred by the introduction of irrelevant matter given—*Bishenmun Singh* vs. *Land Mortgage Bank*, 12 Ind. App., 7; *Rajah of Pittapur* vs. *Sri Rajah Row*, 12 Ind. App., 22; nor should the respondent if he has been guilty of fraud get costs—*Bhubaneshwari* vs. *Nilkamul*, 12 Ind. App., 137; I. L. R., 12 Cal., 19. And where on appeal the decision appealed from was upheld on different grounds from those relied on by the Lower Court, the appeal was dismissed without costs—*Fischer* vs. *Kamola Naicker*, 8 Moore, 170. See also *Mirtoonjoy Chucherbutty* vs. *Cochrane*, 10 Moore, 229.

Costs; How Calculated.—Among the items that have been allowed are the salary of one accountant, or even two, in cases in which the Court would appoint a Commissioner to examine accounts—*Macnair* vs. *Hogg*, 2 Hyde, 89; expenses and losses arising from the attachment of the defendant's property when the suit is dismissed—*Sewa Ram* vs. *Landy*, S. D., N. W., 1856, p. 514; and where a case was remanded from the High Court with orders allowing plaintiff to amend on payment of all costs of the two first

hearings, it was held that this order included the stamp for the plaint—*Madhab Chunder* vs. *Ram Lochan*, 14 W. R. 143.

Pleader's Fees.—Pleader's fees must be calculated according to the rules, irrespective of any private arrangement between pleader and client—*Umritonath Jha* vs. *Roghoonath*, 6 W. R., Mis., 35.

Other Costs.—The amount is calculated on what the plaintiff claims from the defendant—*Kasheenath Sein* vs. *Chunder Mones*, 9 W. R., 289; and when a suit contains several distinct claims against separate defendants, the amount of costs to be allowed to each depends on the claims against him—*Rooddur Narain Roy* vs. *Coomar Narain*, 13 W. R., 320; but the rules do not provide for the case of persons having separate interests made defendants in order to perfect their title and consent to a decree, and the Court should only allow them a sum sufficient to cover the costs of their appearance—*Ramputty Koer* vs. *Kalee Churn Singh*, 14 W. R., 94. Where there is no rule as to costs and no express agreement, a pleader is only entitled to reasonable remuneration for his work and labour—*Mussamut Ameeroonissa* vs. *Chapman*, 6 W. R., 108.

Plaintiff should not be saddled with the costs of three pleaders if two are sufficient—*Sukeena Bibee* vs. *Usud Ali*, S. D., N. W., 1861, p. 333.

Costs may be set-off against sum admitted or found to be due.

221. The Court may direct that the costs payable to one party by another shall be set-off against a sum which is admitted or is found in the suit to be due from the former to the latter.

This section applies to H. C. and P. S. C. C.

If, in consequence of any defect in the judgment or negligence on the part of the appellant in not getting the decree properly drawn up, costs have not been allowed, no set-off can be claimed in execution—*Huro Pershad* vs. *Foolkishoree Dossee*, 16 W. R., 308.

In a pre-emption suit plaintiff deposited the purchase-money less the costs decreed to him, and asked for possession. It was granted—*Ishri* vs. *Gopal Saran*, I. L. R., 6 Alla., 351.

See note on section 111, *ante*.

Interest on costs.
Payment of costs out of subject-matter.

222. The Court may give interest on costs at any rate not exceeding six per cent. per annum, and may direct that costs, with or without interest, be paid out of, or charged upon, the subject-matter of the suit.

This section applies to H. C. and P. S. C. C.

The same rule applies to interest on costs as to interest on mesne profits, and it cannot be given in execution unless expressly granted by the decree—*Pillai* vs. *Pillai*, 24 W. R., 193; 15 B. L. R., 383; 2 Ind. App., 219; even if the decree be a decree of the Privy Council—*Bhoza Rughbur Singh* vs. *Bhoza Roy Singh*, 3 Alla., 319; *Forester* vs. *The Secretary of State*, 4 Ind. App., 137. Interest on costs after decree may be the subject of a separate suit—*Pillai* vs. *Pillai*, 2 Ind. App., 219, *supra*; but if it is allowed by way of compromise on execution, the Appellate Court will not interfere—*Sett Gokul Doss* vs. *Murli*, I. L. R., 3 Cal., 602; see also *Forester* vs. *The Secretary of State*, 4 Ind. App., 137.

CHAPTER XIX.

OF THE EXECUTION OF DECREES.

Application of this Chapter.—See the scope of this Chapter discussed—*In re Ratansi Kalianji*, I. L. R., 2 Bom., 148. See also sections 375A, 647 and 649, *infra*.

A.—Of the Court by which Decrees may be executed.

Court by which decree may be executed.

223. A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions hereinafter contained.

The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

(*a*) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(*b*) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(*c*) if the decree directs the sale of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(*d*) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

The Court which passed a decree may, of its own motion, send it for execution to any Court subordinate thereto.

The Court to which a decree is sent under this section for execution shall certify to the Court which passed it the fact of such execution, or, where the former Court fails to execute the same, the circumstances attending such failure.

If the decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificate respectively mentioned in clauses (*a*), (*b*) and (*c*) of section 224; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

If the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, if the Court to which the decree is to be sent for execution is situate in a different district, the Court

which passed it shall send it to the District Court of the district in which the decree is to be executed.

Application of Section—This section applies to H. C. and P. S. C. C. It also applies to rent-decrees under Act X of 1859—*Nilmoni Singh* v. *Taranath*, I. L. R., 9 Ind. App., 174. The words in the last clause but one from "It passed" down to the end of "Court of Small Causes" have been substituted by Act VII of 1888, section 22. The amendment was made to prevent any doubt as to the case that could be sent for execution to the Small Cause Court at the Presidency.

May, on the Application of the Decree-holder.—The word "may" shows that clause (*c*) is an extension of the powers of a Court to execute its own decree, which can be exercised when the procedure described in clauses (*a*) and (*d*) would be inconvenient—*Kartick Nath* vs. *Tilukdhari*, I. L. R., 15 Cal., 667; and see *Maseyk* vs. *Steel*, I. L. R. 14 Cal. 661.

The Court which Passed It.—If the subject-matter of the suit is within the Court's jurisdiction of the Court, the jurisdiction continues in all matter of execution.—*Shamlav* vs. *Niloji*, I. L. R., 10 Bom., 200.

Where the Court which has passed the decree has ceased to have jurisdiction, application for execution may be made either to that Court or to the Court which (if the suit wherein the decree had been passed, were instituted at the time of making the application to execute it) would have jurisdiction to try the case—*Lachman Pundeh* vs. *Maddan Mohun*, I. L. R., 6 Cal., 513; *Paluckdhary* vs. *Radha Purshad*, 4 C. L. R., 342.

Provisions hereinafter Contained.—As to the effects of the Scheduled Districts Act, see *Kashi Mohun* vs. *Bishnoo*, I. L. R., 15 Cal., 365.

Outside British India.—See section 229, *post*; and compare *Kasturchand* vs. *Parsha*, I. L. R., 12 Bom., 230.

On Application.—It is not necessary that the decree or a copy of it should be produced with the application—*Gunga Gobind* vs. *Makhun*, 9 W. R., 362; *Khettar Mohan* vs. *Ishen*, 11 W. R., 271; *Modhoo Dossia* vs. *Nobin Chunder*, 16 W. R., 25.

An application to send is not an application to execute within section 230, *post* *Nilmony Singh* vs. *Bireesur*, I. L. R., 16 Cal., 745; but it is a step in aid of execution *Lachman Pundeh* vs *Madan Mohun*, I. L. R., 6 Cal., 513. See "LIMITATION," *infra*.

Shall Certify to the Court which Passed It.—If the decree-holder requires that the decree should be executed in the original district before the return of the certificate, the original Court may recall the proceedings—*Ashootosh Dutt* vs. *Doorga Churn Chatterjee*, I. L. R., 6 Cal., 504. On the other hand, if the judgment-debtor has out of Court partly satisfied the debt, subsequent to the transmission of the decree for execution to another Court, but before actual execution has been applied for, he is entitled, on execution being demanded in full, to an order from the Court to which the decree has been transferred, calling upon the decree-holder to certify the fact of such payment—*Rajendronath Roy* vs. *Chunnoomul*, I. L. R., 5 Cal., 448.

What Decree may be Executed.—Whether the decree of the Lower Court is reversed, modified or affirmed, the decree passed in the Appellate Court is the final decree and as such the only decree capable of execution—*Ram Charan* vs. *Lakhi Kant*, 7 B. L. R., 704; *Muhammad Sulaiman* vs. *Muhammad Yar*, I. L. R., 11 Alla., 267; but see *Nourang Rai* vs. *Latif Chaudhri*, I. L. R., 13 Alla., 394, and if it is altered by the Court of first instance execution cannot issue—*Muhammad Sulaiman* vs. *Fatima*, I. L. R., 11 Alla., 314; and hence it is expedient in all cases to embody so much of the decree as it is intended to affirm, and thus avoid reference to the suspended decree—*Kisto Kinker Ghose* vs. *Burrodacaunt*, 10 B. L. R., 101; and where the decree in the Appellate Court awarded Rs. 195 costs, and as a fact it appeared from the first Court's decree the sum was Rs. 161, the last decree was executed—*Shobrat Singh* vs. *Bridgman*, I. L. R., 4 Alla., 376; see, however, *Mir Ajmuddin* vs. *Mathura*, 11 Bom., 206; but where the appellate decree is not complete in itself, reference must be made to the prior decree—*Shorhat Singh* vs. *Bridgman*, I. L. R., 4 Alla., 376. Thus, where the last decree was "that the order of the Lower Court be upheld and the appeal dismissed, appellant to pay the costs," the costs as specified in the first decree were recovered—*Himayat* vs. *Jai Devi*, I. L. R., 5 Alla., 589; *Behari Lal* vs. *Khubchand*, I. L. R., 6 Alla., 48. See also *Gobordhan Dass* vs. *Gopal Ram*, I. L. R., 7 Alla., 366.

Special Appeals.—In the case of *Kisto Kinker Ghose* vs. *Burrodacaunt*, *supra*, their Lordships of the Privy Council suggested that there might be cases in which the Appellate Court, especially in special appeal, might see good reason to limit its decision to a simple dismissal of the appeal and to abstain from confirming a decree erroneous or questionable, and yet not open to examination by reason of the special and limited nature

of the appeal. This suggestion has not been adopted further than this, that when the last decree affirms and adopts the mandatory part of the first decree, this document should be referred to and the mandatory part of it so affirmed should be executed as if it was the decree of the Appellate Court—*Gobardhan Das* vs. *Gopal Ram*, I. L. R., 7 Alla., 366. See also *Noor Ali* vs. *Koni*, I. L. R., 13 Cal., 13; *Muhammad Sulaiman* vs. *Muhammad Yar*, I. L. R., 11 Alla., 267.

Privy Council.—Although an order of Her Majesty in Council may only confirm the decree of the Court below, it is the order that must be executed—*Lachman Pershad* vs. *Kishun*, I. L. R., 8 Cal., 218.

Resides.—See note on sections 16 and 17, *ante*. Where plaintiff sought to execute his decree by attaching the pay of his debtor, and neither the debtor nor his payer resided within the local jurisdiction, the order of attachment was held void—*Rango* vs. *Balkrishna*, I. L. R., 12 Bom., 44.

Has not Property within Local Limits: Irregularity.—Before a Court will act in such a case, it will require to be satisfied in some manner, by sworn testimony or by affidavit, that these facts exist. Where a decree has been executed by a Court other than that in which it was passed, the title of the purchaser cannot be avoided by shewing that there was property of the judgment debtor within the jurisdiction of the Court that passed the decree which might have been attached and sold—*Kally Prosunno Bose* vs. *Dinonath*, 19 W. R., 434.

Outside Jurisdiction.—*Wholly.*—Neither a Subordinate Judge nor Munsif could exercise jurisdiction where the subject-matter of the suit or application was property wholly falling outside the territorial jurisdiction allowed under section 18, Act VI of 1871 —*Dakhina Churn* vs. *Bilash Chunder*, I. L. R., 18 Cal., 527; *Obhoy Churn* vs. *Golam Ali*, 7 C. L. R., 410; I. L. R., 7 Cal., 410. So a Munsif cannot under a decree for rent sell property beyond his jurisdiction (*id*): and a Court has no jurisdiction to sell property in execution of a mortgage-decree over which it had not jurisdiction either at the time of suit or at the passing of the order of sale—*Prem Chand Dey* vs. *Mokhoda*, I. L. R., 17 Cal., 699; but if after a mortgage-decree property passed, land is placed wholly under another local jurisdiction, execution may be pursued either to the Court which passed the decree or the Court within whose jurisdiction it lay at the time of application—*Kartick Nath* vs. *Tilukdhari*, I. L. R., 15 Cal., 667; *Latchman Pandeh* vs. *Madun Mohun*, I. L. R., 8 Cal., 703; and see *Prem Chand Dey* vs. *Mokhoda*, I. L. R., 17 Cal., 699.

Not Wholly Outside.—Under Act VIII of 1859, the Judge of the 24-Pergunnahs got a money-decree and applied for execution; but before sale he sent a certificate to the District Court of Nuddea and the Judge attached and sold an estate entered in the Collector's roll of that district and where the revenue was paid. Some of the lands of the estate were in the 24-Pergunnahs. *Held*, the sale passed these lands—*Kally Prosonno Bose* vs. *Dinonath*, 11 B. L. R., 56, 19 W. R., 434; *Gunga Narain* vs. *Annunda*, 12 C. L. R., 404, and in a suit on a mortgage under section 19, Act X of 1877, a decree was passed in connection with an estate registered in Backerjunj by a Subordinate Judge of that district it was held he could sell the whole estate although a portion of it fell within the district of Furridpore—*Shurroop Chunder* vs. *Ameerunnissa*, I. L. R., 8 Cal., 703; and where a decree was obtained in one district on a mortgage in connection with lands lying in different districts and registered in the Collectorate of another district, it was held the Court giving the decree could sell the property, though a doubt was expressed if this could be done under a simple money-decree—*Maseyk* vs. *Steel*, I. L. R., 14 Cal., 661; followed in *Kartick Nath Pandey* vs. *Tilukdhari*, I. L. R., 15 Cal., 667. In such cases the Court is not bound to send the case to another Court under clause (*c*)—*Gopimohun* vs. *Doybaki*, I. L. R., 19 Cal., 13. Again in the case of *Unnocool Chunder* vs. *Hurry Nath*, 2 C. L. R., 334, it was held that the case of Kally Prosunno, *supra*, did not apply to a sale by a Munsif under Act VIII of 1859 of an estate lying in different munsifees in the same district; and in *Ram Lall Moitra* vs. *Bama Sunduri*, 12 C. L. R., it was decided that a Munsif had power under a money-decree to sell a share of an estate lying within three munsifees in the same district.

Concurrent Execution.—A decree given in the District of Burdwan was executed there as far as possible. The decree-holder then applied to the Court to have it executed in three other districts, asking that certain specified properties should be there attached, but that the properties in one particular district should be first sold; and if the decree should be then unsatisfied, that the properties in the other districts should in turn be sold. The Court accordingly issued the necessary certificates (such as are now required by section 224) to the Courts of these three districts, and the properties were attached. The question was then raised and tried whether such attachments were valid and according to law, and it was held by the Privy Council that they were good attachments and could be made if a Court should, in exercise of its discretion, think fit to do so. Their Lordships remarked:

"It would, no doubt in many cases, be a right exercise of the discretion of the Court not to act on the power and to refuse to send a decree for concurrent execution

into several places; and when it did act on it, it would be in many cases proper to impose terms on decree-holders, that they should not proceed to sale under all the attachments at once."—*Saroda Prosad* vs. *Luchmeeput*, 17 W. R., 289; 10 B. L. R., 214; 14 Moore, 529; *Kisto Kishore Dutt* vs. *Rooplall*, L. I. R., 8 Cal., 687.

Small Cause Court.—A decree may be sent for execution to another Cour either on the application of the decree-holder on one of the grounds stated in th section, or by the Court which passed it of its own motion; but in this latter case, th transfer can be only to a subordinate Court. Looking to the terms of section 2, whe defining the terms "District" and "District Court," it would seem that such a transfe could be properly made only by a District Court or a High Court, and not by a Subor dinate Judge, to a Munsif. It was held that this section did not modify section 2 o Act XI of 1865, and if the Judge of a Small Cause Court was invested with the power of a Subordinate Judge he could sell immoveable property in execution of the Smal Cause Court decree—*Gopal* vs. *Nanku*, I. L. R., 1 Alla., 624, without any forma transfer under this section, unless the territorial jurisdiction of the Subordinate Judge was more extensive than that of the Small Cause Court Judge—*Dharamdas* vs. *Vamangovind*, I. L. R., 9 Bom., 237; *Bhagvan* vs. *Bhalu*, I. L. R., 8 Bom., 230; or he might send it to the Munsif having jurisdiction for execution—*Kahanarama* vs. *Ranga*, I. L. R., 8 Mad., 8.

A Court of Small Causes cannot execute its own decree against moveable property situated outside its jurisdiction. It must transfer it under this section—*Parbatichurn* vs. *Panchanund*, I. L. R., 6 Alla., 243.

Practice.—It will be necessary for the holder of a decree which has been transferred for execution to another Court to make due application for execution to that Court (section 230, *post*). A District Court, on receiving a decree transferred for exe cution, can direct any subordinate Court to execute it (section 226). Where both Courts are in the same district one Court may send to the other direct—*Kelu* vs. *Vikrisha*, I. L. R., 15 Mad., 345.

Limitation.—An application under this section is not an application to execute —*Nilmony Singh* vs. *Biressur Lal*, I. L. R., 16 Cal., 744; but is an application to keep in force a decree—*Collins* vs. *Moula Baksh*, I. L. R., 2 Alla., 284; *Setcharun Pandeh*, I. L. R., 6 Cal., 513. If the application is made by a vakil after the death of his client, it does not save time running—*Kallee* vs. *Mahomed*, I. L. R., 7 Alla., 564.

See note on section 649, *post*.

Value: Jurisdiction.—A Munsif may execute a transferred decree of any amount a and is not limited to his ordinary jurisdiction—*Narasayya* vs. *Venkatakrishnayya*, I. L. R., 7 Mad., 397; not so—*Durga Churn* vs. *Umatara*, I. L. R., 16 Cal., 465; *Gokulkristo* vs. *Aukhil Chunder*, I. L. R., 16 Cal., 457. See also *Sidheshwar* vs. *Harihar*, I. L. R., 12 Bom., 155; and compare *Kelu* vs. *Vikrisha*, I. L. R., 15 Mad., 345.

Procedure when Court desires that its own decree shall be executed by another Court.

224. The Court sending a decree for execution under section 223 shall send—

(*a*) a copy of the decree;

(*b*) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted; and

(*c*) a copy of any order for the execution of the decree, and if no such order has been made, a certificate to that effect.

Act VIII of 1859, section 286. This section applies to H. C. and P. S. C. C.

Copy.—For Court-fee on such copies, see Act VII of 1870, Schedule I, Article 7.

Forms.—For form of certificate, see Schedule IV, No. 134, *infra*.

See the latter portion of the note to section 223 regarding the powers of Small Cause Courts to transfer their decrees for execution elsewhere.

Presumption.—Where the validity of an attachment under a decree transferred to another district for execution was in dispute between the parties to a suit, with special

reference to the fact whether a "copy of the decree" had been sent with the certificate; it was held by the Privy Council that the attachment having been made, it must be presumed to have been correctly made (see section 114, Indian Evidence Act), and that consequently the onus lay on the party denying the fact—*Saroda Prosad Mullick* vs. *Luchmeeput*, 17 W. R., 289; 10 B. L. R., 214. See "SECONDARY EVIDENCE," section 330, *post*.

Copy of any Order.—The order must be a subsisting order—*Hathibhai* vs. *Patel*, I. L. R., 13 Bom., 371. If any order is passed under section 248, *post*, a copy of it should be sent—*Srihari Mundul* vs. *Murari*, I. L. R., 13 Cal., 257.

Secondary Evidence of Decree.—See section 230, *post*.

Court receiving copies of decree, &c., to file same without proof.

225. The Court to which a decree is so sent shall cause such copies and certificate to be filed, without any further proof of the decree or order for execution, or of the copies thereof, or of the jurisdiction of the Court which passed it, unless the former Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

Act VIII of 1859, section 286. This section applies to H. C. and P. S. C. C.

The filing of the copies and the certificate is quite distinct from executing the decree, for which an application should be regularly made. See section 245, *post*.

Jurisdiction.—This section recognises the right of the executing Court to inquire into the jurisdiction of the Court which passed the decree—*Haji Musa* vs. *Purmanand*, I. L. R., 15 Bom., 209, p. 219; and see *Mohan Ishwar* vs. *Haku*, I. L. R., 4 Bom., 638; *Muhammad Sulaiman* vs. *Fatima*, I. L. R., 11 Alla., 314.

Execution of decree or order by Court to which it is sent.

226. When such copies are so filed, the decree or order may, if the Court to which it is sent be the District Court, be executed by such Court or by any subordinate Court which it directs to execute the same.

Act VIII of 1859, section 287. This section applies to H. C.

A judgment of the Privy Council was sent for execution to the Judge of Ghazipore, who referred it to his Subordinate Judge. This officer, finding that the land in dispute had been annexed to the District of Shahabad, transferred the case direct to the Judge of that district, who, in turn, referred it to his Subordinate Judge: *Held*, that the proceedings were regular—*Pulukdhari Roy* vs. *Radha Pershad*, 8 Ind. App., 165.

A Court of Small Causes within a District is subordinate to the District Judge. See section 2, "District Court."

Execution by High Court of decree transmitted by other Court.

227 If the Court to which the decree is sent for execution be a High Court, the decree shall be executed by such Court in the same manner as if it had been made by such Court in the exercise of its ordinary original civil jurisdiction.

This section applies to H. C. and P. S. C. C.

Ordinarily a decree would be sent for execution to a High Court, only when it has been passed in a case not cognizable by a Small Cause Court, for in such a case it would be sent to the local Court of Small Causes. See section 223, *ante*.

As to the execution of a judgment entered up under section 86 of the Indian Insolvent Act, see the case of *Candas Narbondas*, I. L. R., 11 Bom., 138; *In re Bhagwandas*, I. L. R., 8 Bom., 511; *In re Candas*, I. L. R., 13 Bom., p. 524.

Where a judgment is removed from an inferior to a superior Court under 1 and 2 Vict., Cap. 110, section 22, for execution, the superior Court has no jurisdiction to inquire into the merits or into the regularity of the proceedings in the Court below—*Williams* vs. *Bolland*, 1 C. P. D., 227; otherwise, if the decree has been passed without jurisdiction—*Bridge* vs. *Branch*, 1 C. P. D., 633; *Oram* vs. *Preary*, L. R., 2 Ex. D., 346. And see section 225, *ante*.

228. The Court executing a decree sent to it under this Chapter shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree.

Powers of Court in executing transmitted decree.

And its order in executing such decree shall be subject to the same rules in respect of appeal, as if the decree had been passed by itself.

Appeal from orders in executing such decrees.

Act VIII of 1869, section 294. This section applies to H. C. and P. S. C. C.

Powers of Court Executing--Application to execute the decree must be regularly made to the Court to which it has been sent (see sections 230–234), and that Court should proceed to execute it as if the decree had been passed by itself.

The functions of a Court in respect of the execution of the decrees of other Courts are judicial, not ministerial--*Gobind Hari Walekar* vs. *Shidram*, 7 Bom., 37, but are confined to effecting execution and to matters arising out of the proceedings in execution—*Jadu Roy* vs *Farrell*, 6 B. L. R., App., 66. Thus the Court to which the decree has been transferred must execute it according to its terms—*Kristokishore* vs. *Rooplal*, I. L. R., 8 Cal., 687.

It should not refuse execution on the ground that the decree was wrongly passed or passed without jurisdiction or obtained by fraud; but it may stay it—*Subramanian* vs. *Panjamma*, I. L. R., 4 Mad., 324; *Choogalal* vs. *Truman*, I. L. R., 7 Bom., 481; *Kasturshet* vs. *Rama*, I. L. R., 10 Bom., 65; *Parvata* vs. *Digambar*, I. L. R., 15 Bom., 307; but see section 225, *ante*, and *Muhammad Sulaiman* vs. *Fatima*, I. L. R., 11 Alla., 314, or wrong and defective—*Rajerao* vs. *Nanarav*, I. L. R., 11 Bom., 528; or that the property directed to be sold by the decree was unsaleable—*Sadashivlalit* vs. *Jayantibai*, I. L. R., 8 Bom., 185; *Madho Lal* vs. *Katwari*, I. L. R., 10 Alla., 130; nor can it alter, vary or add to the terms of the decree—*Forester* vs. *The Secretary of State*, I. L. R., 3 Cal., 161; *Pillai* vs. *Pillai*, 2 Ind. App., 219; *Hurro Doorga* vs. *Surut Soonduri*, L. R., 9 Ind. App., 1; *Subramanian* vs. *Panjamma*, I. L. R., 4 Mad., 324; *Ramphal* vs. *Ram*, I. L. R., 5 Alla., 53; nor extend its scope—*Muttia* vs. *Vir Ammal*, I. L. R., 10 Mad., 283; nor correct errors—*Nilkomul Roy* vs. *Rohinee*, 13 W. R., 330; *Rao Omrao Singh* vs. *Satun Lall*, 1 Alla., 168; nor extend the period of redemption—*Ishwargar* vs. *Dasama*, I. L. R., 13 Bom., 106; *Subhana* vs. *Krishna*, I. L. R., 16 Bom., 544; nor execute before the period fixed in the decree—*Har Dyal* vs. *Chadami Lal*, I. L. R., 7 Alla., 194; nor in instalments contrary to its terms—*Sheo Pershad* vs. *Shiva Ram*, 2 Alla., 59; nor to inquire whether the balance certified to be due on the decree is correct—*Keshub Chunder* vs. *Khelut Chunder*, 9 W. R., 361; nor admit an assignee to be substituted for the decree-holder—*Sheo Naraian Sing* vs. *Hurbuns Lal*, 5 B. L. R., 497; 14 W. R., 65; section 232, *infra*; nor entertain any question of the right of a transferree whose name is on the record and has taken out execution—*Ram Chunder* vs. *Mohendro Nath*, 21 W. R., 141; nor of the right of the person asking for execution—*Dhunesh Koeree* vs. *Oolfut Hossein*, 21 W. R., 219; nor transmit the decree to a third district for execution—*Dhunput Sing* vs. *Wooma Sunkuree*, 21 W. R., 337; *Shib Narain* vs. *Bipin Behary*, I. L. R., 3 Cal., 512; nor when the decree is more than one year old before its transfer, should it issue an application calling on the defendants to shew cause why execution should not issue, since in all these cases the application should have been made to the first Court, and all the latter can do is to stop execution until such application may be preferred—*Ladkubarbai* vs. *Ghoel Sri Sarsangji*, 7 Bom., 162; *Jadu Roy* vs. *Farrell*, 6 B. L. R., App., 66; *Lutfullah* vs. *Kirat Chand*, 13 B. L. R., App., 30; 21 W. R., 330; but see—*Nursing Doyal* vs. *Hurryhur*, I. L. R., 5 Cal., 897; section 248, *infra*; and *Srihari Mundul* vs. *Murari*, I. L. R., 13 Cal., 257; though it can issue a notice on the debtor to shew cause if the decree has been transferred within one year of its passing, but remained unexecuted after that period—*Chagan Lal Narbheram* vs. *Jumnadas Mancharam*, 11 Bom., 19 (but see section 248, *infra*); nor can it review an order striking of the execution case so long as the documents specified in section 224 remained filed in it—*Bagram* vs. *Wise*, 1 B. L. R., 91; but see *Brojendro Narain Roy* vs. *Benode Ram Sen*, 11 W. R., 269; nor determine the claim of a third party to property attached in execution—*Indra Chund Doogur* vs. *Gopal Chunder*, 11 W. R., 557; 3 B. L. R., 181; *Vishnu* vs. *Narsingrav*, I. L. R., 6 Bom., 584. It can decide if the application is barred—*Leake* vs. *Daniel*, B. L. R., (F. B.), 970; *Nursing Doyal* vs. *Hurryhur*, I. L. R., 5 Cal., 897;

Choti Lall vs. *Manickchand*, 7 Alla., 115, unless the Court forwarding the decree for execution has decided that it is not—*Husein Ahmad* vs. *Saju Mahamad*, I. L. R., 15 Bom., 28. And see *Nursing Doyal* vs. *Hurryhur*, I. L. R., 5 Cal., 897; *Srihary Mundul* vs. *Murari*, I. L. R., 13 Cal., 257.

Lex Fori.—If there are different laws of limitation in the two Courts, the law applicable to the proceedings in execution of the decree should be the law of the Court to which the decree has been transmitted for execution—*Leake* vs. *Daniel*, C. L. R., (F. B.), 970. This decision was under the old law; but now limitation depends on the Court which passed the decree—*Tincowree Dawn* vs. *Debendro Nath*, I. L. R., 17 Cal., 491. See, however, *Hukumchand* vs. *Gyanender*, I. L. R., 14 Cal., 570.

Exclusive Jurisdiction—Where a decree has been transferred for execution to another district, the first Court cannot call for the proceedings to determine the claim of a third party to property attached in execution in that district, for such a claim should be decided in the district in which the decree is under execution—*Indar Chunder* vs. *Gopal Chunder*, 11 W. R., 557; 3 B. L. R., 181. On the other hand, if the debtor has petitioned to be an insolvent in the first Court, and this is certified to the Court executing, the latter should stay proceedings, pending an adjudication on the petition—*Vishnu* vs. *Narsingrav*, I. L. R., 6 Bom., 584. See "PRACTICE," section 239, *post*.

Concurrent Jurisdiction.—Where a decree has been transferred under section 223, and the debtor objects that the application is barred by limitation and he has had no notice under section 248, he may have his objection of limitation tried by the Court executing the decree, or by the original Court if the former stays further proceedings under section 239, *infra*—*Srihary Mundul* vs. *Murari*, I. L. R., 13 Cal., 257. See also the remarks of Mahmood, J., in the case of *Ghazidin* vs. *Fukir*, I. L. R., 7 Alla., 73, p. 76, and "STAY THE EXECUTION," section 239, *post*.

Step in Aid of Execution.—An application to the Court executing to return the proceedings to the original Court is a step in aid of execution—*Krishnayyar* vs. *Venkayyar*, I. L. R., 6 Mad., 81; *Lutchman Pundeh* vs. *Maddan Mohun*, I. L. R., 6 Cal., 513.

Decree of Courts established by Government of India in Native States.

229. A decree of any Court established or continued by the authority of the Governor-General in Council in the territories of any Foreign Prince or State, which cannot be executed within the jurisdiction of the Court by which it was made, may be executed in manner herein provided within the jurisdiction of any Court in British India.

Act VIII of 1859, section 284. This section applies to H. C. and P. S. C. C. The words "or continued" have been introduced by Act VII of 1888, section 23.

Applicants under this section must show that the Court passing the decree is one or other of the Courts referred to in this section. Thus, where it was not proved that the Court of the Dewan Ahilkar of Cooch Behar was a Court within British territories or established by the Governor-General in a Foreign State, it was held that the Judge of Rajshahye had no jurisdiction to execute its decree—*Jadub Chundra* vs. *Dinanath*, 4 B. L. R., 134. But see section 434, *infra*.

Sending of decrees of British Indian Courts to British Courts in Native States.

229A. So much of the foregoing sections of this Chapter as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor-General in Council in the territories of any Foreign Prince or State to which the Governor-General in Council has, by notification in the *Gazette of India*, declared this section to apply.

Inserted by Act VII of 1888, section 24.

Execution in British India of decrees of Courts of Native States.

229B. The Governor in Council may, from time to time, by notification in the *Gazette of India*

(*a*) declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with Her Majesty, and not established or continued by the authority of the Governor-General in Council, may be executed in British India as if they had been made by the Courts of British India, and

(*b*) cancel any such declaration.

So long as such declaration remains in force, the said decrees may be executed accordingly.

This section was formerly section 434. The words "or continued" have been inserted by Act VII of 1888, section 39. It applies to H. C. and P. S. C. C.

The judgment of a foreign Court, on a decree obtained in British India, is no bar to the execution of the original decree—*Fakuruddin Mahomed* vs. *Official Trustee*, I. L. R., 7 Cal., 82.

In Bombay no suit would, until the amendment of section 14, *ante*, lie on the judgment of the Court of a Native State; such judgment could only be enforced, if at all, in the manner provided by this section—*Hemmatlal* vs. *Shirajirav*, I. L. R., 8 Bom., 593. Otherwise in Madras *Sama Rayar* vs. *Annamalai*, I. L. R., 7 Mad., 164, but not in a Small Cause Court—*Anakattil* vs. *Kocheri*, I. L. R., 6 Mad., 191. See notes on sections 12 and 44, *ante*.

May be Executed.—This means that it is legal and possible to execute the decree, but a Court in British India is not bound to execute a foreign decree obtained by fraud or passed by a Court not having jurisdiction—*Haji Musa* vs. *Purmanand*, I. L. R., 15 Bom., 216. As to rent-suit see *Hukumchand* vs. *Gyanender*, I. L. R., 14 Cal., 570.

As to the manner in which a foreign decree is proved *Ganse Mahomed* vs. *Tarini Charan*, I. L. R., 14 Cal., 540, and executed—*Kandasami* vs. *Moidin*, I. L. R., 2 Mad., 337.

B.—Of Application for Execution.

Application for execution.

230. When the holder of a decree desires to enforce it, he shall apply to the Court which passed the decree or to the officer, if any, appointed in this behalf, or if the decree has been sent, under the provisions hereinbefore contained, to another Court, then to such Court, or to the proper officer thereof.

The Court may in its discretion refuse execution at the same time against the person and property of the judgment-debtor.

Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates (namely) :—

(*a*) the date of the decree sought to be enforced, or of the decree (if any) on appeal affirming the same, or

(*b*) where the decree or any subsequent order directs any payment of money, or the delivery of any property to be made

at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.

Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application.

Act VIII of 1859, section 207. This section applies to H. C. and P. S. C. C. Th last paragraph has been repealed by Act VII of 1888, section 25.

The Court which Passed the Decree, &c.—Enforcement of a decree by a Court other than that which passed it can be obtained only after it has been regularly sent to that Court in the manner directed by sections 223, 224, *ante*.

A mortgage decree was given by the Munsif of Manbazar. Shortly afterwards the land covered by the decree was transferred to the jurisdiction of the Munsif of Katra; and the head-quarters of the Manbazar Munsiffee were transferred from Manbazar to Burrabazar. *Held*, that an application for execution of the decree might be made either to the Burrabazar Court or to the Katra Court (see section 649, *post*)—*Lutchman Pundeh* vs. *Maddun Mohun*, 7 C. L. R., 521; I. L. R., 6 Cal., 513.

Payment of Money or Delivery of other Property.—Section 254 provides for the enforcement of a decree for payment of money; section 259 for the delivery of specific moveable property; and sections 263, 264, for the delivery of immoveable property.

An order directing a petition to be filed praying for a decree in terms of a *kistbundi*, is not an order for the payment of money—*Bal Chand* vs. *Raghunath Das*, I. L. R., 4 Alla., 155.

Portion of Decree.—Execution may be taken out for a portion of a decree in certain cases. For instance, a decree-holder may obtain a decree for possession of lands and for mesne profits to be assessed in execution. The decree cannot, therefore, be executed as regards *mesne profits* until the amount has been ascertained. That ought not to prevent the execution-creditor from executing the decree as to that portion which is perfect and capable of execution and so seizing the lands which have been decreed to him. But where the decree might be executed in its entirety, as, for instance, in the case just put, after the mesne profits have been assessed and fixed, the decree-holder cannot take out one execution for the mesne profits, another for the costs, and another for the interests on the costs—*Huro Sunkur* vs. *Taruck Chunder*, 11 W. R., 488; 3 B. L. R., 114. See also *Fulchand* vs. *Bai Ichha*, I. L. R., 12 Bom., 98. See "WHOLE DECREE," section 231, *post*; "SEVERAL DEBTORS," section 235, *post*.

Who can Apply.—A mookhtar cannot make an application—*In re Ishur Kant Bhadoree*, 24 W. R., 233; but if the application is not returned at the time, it cannot afterwards be objected to on this ground—*Autoo Misree* vs. *Bidhoo Mookhee*, I. L. R., 4 Cal., 605. A *benamidar* cannot apply—*Denonath* vs. *Lolit Kumar*, 12 C. L. R., 146; I. L. R., 9 Cal., 633; *Gour Sundar* vs. *Hem Chunder*, I. L. R., 16 Cal., 355; see, however, *Ram Sahai* vs. *Gaya*, I. L. R., 7 Alla , 107. As to a minor, see *Hari* vs. *Sambhaji*, I. L. R., 12 Bom., 427.

Deceased CREDITOR.—See section 4, Act VII of 1889.

Application for Execution.—This means an application under section 235 or otherwise by which proceedings in execution are commenced, and not applications of an incidental kind made while they are pending—*Chunder Coomar* vs. *Bhogobutty*, I. L. R., 3 Cal., 235, such as the issue of an attachment proceeding—*Prabhacararow* vs. *Potannah*, I. L. R., 2 Mad., 1.

Step in aid of Execution.—An application for execution of a portion of a decree is not a step in aid of execution—*Dalichund* vs. *Shivkor*, I. L. R., 15 Bom., 242.

Amendment.—See section 245, *infra*.

Dekhan Agriculturists' Act.—See *Manohar* vs. *Gebiapa*, I. L. R., 6 Bom., 31.

Form of Application.—Application to enforce a decree should contain the particulars set forth in sections 235–238, *post*, and must be in writing, except in the case provided for in section 256, that is, "where the decree is for a sum of money, and the

amount decreed does not exceed the sum of one thousand rupees." A Court may, in such a case, "*when passing the decree*, on the oral application of the decree-holder, order immediate execution," but only within the limits of its local jurisdiction, against the person or moveable property of the debtor.

Irregular Application.—An imperfect application is one within the section—*Asgar Ali* vs. *Troilokya*, I. L. R., 17 Cal., 631, provided it does not ask for what the creditor cannot get under the decree—*Pandarinath* vs. *Lilachand*, I. L. R., 13 Bom., 237. See also *Hari* vs. *Narayan*, I. L. R , 12 Bom., 427.

An application under section 223, *ante*, is not an application within this section—*Nilmoney Singh* vs. *Biressur*, I. L. R., 16 Cal., 744.

And Granted.—That is "admitted" as stated in section 245, *post*—*Dewan Ali* vs. *Saroshibala*, I. L. R., 8 Cal., 297, and in addition that there has been issue of process in execution—*Nilmoney Singh* vs. *Biressur*, I. L. R., 16 Cal., 744. On an application, notice was issued under section 248, but nothing further was done: *Held*, not granted—*Chengayya* vs. *Appasami*, I. L. R., 6 Mad., 172. So where notice issued to the representatives of a deceased creditor and then a petition was put in intimating some arrangement had been come to and praying for a postponement, but nothing further was done, and the case was struck off: *Held*, not granted—*Paraga* vs. *Bhagawan*, I. L. R., 8 Alla., 301; *Ramdhar* vs. *Ram Dayal*, I. L. R., 8 Alla., 536. But see *Motichand* vs. *Krishnarav*, I. L. R., 11 Bom., 524.

Certain Date.—A decree directing payments to be made annually or monthly is not a decree directing payment at a certain date within the meaning of this section—*Yusuf Khan* vs. *Didar Khan*, I. L. R., 7 Mad., 83; *Sabhanatha* vs. *Lakshmi*, I. L. R., 7 Mad., 80; but if the date can be made certain on construction it is sufficient—*Kaveri* vs. *Venkamma*, I. L. R., 14 Mad., 396; *Lakshmibai* vs. *Madhavrav*, I. L. R., 12 Bom , 65. And where a debtor on being arrested petitioned to have fifteen days to pay and the petition being agreed to, an order "Let the petition be filed" was passed, it was held not an order to pay at the end of fifteen days—*Jogobundhoo Das* vs. *Hori Rawoot*, I. L. R., 16 Cal., 16; *Balchand* vs. *Raghunath*, I. L. R., 4 Alla., 155; see, however, *Jhoti Sahu* vs. *Bhubungir*, I. L. R., 11 Cal., 143. See "PAID BY INSTALMENTS," section 210, *ante*; "SUBSTANTIAL COMPLIANCE," *id.*

Annuity.—Future maintenance is obtained under this section and section 255 *post*—*Ashutosh* vs. *Lukhimoni*, I. L. R., 19 Cal., 139; *Lakshmibai* vs. *Madhavrav*, I. L. R., 12 Bom., 65.

Subsequent Application.—This section assumes that the previous application to execute had been made under the Code itself—*Annanji* vs. *Ramji*, I. L. R., 10 Bom., 348; *Ashootosh Dutt* vs. *Durga*, I. L. R., 6 Cal., 504; *Gandharap* vs. *Sheodarshan*, I. L. R., 12 Alla., 571.

Where a decree-holder seeks to execute a decree passed more than twelve years before application—*Virarama* vs. *Annasami*, I. L. R., 6 Mad., 359, he is allowed only one opportunity to execute—*Sreenath Goohoo* vs. *Yusoof Khan*, I. L. R., 7 Cal., 556; *Musharaf Begum* vs. *Ghalib*, I. L. R., 6 Alla., 180; *Ramdhar* vs. *Ram Dayal*, I. L. R., 8 Alla., 65; and no subsequent application can be granted unless the debtor has by fraud or force prevented the decree from being executed within the twelve years—*Ashootosh Dutto* vs. *Durga*, I. L. R., 6 Cal., 504; *Visalatchi* vs. *Sivasankara*, I. L. R., 4 Mad., 292.

Fraud.—Preventing—*Bhagu Jetha* vs. *Malik*, I. L. R., 9 Bom., 318, or evading arrest seems sufficient to constitute fraud—*Pattakara* vs. *Rangasami*, I. L. R., 6 Mad., 365.

Limitation.—Since the passing of Act XV of 1877, limitation is governed by that Act—*Becharam* vs. *Abdul*, I. L. R., 11 Cal., 55; *Gurupadapa* vs. *Virbhadrapa*, I. L. R., 7 Bom., 459; *Jugmohan Makto* vs. *Luchmeshur*, I. L. R., 10 Cal., 748.

Section 19.—Section 19 of that Act applies to applications in execution in Calcutta—*Torer Mahomed* vs. *Mahomed*, I. L. R., 9 Cal., 730; in Allahabad—*Ramhit Rai* vs. *Salgar*, I. L. R., 3 Alla., 247; but not in Madras—*Rama* vs. *Venkatesa*, I. L. R., 5 Mad., 171.

Striking Off.—As to the effect of striking off an application granted, see *Baroda Sundari* vs. *Fergusson*, 11 C. L. R., 17; *Biswa Sonan* vs. *Binanda*, I. L. R., 10 Cal., 416; *Syam Singh* vs. *Baidayanath*, 13 C. L. R., 176; *Ragubans Gir* vs. *Sheosaran*, I. L. R., 5 Alla., 243; *Venkatrav* vs. *Bijesing*, I. L. R., 10 Bom., 108.

Order to Restrain Execution.—As to an application after injunction is dissolved, see *Kalyanbhai* vs. *Ghanashamlal*, I. L. R., 5 Bom., 29; *Krishnaji* vs. *Anandrav*, I. L. R., 7 Bom., 295; *Bati Begam* vs. *Nihal*, I. L. R., 5 Alla., 459; *Lutful Huq* vs. *Sumbhudin*, I. L. R., 8 Cal., 248.

Redemption.—See *Narayan* vs. *Anandram*, I. L. R., 16 Bom., 480; *Ramunni* vs. *Brahma*, I. L. R., 15 Mad., 366.

Wasilat.—In a decree for wasilat time runs from the date on which the sum is ascertained—*Baroda Sundari* vs. *Fergusson*, 11 C. L. R., 17, and when there is a decree for possession and wasilat, an application to have the wasilat assessed is not subject to limitation. See section 211, *ante*.

Partition.—A decree for partition determines the right of all the parties, and if one party applies for execution no other party need apply—*Sheikh Khorshed Hossein* vs. *Nubbee Fatima*, I. L. R., 3 Cal., 551; see, however, *Hikmat Ali* vs. *Waliunnissa*, I. L. R., 12 Alla., 506; but in regard to limitation, it must be looked on as a joint decree—*Mohun Chunder* vs. *Mohesh Chunder*, I. L. R., 9 Cal., 568.

Rent-Decree.—By section 58, Act VIII (B. C.) of 1869, execution for a sum under five hundred rupees could not issue unless properly applied for within three years from the date of the judgment. Where an application was made within three years to send the decree from one Court to another, it was held that execution could not issue in the latter Court after three years—*Bholanath Roy* vs. *Hari Mohun*, 12 C. L. R., 58.

Court Closed.—Where parties are prevented from doing anything on a particular day not by any act of their own but by the act of the Court itself, they are entitled to do it on the first opportunity—*Peary Mohun* vs. *Anunda Charan*, I. L. R., 18 Cal., 631.

Secondary Evidence.—If the records of the case have been destroyed, then the decree may be provided by secondary evidence—*Nuzor Banoo* vs. *Hossein Ali Khan*, W. R., 1864, p. 378; and see the remarks of Mittor, J., in *In the matter of Kally Soondery Dabia*, I. L. R., 6 Cal., 595; 10 Ind. App., 4. See also *The "Ara"* and *"Brenhilda,"* I. L. R., 5 Cal., 568. See "COPY OF DECREE," section 224, *ante*.

Res-Judicata.—The decision of a Court in execution is *res-judicata* between the parties—*Mungul Pershad* vs. *Grijakant*, I. L. R., 8 Cal., 51; 8 Ind. App., 123; *Kanji Mal* vs. *Kanhia*, I. L. R., 7 Alla., 373; *Bani Ram* vs. *Nanku*, 11 Ind. App., 181; and where a Court rejects an application as barred, no subsequent application can be allowed —*Bandey Karim* vs. *Romesh Chunder*, 11 C. L. R., 145; I. L. R., 9 Cal., 65; see also *Bhooboona* vs. *Jobraj*, 11 C. L. R., 277; on the other hand, where execution has been ordered, the debtor cannot on a subsequent application impeach the result of the first—*Dulchand* vs. *Shirkor*, I. L. R., 15 Bom., 242; *Manjunath* vs. *Venkatesh*, I. L. R., 6 Bom., 54; *Hurrosoondary* vs. *Jugobundhoo*, I. L. R., 6 Cal., 203. But see *Dinkar* vs. *Hari*, I. L. R., 14 Bom., 106.

In the case of the *Delhi and London Bank* vs. *Orchard*, I. L. R., 3 Cal., 47, an order refusing to execute as the necessary sanction of the Commissioner had not been obtained was not a *res-judicata*, and see *Manjunath* vs. *Venkatesh*, I. L. R., 6 Bom., 54, and relying on this it has been held that an order refusing an application to execute is not an adjudication within the rule—*Hurrosoondary* vs. *Jugobundhoo*, I. L. R., 6 Cal., 203, and see *Gourmoni* vs. *Juguf*, I. L. R, 17 Cal., 57, p. 63.

Section 43 *ante* does not apply to an application under this section—*Radha* vs. *Radha*, I. L. R., 18 Cal., 515.

Construction.—A construction put upon a decree in execution-proceedings will bar a subsequent suit—*Kali Mundal* vs. *Kadar Nath*, 6 C. L. R., 215; *Mungal Pershad Dichit* vs. *Grija Kant*, L. R., 8 Ind. App., 123; I. L. R., 8 Cal., 51. But see *Ishwardas* vs. *Dosibai*, I. L. R., 7 Bom., 316. And although the mere order of a Court without contest is not necessarily *res-judicata* still the construction of a document long held should not be lightly set aside—*Gopal Hanmant* vs. *Kondo*, I. L. R., 9 Bom., 329.

Person and Property—Discretion.—In exercising its discretion to refuse execution at the same time against the person and property of the judgment-debtor, a Court should refuse to issue a warrant against the person of a purda lady, until it is satisfied by the decree-holder that he has no other means of enforcing his decree—*Narain Coomaree* vs. *Burroda Soondaree*, 10 W. R., (F. B.,) 21. Now a woman is liable to arrest on a money-decree, section 245A, *post*.

See *Davis* vs. *Middleton*, 8 W. R., 282; *Johan Mal* vs. *Sant Lal*, I. L. R., 9 Alla., 484.

Interest Sold by Decree.—A having a decree against B, in the district of Nuddea, in execution sold the rights and interests of B in a decree which B had obtained against a third party in the district of Beerbhoom, and then applied to the Court of Beerbhoom to execute that decree: *Held*, that Nuddea Court had jurisdictior to sell that decree, and the application to execute it was properly made to the Court in Beerbhoom—*Rambuksh Chuttanges* vs. *Bunwari*, 10 W. R., 357; 2 B. L. R., 65.

Appeal.—An order refusing execution is a decree, and an appeal will lie to determine if the Court has exercised a proper discretion—*Chena* vs. *Ghelabhai*, I. L. R., 7 Bom., 301.

Passing of this Code.—The date on which it received the sanction of the Governor-General—*Damodardas* vs. *Ram Chand*, I. L. R., 7 Bom., 214.

High Court.—This section does not limit Art. 180, Schd. II, Act XV of 1877, and apparently does not apply to decrees made by the High Court—*Mayabhai* vs. *Tribhunvan Das*, I. L. R., 6 Bom., 258; *Ganapathi* vs. *Balasundara*, I. L. R., 7 Mad., 541, or to an order made under section 86, of 11 and 12 Vict., cap. 21.

An order for execution under the Code of Civil Procedure made after notice has, on the Original Side of the High Court, the same effect of reviving a judgment as *scire-facias* had—*Aushootosh Dutt* vs. *Doorga*, 8 C. L. R., 23; I. L. R., 6 Cal., 505. See, however, *Tincowrie Dawn* vs. *Debendro*, I. L. R., 17 Cal., 491.

Application by joint decree-holder.

231. If a decree has been passed jointly in favour of more persons than one, any one or more of such persons, or his or their representatives, may apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors, and the representative in interest of the deceased.

If the Court sees sufficient cause for allowing the decree to be executed on an application so made, it shall pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

Act VIII of 1859, section 207. This section applies to H. C. and P. S. C. C.

Passed Jointly.—A obtained a decree for partition of certain property. Subsequently B got a decree against A, declaring he was entitled to a one-fifth share of what A would recover, and then applied to execute B's decree: *Held*, they were not joint decree holders—*Ramasami* vs. *Anda Pillai*, I. L. R., 13 Mad., 347; but B as assignee of a share could execute the whole decree—*Id.*, I. L. R., 14 Mad., 252. See "LIMITATION," *infra*.

Whole Decree.—Ordinarily all the decree-holders in a joint decree must join in an application to execute a decree for possession of property—*Roy Goodur* vs. *Dhunneshur*, 7 C. L. R., 117; or for money—*Collector of Shahjahanpur* vs. *Surjan*, I. L. R., 4 Alla., 72; *Dalichand* vs. *Bai Shirkor*, I. L R., 15 Bom., 242; *Banarsi* vs. *Kuar*, I. L. R., 5 Alla., 27; but where there are several joint decree-holders and there is no condition precedent preventing—*Farzand* vs. *Abdullah*, I. L. R., 6 Alla., 69, the Court can issue execution on the application of some of them or their representatives—*Teja Singh* vs. *Raj Narayan*, 1 B. L. R., 62; *Azizunnissa Khatun* vs. *Shashi Bhusan*, 2 B. L. R., App., 47. The application must be for the whole decree and not for any fractional share that the applicant may consider himself entitled to—*Thakoor Dass Singh* vs. *Luchmeeput*, 7 W. R., 10; *Banarsi* vs. *Kuar*, I. L. R., 5 Alla., 27; *contra*—*Hurrish Chunder* vs. *Kali Sundari*, I. L. R., 9 Cal., 482.

Where two out of several co-decree-holders applied to the Judge's Court to execute their share of a decree, it was held that the application was not one upon which the Court could proceed in execution, and that in appeal it could not be changed into an application to execute the whole decree—*Purna Chundra* vs. *Saroda Churn*, 3 B. L. R., App., 21; *contra*—*Roy Goodur* vs. *Dhunneshur*, 7 C.L.R., 117; moreover it is not sufficient to bar limitation and cannot be cured by petition after the period of Limitation Act has expired — *Collector of Shajahanpur* vs. *Surjan*, I. L. R., 4 Alla., 72; *contra*—*Kuthath* vs. *Bavotti*, I. L. R., 3 Mad., 79; *Dalichand* vs. *Bai Shinkor*, I. L. R., 15 Bom., 242, and where by inadvertence, execution issued for the separate shares, costs were refused—*Prannath Mitter* vs. *Moothoranath*, 6 W. R., Mis., 65. A defendant cannot object to the share claimed for himself by a decree-holder, and on that account refuse to pay into Court the entire amount if the Court allows execution of the whole decree—*Sutesh Chunder* vs. *Saroda Pershad*, 5 W. R., Mis., 58.

Part Execution Allowed.—A joint money-decree was passed in favour of A and B each claiming one-half. Subsequently A applied for execution, stating that B could not join in the application. B admitted that he had secured more than one-half from the debtor; but the Court disbelieving this statement allowed execution to issue for the full amount: *Held*, the Court should have issued execution only for half the amount—*Brojeswari Chowdhranee* vs. *Tripoora Soonderee*, 3 C. L. R., 513; and where of two decree-holders one sold his share to the debtor, and delivered to him the certified copy of the Privy Council decree required for execution, and the other applied for execution, it was held that execution should issue, leaving the Court in execution to decide under section 244 the share of the remaining decree-holder—*In the matter of the Petition of Kally Soontary*, I. L. R., 6 Cal., 595; I. L. R., 9 Cal., 482; and see *Kudhai* v. *Sheo Dayal*, I. L. R., 10 Alla., 570.

Regular Suit.—As to when a regular suit will lie for a portion of the decretal money realised by the debtors who have purchased benamee and whose benamidar has not

succeeded in getting his name registered under section 232, *post*—*Haragobind* vs. *Issuri*, I. L. R., 15 Cal., 187.

Satisfaction.—But as one joint decree-holder is not bound by the acts of another, who has compromised or received payment out of Court—*Balgobind* vs. *Bhowanee Deen*, 1 Agra, Mis., 16; the debtor would be wise in not paying unless jointly or to the extent of their admitted shares—*Mahima Chandra* vs. *Pyarimohun*, 2 B. L. R., App. 43; for ordinarily, a joint decree-holder has no power to give a discharge out of Court to a judgment-debtor for more than his own share of the decree—*Bibee Budhun* vs. *Hafeezah*, 4 C. L. R., 70, and see *Banarsi* vs. *Kuar*, I. L. R., 5 Alla., 27; and certainly not if the decree be not based on contract, but is for possession of land against the defendants as wrong-doers—*Anando* vs. *Anando*, I. L. R., 14 Cal., 50; *Tarruck Chunder* vs. *Divendro Nath*, I. L. R., 9 Cal., 831; approved in *Sultan* vs. *Savalayammal*, I. L. R., 15 Mad., 343. A release by one joint-creditor by contract and not fraudulent is good if certified—*Sultan* vs. *Savalayammal*, I. L. R., 15 Mad., 343; but if the decree is of such a nature that it cannot be satisfied in shares, as if it were to knock down a wall, one decree-holder may execute it, although the others have entered into a compromise with the defendant—*Inderjeet* vs. *Sewaram*, 5 Alla., 16; and see *Ahamudeen* vs. *Grish Chunder*, I. L. R., 4 Cal., 350. See "PORTION OF DECREES," section 230, *ante*; "SEVERAL DEBTORS," section 235, *post*.

Limitation.—Where the judgment-debtors are sued as wrong-doers, not as joint-debtors under a contract, then if one of the creditors is a minor, and the decree is not barred as against him, he should be allowed to execute the whole decree—*Anando* vs. *Anando*, I. L. R., 14 Cal., 50, and the cases there cited; *contra*—*Seshan* vs. *Rajagopala*, I. L. R., 13 Mad., 236.

Act XV of 1877, Schd. II, Art. 179, Explanation 1, is to the following effect: "When the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number (*i.e.*, the application for execution, or to take some step in aid of the execution of the decree or order), shall take effect in favour only of such of the said persons or their representatives as it may be made by. But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all"—See *Seshan* vs. *Rajagopala*, I. L. R., 13 Mad., 236; *Ramasami* vs. *Anda Pillai*, I. L. R., 14 Mad., 252. And where one of two joint decree-holders applied for execution of his share, the application was not sufficient to keep the decree in force—*Collector of Shajahanpur* vs. *Surjan*, I. L. R., 4 Alla., 72. See *Shib Chunder Dass* vs. *Ram Chunder Paddar*, 16 W. R., 26. See note under section 235, *post*. But in Madras, the disability of one of two co-heirs does not save the law of limitation in favour of the other, and therefore a minor should not be allowed to execute the whole decree or even his share of it, if it is a joint decree and is barred as regards those who have attained majority—*Seshan* vs. *Rajagopala*, I. L. R., 13 Mad., 236, *contra*—*Anando* vs. *Anando*, I. L. R., 14 Cal., 50.

Irregular Application.—Although an application to execute a decree in part is informal, yet, if the proceedings taken upon it are in effect execution of the decree as a whole, they are good and valid.—*Jugjeebun Goopto* vs. *Goluck Mones*, 22 W. R., 354. See, however, the case of the *Collector of Shajahanpur* vs. *Surjan*, I. L. R., 4 Alla., 72; and compare—*Kuthath* vs. *Bavotti*, I. L. R., 3 Mad., 79.

An application for execution was made by a Mookhtar and admitted by the Judge who ordered a notice to issue on the judgment-debtor: *Held*, that such an application could not, after the notice was issued, and on the occasion of a subsequent application, be set aside as having been irregularly filed—*Dhanpat Singh* vs. *Lilanund*, 2 B. L. R., App., 18; *Autoo Misree* vs. *Bidhoomookee*, I. L. R., 4 Cal., 605. So where a decree-holder instead of applying in a regular manner merely prayed issue of notice, it was held that the debtor could not object to the form after he had contested the application and pleaded limitation—*Chunder Koomar Roy* vs. *Chunder Kishore*, 1 Shome, 18; and even where an application was irregular and returned for amendment and nothing further was done, it was held to give a new starting point for limitation—*Ramanadan* vs. *Periatambi*, I. L. R., 6 Mad., 250; *Radha* vs. *Radha*, I. L. R., 18 Cal., 515; provided perhaps the application does not ask what the decree cannot give—*Pandarinath* vs. *Lilachand*, I. L. R., 13 Bom., 237.

Double Executions.—The fact that the petition of one of several decree-holders in applying for execution requires amendment, because of the list of property being incomplete is no ground for declaring such application to be superseded by a later application made, before the completion of the necessary amendment, by another co-decree-holder for execution; both execution can proceed—*Sheik Ahmed Chowdhry* vs. *Shahzada*, 7 C. L. R., 537.

Practice.—One of several decree-holders has no right to claim execution unless he satisfies the Court that he has sufficient cause for asking for execution alone, and as this ordinarily cannot be properly done without hearing the other decree-holders, notice should be given to them and the application disposed of in their presence—*Umrith Nath Chowdhry* vs. *Chunder Kishore*, 21 W. R., 31; see *Sheikk Ahmed Chowdhry* vs. *Shahzada*, 7 C. L. R., 537; *Hurrish Chunder* vs. *Kali Sundari*, I. L. R., 6 Cal., 594;

I. L. R. 9 Cal., 482; 10 Ind. App., 4. If the application is allowed, the Judge is bound to pass such order as is necessary to protect the interests of the non-applicants. The usual order is an order reserving, in express terms, their rights to share in the proceeds of the execution—*Tarasundari Burmoni* vs. *Beharilal Roy*, 1 B. L. R., 28.

Appeal; Distribution.—An appeal lay from a decision under Act VIII, 1859, section 207, as to the distribution of the assets realized—*Tarasundari Burmoni* vs. *Beharilal Roy*, 1 B. L. R., 28; I. L. R., 9 Cal., 482; 10 Ind. App., 4; *In the matter of the Petition of Kally Soondary*, I. L. R., 6 Cal., 595; and compare *Gyamones* vs. *Radha Romon*, I. L. R., 5 Cal., 592; *Haragobind* vs. *Issuri*, I. L. R., 15 Cal., 187.

Refusal.—But no appeal lay from an order refusing to allow one of several joint holders to execute—*Odhoya Pershad* vs. *Mohadeo Bhandaree*, 17 W. R., 415; and none is given under section 588, *post*.

Application by transferee of decree.

232. If a decree be transferred by assignment in writing, or by operation of law, from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it; and, if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided as follows:

(*a*) where the decree has been transferred by assignment, notice in writing of such application shall be given to the transferror and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution:

(*b*) where a decree for money against several persons has been transferred to one of them, it shall not be executed against the others.

Act VIII of 1859, section 208. This section applies to H. C. and P. S. C. C.

Rent-Suits.—It does not apply to the transfer of a rent-decree in Bengal—Act VIII, 1885, section 148, cl. (*b*).—See *Koilash Chunder* vs. *Jodunath*, I. L. R., 14 Cal., 380, nor to a decree under Reg. IV, 1816 (Mad.); but in Madras a transferree can execute—*Kalandan* vs. *Pakrichi*, I. L. R., 9 Mad., 378.

If Decree be Transferred.—This would seem to exclude the owner of any interest in existence before decree—*Abedoonissa* vs. *Ameeroonissa*, 4 Ind. App., 66, p. 73. If the decree-holder's interest in the property and not the decree be assigned, possibly the assignee should not be put on the record and the decree should be executed by the decree-holder—*Ram Sahi* vs. *Gaya*, I. L. R., 7 Alla., 107. A pre-emption decree cannot be assigned to a stranger—*Id.* It is doubtful if this section would apply to the transfer of a part and not of the whole decree—*Seetaput Roy* vs. *Syud Ali*, 24 W. R., 11; *contra*—*Kishore Chand* vs. *Gisborne & Co.*, I. L. R., 17 Cal., 341. See "WHOLE DECREE," p. 229, *ante*.

In Writing.—An oral transfer is not recognised—*Javermal* vs. *Umaji*, I. L. R., 9 Bom., 179; *Parvata* vs. *Digambar*, I. L. R., 15 Bom., 307. See as to the distinction between a purchaser at a sale in execution of decree, and a private assignee—*Gour Sundar* vs. *Hem Chunder*, I. L. R., 16 Cal., 355

In this country an assignment can always be impeached by third parties who can show that it is not a real transaction—*Mulji* vs. *Nathubhai*, I. L. R., 15 Bom., 1.

By Operation of Law.—The holder of a certificate under Reg. VIII of 1827 in regard to a deceased judgment-creditor is a transferree—*Khanderav* vs. *Ganesh*, I. L. R., 11 Bom., 368. A Hindu widow obtained probate of an alleged will of her husband, and got a decree for rent due by one of his tenants. The heir got the will set aside. *Held*, he was a transferree of the rent-decree by operation of law—*Umasoondury* vs. *Brojonath*, I. L. R., 16 Cal., 347.

Transferree.—The transfer must have been from "the decree-holder to any other person." A instituted a suit, and, dying before judgment, his wife C carried on the suit as his representative and got a decree. It was held that D, who claimed as heir of A, could not execute the decree so long as C was alive, and did not transfer her rights to him—*Abdoonissa* vs. *Ameeroonissa*, 4 Ind. App., 73.

Benamidar.—Where a decree was assigned to A for his benefit in the name of B, the ostensible owner B was allowed to take out execution—*Purna Chundra* vs. *Abhaya Chundra*, 4 B. L. R., App., 40; *contra*—*Gour Sundar* vs. *Hem Chunder*, I. L. R., 16 Cal., 355, and see "BENAMIDAR," *infra*. Where S obtained a degree against D, the owner in possession, and subsequently in a suit brought by J against S, a decree was passed by consent, that J should execute S's decree; it was held that J was a transferree within the section—*Doorga Pershad* vs. *Lallah Juggunnath*, S. D., N. W., 1869, 34.

Certificate.—It was not essential under Act VIII of 1859 that the representative should in every case should have obtained a certificate under Act XXVII, 1860, before he could be allowed to execute—*Rajah Gopal Singh Deb* vs. *Gopal Chunder Chuckerbutty*, 7 W. R., 394. But see section 4 Act VII of 1889.

Notice to Judgment-Debtor.—If the judgment-debtor is dead before the transfer, and cannot get notice, the transfer may still be allowed—*Khushrobhai* vs. *Hormazsha*, I. L. R., 11 Bom., 727.

Notice shall be given to the Transferror.—The penalty imposed by this proviso is that there is not power to execute unless it is complied with. Decree-holder assigned to A, who assigned to B. A's name was not put on the record on application by B to get his name recorded, the judgment-debtor objected that notice had not been given to all the transferrors, that one of the transferrors being dead, notice should have issued to his representatives: *Held*, the debtor had no interest in the matter of notice, and it was doubtful if the representatives of the deceased should get any; but even if the debtor could raise the question, he could not do so before an application for execution had been made—*Gulzari Lall* vs. *Daya*, I. L. R., 9 Alla., 46. If a transfer is made after notice to transferror and debtor, and the decree partly executed, the representative of the judgment-debtor cannot subsequently object—*Mulchand* vs. *Chhagan*, I. L. R., 10 Bom., 74.

Abatement.—There is no express provision in the Code for abatement of proceedings in execution. When it is brought to the notice of the Judge that the judgment-creditor is dead, he should strike off the proceedings by default, leaving the legal representative to apply within the period of limitation—*Dulari* vs. *Mohan Sing*, I. L. R., 3 Alla., 759; and a sale of property attached in the debtor's life-time properly published is not bad if it takes place after the death of the debtor—*Sheo Prasad* vs. *Hera Lal*, I. L. R., 12 Alla., 440. See note under section 366, and section 375A, *post*.

Benamidar.—A *benamidar* has no *locus standi* under this section; the person having the beneficial interest is the transferree—*Abdul Kurreem* vs. *Chukhun*, 5 C. L. R., 253; and an application by him does not save limitation—*Deno Nath* vs. *Lallit Coomar*, I. L. R., 9 Cal., 633; 12 C. L. R., 146; *Gour Sundar* vs. *Hem Chunder*, I. L. R., 16 Cal., 355.

Transfer Recorded.—The actual substitution of the name of the assignee for that of the decree-holder is not necessary for the validity of the proceeding in execution. The law merely requires the assignee to apply for execution of the decree under assignment—*Syud Nadir Hossein* vs. *Pearoo Thovildarinee*, 19 W. R., 255; but his name should be brought on the record—*Balkishoon* vs. *Mahommed Tazam*, 4 Alla., 90; see *Dhuronidhur Sen* vs. *The Agra Bank*, I. L. R., 5 Cal., 86, p. 91, but the proceedings are not void but only irregular if the executing Court has jurisdiction over the subject-matter of the dispute, and can give the same relief in a suit—*Vishnu* vs. *Krishnarao*, I. L. R., 11 Bom., 153; but it should be borne in mind that the term "decree-holder" includes any person to whom a decree or order may have been transferred—section 2, *ante*. And see the case of *Vishnu* vs. *Krishnarao*, I. L. R., 11 Bom., 153. A judgment-debtor cannot object that the decree has been transferred by assignment to a third party so long as such assignment has not been notified to the Court by one of the parties to it and been duly recognized—*Khetter Mohan* vs. *Ishur Chunder*, 11 W. R., 271.

If the application is sanctioned, then the transferree is entitled to all the privilege of the decree-holder, and to have the decree executed as if the application had been made by the petitioner—*Shamanund Surma* vs. *Sumbhoo Chunder Doss*, 7 W. R., 205; *Rooghu Nundun* vs. *Somessur*, 22 W. R., 235.

Court which Passed It.—Application for the execution of a decree should be made by the assignee of such decree to the Court which passed it, and not to the Court to which it may have been sent for execution—*Sheo Narain* vs. *Hurbuns Lall*, 14 W. R., 36; 5 B. L. R., 497; *Nakoda Ismail* vs. *Kassam*, 9 Bom., 46; *Framji Rustamji* vs. *Ratansha*, 9 Bom., 49.

If that Court thinks Fit.—The Court may, in its discretion, grant or refuse an application to execute by a transferree—*Megh Narayan* vs. *Radha Prasad*, 4 B. L. R., 200; *Heera Roy* vs. *Gujadhur Pershad*, 24 W. R., 286; and he is not entitled to it as of right like the original decree-holder—*Shama Puddo Dutt* vs. *Nobin Chunder Bose*, 15 W. R., 283; *Javermal* vs. *Umaji*, I. L. R., 9 Bom., 179; *Parvata* vs. *Digambar*, I. L. R., 15 Bom., 307; see, however, the case of *Vishnu* vs. *Krishnarao*, I. L. R., 11 Bom., 153. If there is no dispute the Court may admit him at once, or if the dispute is one that it can try, it can decide the point and upon the result of the trial admit or refuse the application—*Bishoo Churn* vs. *Kishen Gopal*, 13 W. R., 207. On application for the execution of such a decree, the Court should issue notice to the debtor, and on fair objection, should, under the discretion given by section 232, restrain from granting the application for execution, leaving the assignee to his remedy against the assignor—*Rughoo Nundun* vs. *Somessur*, 22 W. R., 235; 13 B. L. R., 489.

Cross-Decrees.—The fact that there are cross-decrees is a good reason for refusing to recognize an assignment of one of them—*Jodoonath Roy* vs. *Ram Buksh*, 8 W. R., 202; but see *Krishna Mohini* vs. *Kedarnath*, I. L. R., 15 Cal., 446. The decrees must, however, be such as are capable of being dealt with as cross-decrees; a decree obtained subsequently to the assignment of another decree is not a cross-decree—*Kussemoonnissa* vs. *Hill*, 15 W. R., 127. Nor is the probability that the decree may be executed against some particular judgment-debtor sufficient ground for refusing a transfer—*Agra Bank* vs. *Cripps*, I. L. R., 8 Mad., 455; and if there is no such objection, and the decree has been transferred, and the transfer is admitted by the decree-holder in Court, the debtor cannot contest the right of the transferree to execute it, except on plea of payment to the original decree-holder—*Sunnooburnissa Khanum* vs. *Meher Chand*, W. R., 1864, p. 323.

A Decree for Money.—The last proviso to section 232 refers to money-decrees only—*Lalla Bhagun* vs. *Holloway*, I. L. R., 11 Cal., 393; and *Yakoob Ali* vs. *Ram Doolal*, 13 C. L. R., 272; *Degumburee Dabee* vs. *Eshan Chunder*, 9 W. R., 230. Purchase of a decree is not the same as satisfaction of it—*Nupher Chunder Mundal* vs. *Punchae*, 1 Shome, 187; the proper course is for the purchaser to bring a suit for contribution—*Degumburee Dabee* vs. *Eshan Chunder*, 9 W. R., 230. See cases above.

Transfer of Part.—Where the whole decree has not been transferred, but only a part, the judgment is so far extinguished, and execution should only issue for the remainder—*Banarasi Dass* vs. *Kuar*, I. L. R., 5 Alla., 27; *Pogose* vs. *Fakurooddeen Mahomed Ashan*, 23 W. R., 343, and the same rule applies to mortgage-decrees—*Kudhat* vs. *Sheo Dayal*, I. L. R., 10 Alla., 570.

As to an insufficient assignment of a decree, see *Gonesh Lal* vs. *Sham Narain*, 6 C. L. R., 533.

Mortgage-Decree.—A mortgagor in possession sold two-annas share of his right in the property to A, and gave him a lease of the remaining 14 annas. A subsequently bought the mortgagee's decree: *Held*, he could execute it—*Kally Doss* vs. *Golam Ally*, 3 C. L. R., 237; and a mortgage-decree for the amount of the mortgage-debt may be transferred to the assignee of a portion of the equity of redemption—*Nafer Chund* vs. *Baikanto Nath*, 4 C. L. R., 156.

But a mortgagee will not be allowed without special reasons to execute his decree exclusively against one of the owners of the equity of redemption for the whole debt whether he is interested in the equity of redemption or not, and if all the persons concerned are on the record, the mortgage debt will be apportioned—*Moro Raghunath* vs. *Balaji*, I. L. R., 13 Bom., 45; *Ramdhun* vs. *Mohesh Chunder*, I. L. R., 9 Cal., 406.

Disputed Transfer.—Disputes as to the share transferred between creditor and debtor must be decided under section 244, *post*—*Kudhat* vs. *Sheo Dayal*, I. L. R., 10 Alla., 570.

Registration.—The assignee of a mortgage-decree under an unregistered deed—the assignment requiring registration—is only entitled to treat the decree as a money-decree—*Hub Lal* vs. *Kumar*, 12 C. L. R., 393; I. L. R., 9 Cal., 839; but a deed of assignment of a decree passed on a hypothecation bond is not a document comprising immoveable property within the meaning of section 49, Act XV of 1877—*Abdul Majid* vs. *Muhammad*, I. L. R., 13 Alla., 89.

Payment to Wrong Person.—Where a person claiming to be the assignee of a decree obtains satisfaction of it, and his title is subsequently declared to be invalid, the debtor cannot sue to recover the money so paid unless he can show that he has been in some way defrauded by the transaction, or that the person receiving payment was not the assignee of the decree, and that consequently the decree is still unsatisfied as between him and the decree-holder. The mere fact that the Court of a Deputy Collector acted *ultra vires* in allowing the assignment gives no cause of action—*Ram Gobind* vs. *Gheenoo*, 20 W. R., 406.

Appeal.—An order under this section disallowing the objections raised to substitution and execution by the transferree on the record is a decree, and is appealable

by the debtor—*Murli Dhar* vs. *Parsotum Das*, I. L. R., 2 Alla., 91; *Gulzari Lal* vs. *Daya Ram*, I. L. R., 9 Alla., 46; *Afzal* vs. *Ram Kumar*, I. L. R., 12 Cal., 610; but when the person claiming, as transferree, is refused execution, he cannot appeal—*Sobha Bibee* vs. *Mirza Sakhamut*, I. L. R., 3 Cal., 371; *contra*—*Purmanand Das* vs. *Vallabdas Das*, I. L. R., 11 Bom., 506; unless his name has been placed on the record—*Lalla Bhagun Persad* vs. *Holloway*, I. L. R., 11 Cal., 393; *Sambasiva* vs *Srinivasa*, I. L. R., 12 Mad., 511; and generally no decision of a dispute between the decree holder and transferree is appealable—*Gyamonee* vs. *Radha Romon*, I. L. R., 5 Cal., 592; *Mosahibir* vs. *Ram Baghowan*, I. L. R., 11 Cal., 150; *Sambasiva* vs. *Srinivasa*, I. L. R., 12 Mad., 511; nor is the discretion allowed to refuse an assignee open to revision—*Krishna Mohinee* vs. *Kedarnath*, I. L. R., 15 Cal., 446; see the case of *Vishnu* vs. *Krishnarao*, I. L. R., 11 Bom., 153. See "REPRESENTATIVES," section 244, *post*.

Effect of Decision.—Decisions under this section are only summary for procedure purposes, and are not decisive of the civil rights of two or more parties, each claiming to be transferree. A regular suit will, in such a case, lie—*Abedoonissa* vs. *Ameeroonissa*, 4 Ind. App, 73; and so will a suit for an injunction to restrain execution by the assignee—*Dhuronidhur Sen* vs. *The Agra Bank*, I. L. R., 4 Cal., 380; 4 C. L. R., 386; I. L. R., 5 Cal., 86; and a regular suit will lie to declare his right to be put on the record —*Ram Baksh* vs. *Panna Lal*, I. L. R., 7 Alla., 457; *Halodhar* vs. *Harogobind*, I. L. R., 12 Cal., 105; *Raman* vs. *Muppil*, I. L. R., 14 Mad., 478; except where the order is passed on the Original Side of the High Court (Madras):—*Agra Bank* vs. *Cripps*, I. L. R., 8 Mad., 455; and allowed to remain pending till the defect is removed—*Abdul Majid* vs. *Muhammad*, I. L. R., 13 Alla., 89.

233. Every transferree of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Transferree to hold subject to equities enforceable against original holder.

This section applies to H. C. and P. S. C. C.

The transferree in execution holds subject to the equities which may be enforced against the original decree-holder, and will hold subject to the rights of the judgment-debtor to set-off a cross-decree in existence at the date of his purchase and in the same Court—*Kaim Ali* vs. *Luckhy Kant*, 10 W. R. (F. B.), 32.

Attached Debt—A assigned to B his right in a decree obtained by him against a certain person, who afterwards had the decree set aside and the suit re-heard, when a decree was again given in favour of A. Thereupon D attached it for a debt due to him by A: *Held*, that D's claim was prior to B's—*Grish Chunder* vs. *Obhoy Churn*, 6 C. L. R., 498.

Assignee with Notice.—An equity against a holder operates against his assignee with notice—*Kristo Kamini* vs. *Kedarnath*, I. L. R., 16 Cal., 619.

234. If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

If judgment-debtor die before execution, application may be made against his representative.

Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit.

Act VIII of 1859, section 210. This section applies to H. C. and P. S. C. C. See Act VII of 1885, section 148, clause (*b*); Ajmere Regulation II of 1877, section 29.

This section omits the power given by section 210, Act VIII, 1859, to execute a decree *against the estate* of a deceased judgment-debtor.

But when the legal representative is put on the record, he becomes a party to the suit, and all matters raised between him and the plaintiff in regard to the execution, discharge or satisfaction of the decree are decided under section 244, *post*—*Kuriyali* vs. *Mayan*, I. L. R., 7 Mad., 255. In Bengal proper, where there is heirship, all claims by Hindu representatives to property attached, unless the claim is to hold as a trustee, are so dealt with—*Punchanan* vs. *Rabia*, I. L. R., 17 Cal., 711; *Roop Lall* vs. *Bekani*, I. L. R., 15 Cal., 437, and the same rule seems to apply to cases in the North-West and Behar where the decree binds the joint family—*Rajrup* vs. *Ramgolam*, I. L. R., 16 Cal., 1; or against a widow, where she and her heirs are made representatives—*Mungeshur Kuar* vs. *Jamoona*, I. L. R., 16 Cal., 693; *Raghubar Dial* vs. *Hamid*, I. L. R., 12 Alla., 74; or the decree has been obtained against the heirs—*Mulmantri* vs. *Ashfak*, I. L. R., 9 Alla., 605.

The same rule applies where a decree has been given against a Karnavan and his representatives are put on the execution record—*Ravanni* vs. *Kunju*, I. L. R., 10 Mad., 117.

Property in Possession of a Third Party.—A person cannot be put on the record on the mere ground that he is in possession of property so long as there is a legal representative on the record. But the judgment-creditor can follow in execution such property of the debtor as is in the possession of such person through the legal representative—*Nadir Hossein* vs. *Bissen Chand*, 3 C. L R., 437, 1 Shome, 82; see also *The Oriental Bank* vs. *Gobindloll*, I. L. R., 10 Cal., 713; and if in execution the property is sold, or a receiver appointed, the purchaser or receiver can sue, but no suit will lie against the person in possession of the property by the decree-holder—*Mirza Mahomed Aga* vs. *Widow of Balmakund*, 3 Ind. App., 241, p. 245; but if the purchaser from an heir or devisee knows that there are debts unsatisfied, and the heir or devisee to whom he has paid the purchase-money does not intend to apply it to the payment of debts—*Greender Chunder* vs. *Mackintosh*, I. L. R., 4 Cal., 897; and there are not assets to pay the debts—*Narsingh Das* vs. *Najmorddin*, I. L. R., 8 Cal., 20, the property may be followed in his hands by suit. And where A obtained a decree against C as representative of C for conversion of his property and D in collusion with C or without his consent sold the property, and retained the price, he was held liable—*Gooroo Das* vs. *Ram Narain*, 11 Ind. App., 59.

Property Disposed of by Heirs.—As regards Muhammadans and Hindus, if the heir has disposed of the property which he has inherited to a *bonâ fide* purchaser, the creditor cannot follow the property into the hands of the purchaser; but the heir is liable to account for the assets he has received—*Bazayet Hossein* vs. *Doolichund*, I. L. R., 4 Cal., 402; 5 Ind. App., 211; and similarly the executor of a Muhammadan can subject to the limitation imposed by the Succession Act in case of real property sell the estate of the deceased to pay his debt—*Kalee Narain* vs. *Ram Coomar*, W. R., 1864, p. 99; *Wahidunnissa* vs. *Shubrattun*, 6 B. L. R., 54; and see *Greender Chunder* vs. *Mackintosh*, I. L. R., 4 Cal., 897. As to the law regarding inheritance in the mofussil generally, see *Musleah* vs. *Musleah*, Fulton, 420.

If Judgment-Debtor Dies.—It is only when the death of the defendant takes place after the decree has been made that it can be executed against the legal representative. Where a party to a suit dies before it is decided, and judgment is given against him, it is incapable of being enforced—*The Representatives of Girendronath Tagore* vs. *Huronath Roy*, 10 W. R, 455; 14 B. L. R, 334, note; but see *The President and Member of the Orphan Board* vs. *Van Rsenan*, 1 Knapp., P. C., 83 p. 96; *Surendra keshav* vs. *Doorgasundari*, 19 Ind. App., 138, p. 134, and compare—*Mina* vs. *Juggat*, I. L. R., 10 Cal., 196, p. 206.

This section, however, does not render a sale of property attached void which takes place after the death of the original debtor and before his presentative is placed on the record—*Stowell* vs. *Ajudhia*, I. L. R., 6 Alla., 255; *contra*—*Krishnayya* vs. *Unnissa*, I. L. R. 15 Mad., 399.

It does not apply to the case of a creditor seeking to sell property attached during the lifetime of the judgment-debtor—*Sheo Prasad* vs. *Hira Lal*, I. L. R., 12 Alla., 440, or to a decree-holder striving to recover possession, if the order for possession has been passed during the lifetime of the defendant—*Biyyakka* vs. *Fakira*, I. L. R., 12 Mad., 211.

Legal Representative.—The Legislature has omitted to declare what are the characteristics of a legal representative in this section—*Greender Chunder* vs. *Mackintosh*, I. L. R., 4 Cal., 897, p. 908; 4 C. L. R., 193. It is clear that, in cases in which the Succession Act and Hindu Wills Act apply, the executor or administrator alone is the legal representative—Section 179, Act X, 1865; *Pogose* vs. *Catchick*, I. L. R., 3 Cal., 708; *Sukh* vs. *Rennick*, I. L. R., 4 Alla., 192, and under Act V of 1881, an executor is the legal representative before he has taken out probate—*Shaikh Moosa* vs. *Essa*, I. L. R., 8 Bom., 241. It has been held that a person taking possession of the estate of a deceased Hindu (who has left a will of which no probate has been granted) must be treated as his representative until a claimant comes forward—*Prosunno Chunder Bhuttacharjee* vs. *Kisto Chytuno Pal*, I. L. R., 4 Cal., 343; followed in *Janaki* vs. *Dhanu Lall*, I. L. R., 14 Mad., 454; and see "PROPERTY IN POSSESSION OF A THIRD PARTY," *supra*; *Hulkhony* vs. *Sheo Churn*, 24 W. R., 109.

Estoppel.—And where a person filed a petition in a suit saying that all the property of the judgment-debtor had passed to him and for several years opposed execution: *Held*, though the name of the applicant was not on the record, that she was liable as a defendant—*Lalla* vs. *Sabeerun*, 7 W. R., 368; though ordinarily a Court has no power to put a debtor's vendee on the record—*Dhoroni* vs. *The Agra Bank*, 3 C. L. R., 421. On the other hand, the legal representative binds all the property in his possession. A Muhammadan woman died leaving the husband and four minor children. The husband and the children were brought in as her legal representatives, but no guardian *ad litem* was appointed for the minors. Some property was brought to sale and purchased by the decree-holder: *Held*, as the father was in possession, the sale was good, and not affected by the non-appointment of a guardian *ad litem*—*Kunhammad* vs. *Kutti*, I. L. R., 12 Mad., 90.

Hindu Widow.—In a decree in which a Hindu widow is defendant in her representative capacity, the heirs of her husband are her legal representatives—*Ramkishore* vs. *Kally Kanto*, I. L. R., 6 Cal., 479; *Hari Saran* vs. *Bhubaneswari*, I. L. R., 16 Cal., 40, and the same rule applies if she sues for possession of family property and is cast in costs—*Ramkishore* vs. *Kally Kanto*, I. L. R., 6 Cal., 479; but the heir of the last full owner is not in regard to a mere personal money-decree against the widow, her representative—*Rameshwar* vs. *Run Bahadur*, I. L. R., 12 Cal., 458. And see *Hari Saran* vs. *Bhubaneswari*, I. L. R., 16 Cal., 40.

See notes under sections 11, 53, and 206, *ante*, and 244 and 252, *post*.

Joint Family.—In the case of joint ancestral property of a Hindu family living under Mitakshara law the property of a son after his father's death is liable for the father's debts, provided that they are not illegal or contracted for some immoral purpose—*Girdharee Lall* vs. *Kanto*, 22 W. R., 56; 14 B. L. R., 187; 1 Ind. App., 321; but this is ordinarily effected by way of regular suit, and if a person gets a decree against a Hindu, and the father's interest is not attached in his lifetime, on his death it passes to the sons by survivorship, and ceases to be his property, therefore, the decree-holder cannot enforce the decree, but must sue—*Karnataka* vs. *Andukuri*, I. L. R., 5 Mad., 232; *Arunachala* vs. *Sivagiri*, I. L. R., 7 Mad., 328; *Venkatarama* vs. *Senthivelu*, I. L. R., 13 Mad., 265; and see *Jagannath Prasad* vs. *Sita Ram*, I. L. R., 11 Alla., 302; for a survivor is not liable for the personal debts and obligations of the deceased member—*Madho Parshad* vs. *Mehrban*, I. L. R., 18 Cal., 157, p. 163; and consequently the obligation to pay even a father's debt does not arise from the decree or procedure but Hindu Law—*Ariabudea* vs. *Dorasami*, I. L. R., 11 Mad., 413. But if the decree has been followed by attachment and order of sale, or the property is directed to be sold as hypothecated, execution may issue—*The Sivagiri Zemindar* vs. *Tiruvengada*, I. L. R., 7 Mad., 339, and a separate suit will not lie—*Kuriyali* vs. *Mayan*, I. L. R., 7 Mad., 255. And where a decree for maintenance was passed against the father, and it did not appear he was sued as representative, it was held that the decree could be executed against the assets of the deceased in the possession of the sons, but these would not include the interest the father had in the joint estate—*Karpakambal* vs. *Ganapathi*, I. L. R., 5 Mad., 234.

The widow in a joint family obtained a decree for maintenance against her husband's brother, which was not expressed to be a decree against the head or representative of the family: *Held*, in execution against the representative of the judgment-debtor that the family estate was not liable—*Muttia* vs. *Virammel*, I. L. R., 10 Mad., 283.

Polliem.—The successor to an unsettled polliem is not liable for the debts of the person whose heir he is as respects that polliem. The polliem reverts absolutely to the Government, and by their fresh grant to the successor a newly created estate for life becomes vested in him—*Arbuthnot* vs. *Olaguppa Chetty*, 5 Mad., 303.

Legal Representative: not Required.—Execution-proceedings do not abate like suits—*Gulabdas* vs. *Lakshman Nurhar*, I. L. R., 3 Bom., 22, and if subsequent to attachment of immoveable property the judgment-debtor dies the property may be sold, without making the legal representative a party—*Sheo Prasad* vs. *Hira Lal*, I. L. R., 12 Alla., 440, not following—*Ramasami* vs. *Bajirathi*, I. L. R., 6 Mad., 180.

Practice.—When an application is made under this section, the Court must, in the first place, issue notice on the person named, calling on him to show cause why the decree should not be executed against him as legal representative; but if the Court has, on a previous application, issued execution against him, no notice is necessary—Section 248; *Mahatab Chand* vs. *Pearee Dassee*, 6 W. R., Mis., 61; *Lalla Poorihit Lall* vs. *Sabeeran*, 7 W. R., 368. If the Court considers that he is the legal representative, it may apparently enter his name on the record without trying the question whether or not he has assets—*In the matter of Hira Lall Mookerjee*, 6 B. L. R., App., 100; 14 W. R., 431; *Avul Khadar* vs. *Andhu*, 2 Mad., 423; *Chowdhry Wahed Ali* vs. *Mussamut Jamaee*, 11 B L. R., 155; *Shurfun Bibee* vs. *Collector of Sarun*, 12 B. L. R., 66 note; 10 W. R., 199; and compare *Lallu* vs. *Tribhuvan*, I. L. R., 13 Bom., 653; but see *Dhuronidhur* vs. *The Agra Bank*, I. L. R., 5 Cal., 86, p. 91.

Come into his Hands.—It would then be for the decree-holder, in the first place, to make search for the property of the deceased; and if no such property could be found, then to prove that some of the property of the deceased had come into the possession of

the representative, and if this were proved, it would lie on him to show that he had properly disposed of the property, and, upon his failing to prove that, he would be personally liable to the extent of it—*Roodro Narain Roy* vs. *Nittyanund*, 8 W. R., 195; *Chowdhry Wahed Ali* vs. *Mussamut Jamaee*, 11 B. L. R., 155; even though he pleaded that the debtor was merely a *benami* holder—*Doorga Soondures* vs. *Soorjo Monee*, 8 W. R., 101. But his liability extends no further—*Khushrobhai* vs. *Hormazsha*, I. L. R., 11 Bom., 727. So where a representative made payments in satisfaction to the full value of the property of the deceased which had come into his hands, it was held that he was no longer liable, although the decree-holder might be able to prove that he had property in his possession which originally belonged to the deceased—*Ram Golam Dobey* vs. *Ayma*, 12 W. R., 177. In accounting mesne profits, whether they have accrued in the shape of rents collected, or interest on moneys which may have come to him from the estate of the deceased, must be brought into the account. Where no such account was given, the Court held that the decree could be executed to the extent of the assets which it found had come into his hands and had not been accounted for—*Assemoonnissa Bibee* vs. *Ameeroonnissa Khatoon*, 15 W. R., 285. See note under section 365, *post*; and see "*Joint Family*," *ante*.

Limitation.—An application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative—*Ram Anuj* vs. *Hingu Lal*, I. L. R., 3 Alla., 517; *Kreshnaji* vs. *Murrarav*, I. L. R., 12 Bom., 48.

Appeal.—No appeal lies by the person placed on the record as legal representative by the judgment-creditor—*Raygo* vs. *Pogose*, I. L. R., 3 Cal., 709; but the order may be set aside by proceeding on revision—*Pogose* vs. *Cathick*, I. L. R., 3 Cal., 708, or by a regular suit—*Abedoonissa* vs. *Ameroonissa*, 4 Ind. App., 16; I. L. R., 2 Cal., 327; or if this is barred by an injunction restraining execution—*Dhuronidhur* vs. *The Agra Bank*, I. L. R., 5 Cal., 86.

Costs.—Where a defendant succeeded in showing he was not the legal representative, but was refused his costs—it was held that he could appeal under section 244, *post*—*Bishen Dayal* vs. *Bank of Upper India*, I. L. R., 13 Alla., 290.

Claims to Property.—Where a person states that the property attached in execution of a decree is held by him as his own estate and not as the legal representative of the deceased judgment-debtor, the matter should be determined in the course of those proceedings under section 244, *post*, and the parties should not be referred to a regular suit—*Seth Chand* vs. *Durga Dei*, I. L. R., 12 Alla., 313; *Rajrup Singh* vs. *Ramgolam*, I. L. R., 16 Cal., 1, p. 8; *Mungeshur Kuar* vs. *Jamoona*, I. L. R., 16 Cal., 603; *Punchanun* vs. *Kamini*, I. L. R., 17 Cal., 711 (F. B.); *Nimba Harishet* vs. *Sitaram*, I. L. R., 9 Bom., 458. Where the Judge refused to hear the objections of a person who though reversioner denied that he was the representative of the judgment-debtor, a Hindu widow, and placed him on the record, held he was not barred subsequently from showing in a regular suit, that the decree only covered the widow's interest—*Kanai Lall* vs. *Shasi Bhusan*, I. L. R., 6 Cal., 777, and see *Rajrup Singh* vs. *Ramgolam*, I. L. R., 16 Cal., 1, p. 8. See note under section 244, *post*.

Official Assignee—An order vesting the estate of a judgment-debtor in the Official Assignee does not give him a greater interest in it than the insolvent had. An order for the sale of certain property belonging to the insolvent, which was under attachment in execution of a decree when the vesting order was passed, is legal, notwithstanding that order, and the sale is valid—*Anad Chunder Pal* vs. *Panch Lall Soobalah*, 5 B. L. R., 691. As to an attachment before judgment, see *Shib Kristo* vs. *Miller*, I. L. R., 10 Cal., 151; *Sadayappa* vs. *Pounama*, I. L. R., 8 Mad., 554.

Answer.—As to the form of answer which a legal representative can advance see section 368, *post*; *Gourmoni* vs. *Jugat*, I. L. R., 17 Cal., 57; *Mulchand* vs. *Chhagan*, I. L. R., 10 Bom., 74.

Costs.—The representative of a deceased plaintiff in an abated suit is liable for costs of interlocutory orders in the suit—*Syad Mahuddee Allee Khan* vs. *Prince Rohemuddeen*, Bourke, 154.

Contents of application for execution of decree.

235. The application for the execution of a decree shall be in writing; verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars (namely):—

(*a*) the number of the suit;

(*b*) the names of the parties;

(*c*) the date of the decree;

(*d*) whether any appeal has been preferred from the decree;

(*e*) whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree;

(*f*) whether any and what previous applications have been made for execution of the decree and with what result;

(*g*) the amount of the debt or compensation, with the interest, if any, due upon the decree, or other relief granted thereby;

(*h*) the amount of costs, if any, awarded;

(*i*) the name of the person against whom the enforcement of the decree is sought; and

(*j*) the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, by the arrest and imprisonment of the person named in the application, or by the attachment of his property, or otherwise as the nature of the relief sought may require.

Act VIII of 1859, section 212. This section applies to H. C. and P. S. C. C.

Application.—It is unnecessary to furnish a copy of the decree when application is made for execution to the Court which passed it—*Modhoo Dassia* vs. *Nobin Chunder*, 16 W.R., 35; *Gunga Gobind* vs. *Makhum*, 9 W.R., 362; *Khettur Mohun* vs. *Ishur Chunder*, 11 W. R., 271; *Ramdhun Rakhit* vs. *Punchanun Chuckerbutty*, 10 W. R., 144, if, however, the decree-holder should obtain permission to execute the decree through another Court, a copy of it (section 224) must be sent to that Court by the Court which passed it, and this is always supplied by the decree-holder, having been prepared at his expense (Section 217). See note under section 280, para. 1, *ante*, where only one of several decree-holders apply, his application should give the details required by the section, or else t may be held not to be an application within this section such as would bar limitation—*Ramhun Roy* vs. *Abdul Gunnee*, 9 W. R., 390; see "IRREGULAR APPLICATION," section 231, *ante*, and where an applicant claimed as transferree by purchase, and failed to prove the transfer, his application was similarly dealt with—*Oodoy Chand* vs. *Nobocoomar*, 10 W. R., 28.

Authority.—Where one of several representatives applied for execution of the whole decree, it was held that he did not require a power-of-attorney from the others—*Ambaram* vs. *Himatsing Kalianji*, 2 Bom., 103; but where the decree-holders do not themselves apply, the applicant must show that he is the representative of some of them. Thus where a minor sued by his guardian and next friend, obtained a decree, and died, it was held that his representative, and not the next friend, could take out execution—*Hulodhur Roy* vs. *Judoonath*, 14 W. R., 162.

An application *in writing* to execute a decree is dispensed with in certain cases (see section 256). It must be written on paper bearing a stamp of one anna when made to any Court other than a principal Civil Court of original jurisdiction, if the amount or value of the subject-matter is less than fifty rupees. In other cases the stamp-fee is eight annas, except the Court is a High Court when it is two rupees. Court-fees' Act (VII of 1870), Schd. II, Art. 1.

In regard to an application to attach and sell a tenure for its own arrears, see Act VIII of 1885, section 162.

Defective Application.—If an application does not contain a description of the property proceeded against, but refers to it as described in another document it is sufficient—*Wajihan* vs. *Bishwanath*, I. L. R., 18 Cal., 463; *Hurry Charan* vs. *Subaydar*, I. L. R., 12 Cal., 161; *Macgregor* vs. *Tarini Churn*, I. L. R., 14 Cal., 124; and compare *Asgar Ali* vs. *Troilokya*, I. L. R., 17 Cal., 631; but an application asking what the decree cannot give is not a step in aid of execution of the decree—*Pandarinath* vs. *Lilachand*, I. L. 13 Bom., 237. See note under section 245B, *post*. See section 231, *ante*.

Representative.—The representative of a deceased decree-holder cannot execute a decree without obtaining a certificate. See SUCCESSION CERTIFICATE ACT, section 366, *post.*

Amendment.—See section 245, *infra.*

Parties.—When a minor is bound by a decree execution may be rightfully sought against him through his guardian, and it is no answer that his name is not on the record—*Hari Saran* vs. *Bhubaneswari*, I. L. R., 16 Cal., 40. On the other hand the Court is bound to allow execution to issue at the request of the decree-holder on the record unless it be shown under section 232, that some other person has taken his place—*Jasoda* vs. *Kirtibash*, I. L. R., 18 Cal., 639. See section 232, *ante.*

Limitation.—The applications described in Art. 179, Schd. II of the Limitation Act, are applications under this section — *Choudhry Paroosh* vs. *Kali Puddo*, I. L. R., 17 Cal., 53; and an imperfect application is within the section—*Asgar Ali* vs. *Troilokya*, I. L. R., 17 Cal., 631.

Res Judicata.—It has been held that a refusal to execute does not bar a subsequent application—*Hurrosoondary Dasses* vs. *Jugobundhoo*, I. L. R., 6 Cal., 203; but see *Mungal Pershad Dichit* vs. *Grija Kant Lahiri Chowdry*, 8 Ind. App., 123; and the remarks of Melville, J., at I. L. R., 6 Bom., p. 59; *Basudeo* vs. *Seology*, I. L. R., 14 Cal., 640; but the decision of a Court admitting part execution is *final* if unreversed—*Dalichand* vs. *Shirkov*, I. L. R., 15 Bom., 242.

Extension of Time.—See *Shooshee Bhusan* vs. *Gobind*, I. L. R., 18 Cal., 231; *Peary Mohun* vs. *Anunda*, *id.*, 631.

Mortgage.—In the case of a mortgage-decree on the Original Side of the High Court six months' time is usually allowed for repayment of the principal and interest; but the Court may allow the decree to be satisfied at once—*Chotoolal* vs. *Mitter*, 7 C. L. R., 267; see *The Administrator-General* vs. *Mirza Ahmed*, I. L. R., 9 Cal., 33.

Rent.—Under clause 6, Part III, Schedule III of the Rent Act, execution cannot issue unless the application has been made within three years from the date of the judgment—*Goluck Money Debia* vs. *Mohesh Chunder*, 1 C. L. R., 149, and the cases there cited.

Whether any Appeal has been Preferred from the Decree.—Where the decree is that of a High Court, or of a inferior Court, affirmed by the High Court and appealable to the Privy Council, if such an appeal has been presented, or if proceedings are being taken for that purpose, the decree-holder should state the fact; and, though he is bound only to state that an appeal has been preferred, it would add to his good faith if he also states when any preliminary proceedings for that purpose have been or are being taken—*In re Toondun Singh*, 14 W. R., 205. And see *Kassa Mal* vs. *Gopi*, I. L. R., 10 Alla., 389.

Limitation.—In case of an appeal decided under Section 544, *post*, see *Babaji* vs. *The Collector of Salt Revenue*, I. L. R., 11 Bom., 596.

Whether any and what Adjustment, &c.—Every adjustment of a decree should be certified to the Court whose duty it is to execute the decree, and if the party seeking execution intentionally makes a false statement as to an adjustment, whether certified or not of the amount still due, he is guilty of an offence under sections 193 and 210 of the Penal Code — *Queen-Empress* vs. *Bapuji*, I. L. R., 10 Bom., 288. Notifying an adjustment in an application under section 235 to the Court will be held to satisfy the requirements of section 258—*Dheraj Mahtab Chand* vs. *Moorleedhur*, 15 W. R., 67. If a decree-holder fails to certify satisfaction made out of Court, the debtor may recover the amount by an action for damages—*Gunamani Dasi* vs. *Prankishori*, 5 B. L. R., 223; or sue out an injunction prohibiting execution—*Nabokishen Mookerjee* vs. *Debnath Roy*, 22 W. R., 194; but money paid in excess of what was due can only it is said be recovered in execution—*Kashee Kishore Roy* vs. *Kishen Chunder*, 15 W. R., 160. See note under section 258, *infra.*

An adjustment, such as is contemplated by (*e*), may also be the result of an application under section 210, by which payment of the money-decree may be ordered to be by instalments.

The Name of the Person against whom Enforcement is Sought.—The name of the original debtor (if he be dead) and of his legal representative against whom enforcement is sought, should be shown here. Execution can be taken out only against those whose names are mentioned in the application, without reference to the decree itself—*Shaik Abdool Kurreem* vs. *Jaun Ali*, 18 W. R., 56; but see as to this case—*Nuzeerun* vs. *Moulvee Ameeroddeen*, 24 W. R., 3. In contention with this matter it is important to note the Limitation Act (XV, 1877), Schd. II, Art. 179, *Explanation I*:—"When the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all."

Clause (2), Art. 179, Schd. I of the same Act applies only to those cases in which the parties to the execution-proceedings were parties to the appeal or the class of cases to

which section 544, *post*, applies, and where a decree is passed against several defendants not jointly but severally, and an appeal is preferred by some only limitation to execute against the others, runs from the date of the decree—*Mashiat-un-nissa* vs. *Rani*, I. L. R., 13 Alla., 1, and the cases cited; *Nandun Lall* vs. *Rai Joykishen*, I. L. R., 16 Cal., 598.

The Mode in which the Assistance of the Court is Required.—Section 230, para. 2, makes it discretionary with a Court to permit execution to be taken out simultaneously against the person and property of the judgment-debtor. A mere request that the amount of the decree may be recovered without any specification of the mode in which the Court was desired to aid in the recovery is not a proper application — *Franks* vs. *Nuneh Mal*, 7 Alla., 79.

Where a person recovered his debt against A by sale of property already mortgaged to B with other estates, it was held that, although the sale did not release the property sold, still the mortgagee was bound to take measures in the first place to recover his debt from the other property—*Nowa Coowar* vs. *Abdool Ruheem*, W. R., 1864, p. 374.

In a suit by certain members of a joint Hindu family to recover from the auction-purchaser certain immoveable property which had been sold in execution of a decree against one member of the family, a decree was obtained for possession subject to a lien in favour of the defendant for the repayment of the debt for which the original decree had been made, with interest at 6 per cent. up to date of realization : *Held*, that the condition in favour of the defendant was not a decree which was capable of being put in execution at his instance—*Ramanagra Singh* vs. *Ramyad*, 5 C. L. R., 176.

Several Debtors.—Where there is a joint, or a joint and several, decree passed against two or more persons, the decree-holder may execute his decree against any of the persons he may select—*Wahed Ali* vs. *Mullick Enayet Hossein*, 12 B. L. R., 500 ; *Kristo Kishore* vs. *Ram Lochun*, 2 W. R., Mis., 49 ; and execution will not be stopped, though the person proceeded against shows that he has paid his proportionate part—*Salig Ram* vs. *Baboo Ram Sewuk*, 1 Agra, Mis., 14, or that the decree-holder has given a release to his co-debtors—*Sheo Churn* vs. *Ram Sarun*, 16 W. R., 49. But where, in execution of a decree passed against B and C it was urged that C was a more *benamidar*, and was the real debtor, it was held that if B's property did not satisfy the decree, C would be liable—*Puresh Monee* vs. *Kissoree Misser*, 1 W. R., Mis., 14. See "WHOLE DECREE," section 231, *ante*.

Otherwise as the Nature of the Relief sought may Require.—These words mean that the mode of execution is to be adapted in each case to the nature of the particular relief sought to be enforced under the decree—*Denonath Ruchit* vs. *Mutty Lall Paul*, 1 Hyde, 158 ; and a person may make separate and successive applications for execution giving relief of different character in respect of such relief—*Radha Kishen* vs. *Radha Pershad*, I. L. R., 18 Cal., 515.

Decree-holders seeking khas possession of land already in the possession of a Surbarakar under order of Court, should apply to the Court that appointed him—*Hurrish Kishto Doss* vs. *Mote Chand*, 10 W. R., 444.

The manner in which a decree directing the defendant to pull down a wall should be enforced is by imprisonment of the debtor, or attachment of his property, and if the mode in which the assistance of the Court is asked is wrong, the Judge should return the application for amendment—*Protab Chunder* vs. *Peary Chowdhrain*, I. L. R., 8 Cal., 174.

Transfer of Property Act.—An application for an order absolute under section 89 of Act IV of 1882, is a proceeding in execution and subject to the rules of such proceedings—*Oudh Behari* vs. *Nageshar*, I. L. R., 13 Alla., 278. An order for sale under section 88 should not be executed unless it is made absolute under section 89- *Ram Lal* vs. *Narain*, I. L. R., 12 Alla., 539.

Section 90.—A decree of the nature referred to in section 90 can be made in the original suit, and a new suit is unnecessary—*Rana Singh* vs. *Parmaind*, I. L. R., 11 Alla., 486.

Foreclosure.—In a foreclosure suit the mortgagee can redeem until order absolute is made—*Poreshnath* vs. *Rampoda*, I. L. R., 16 Cal., 247 ; *contra*—*Oudh Behari* vs. *Nageshar*, I. L. R., 13 Alla., 278 ; *Elayadath* vs. *Krishna*, I. L. R., 13 Mad., 267.

Succession Certificate Act.—Clause (*c*) of sub-section 1 of section 4 of Act VII, 1889, does not apply to applications or proceedings in execution of a decree made before and pending when the Act came in force—*Balubhav* vs. *Nasar*, I. L. R., 15 Bom., 79 ; and see *Chemniram* vs. *Hanmanta*, I. L. R., 15 Bom., 265.

Application for attachment of moveable property to be accompanied with inventory.

236. Whenever an application is made for the attachment of any moveable property belonging to the judgment-debtor, but not in his possession, the decree-holder shall annex to the application an inventory of the property

to be attached, containing a reasonably accurate description of the same.

Act VIII of 1859, section 284. This section applies to H. C. and P. S. C. C.

This section, it should be noted, refers only to an application for the enforcement of a decree by attachment of moveable property *belonging to the judgment-debtor, but not in his possession.* Sections 268, 273, prescribe the mode of attachment in such cases, the last mentioned section referring to property deposited in or in the custody of any Court or public officer.

Moveable Property.—See note under section 266, *infra.*

Wrong Seizure.—Regarding the liability of the decree-holder, Sheriff or Nazir for damages for seizure of moveable property belonging to a third party and not to the judgment-debtor, see the cases of *Kalee Coomar* vs. *Siddhessur*, 11 B. L. R., 256; *Goma Mahad* vs. *Gokaldas Khimjee*, I. L. R., 3 Bom., 74; *Framji* vs. *Hormasji*, I. L. R., 2 Bom., 258, p. 271; *Raj Chunder* vs. *Shama Soondari*, I. L. R., 4 Cal., 583.

Further particulars when application is for attachment of immoveable property.

237. Whenever an application is made for the attachment of any immoveable property belonging to the judgment-debtor, it shall contain at the foot a description of the property sufficient to identify it, and also a specification of the judgment-debtor's share or interest therein to the best of the belief of the applicant and so far as he has been able to ascertain the same.

Every such description and specification shall be verified in manner hereinbefore provided for the verification of plaints.

Act VIII of 1859, section 213. This section applies to H. C.

Description.—The intention of this section being that the description of the property should be such as may be sufficient to identify it; where the property is an estate paying revenue to Government, a specification of the revenue is necessary—*Lack Ram* vs. *Mohesh Dass*, 12 W. R., 488; where property was described as a *lakheraj* tank with four banks, the boundaries of which were given, the identification was held to be fully made out—*Dheraj Mahtab* vs. *Burodanath*, 18 W. R., 411.

And so when the property was described as the property sought to be attached in a former execution, the description, though irregular in form, was considered sufficient—*Hurry Churan* vs. *Subaydar*, I. L. R., 12 Cal., 161; *Wajihan* vs *Bishwanath*, I. L. R., 18 Cal., 463, and compare *Macgregor* vs. *Tarini Churn*, I. L. R., 14 Cal., 124.

Specification of the Share.—In case of a joint family the application should state whether it is the judgment-debtor's share or the joint family property that is sought to be attached. It should also specify the family property—*Muhammad* vs. *Dip Chand*, I. L. R., 14 Alla., 190.

Estoppel.—The decree-holder may be prevented from executing his decree. Thus, where A sold the right, title and interest of his debtor without disclosing that he had a mortgage on it, he was not able to enforce the mortgage against the purchaser—*Dullab Sirkar* vs. *Krishna Kumar*, 3 B. L. R., 407; *Tinappa* vs. *Murugappa*, I. L. R., 7 Mad., 107, otherwise if he could prove the purchaser had notice of the mortgage—*Nursingh* vs. *Roghoobur*, I. L. R., 10 Cal., 609; *Agarchand* vs. *Rakhma*, I. L. R., 12 Bom., 678. And where a judgment-creditor entered by mistake the same piece of land under two separate numbers, and he bought one, it was held he could not enforce his claim against the purchaser of the other—*Tinappa* vs. *Murugappa*, I. L. R., 7 Mad., 107. See note to section 316, *post.*

When application must be accompanied by extract from Collector's register.

238. If the property be land registered in the Collector's office, the application for attachment shall be accompanied by an authenticated extract from the register of such office, specifying the persons registered as proprietors of, or

as possessing any transferable interest in, the land or its revenue or as liable to pay revenue for such land, and the shares of the registered proprietors.

Act VIII of 1859, section 213. This section applies to H. C.

Sections 237, 238 reproduce with slight additions and modifications, section 213, Act VIII, 1859. It was held under the last-mentioned law that, when the land to be attached was registered in the Collector's office, the decree-holder was bound to furnish all the information necessary to attach it as immoveable property, and also as land so registered, and probably the same rule will now be followed—*Ajoodhya Dass* vs. *Sheo Pershun Sing*, 11 W. R., 175. It should be noted that section 238 is not restricted to land registered in the Collector's office in the name of the judgment-debtor, for it frequently happens that the actual proprietors are not so registered.

Description.—The decree-holder is not bound to specify the names of all appurtenances to an estate registered in the Collector's office, such as *aslee* and *dakhilaee* mouzahs, as they would necessarily be included in the estate, which is sufficiently described by its ordinary name and the amount of Government revenue payable—*Zerkalee Kooer* vs. *Lalla Doorga*, 16 W. R., 149.

Step in Aid of Execution.—An application by the judgment-creditor to the Court which passed the decree for a certificate that a copy of the Revenue Register of Land is necessary to enable him to get a copy from the Collector's office and thereupon execute his decree is a step in aid of execution—*Kunhi Mannan* vs. *Seshagiri*, I. L. R., 5 Mad., 141.

C.—Of Staying Execution.

See section 545, *infra*.

When Court may stay execution.

239. The Court to which a decree has been sent for execution under this chapter shall, upon sufficient cause being shewn, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was made, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto;

and in case the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution or discharge of such property or person pending the result of the application for such order.

Act VIII of 1859, section 290. This section applies to H. C. and P. S. C. C. The decree would have been sent for execution under section 223.

Appellate Jurisdiction.—The Court having appellate jurisdiction, referred to in section 239, would be the Court having such jurisdiction over the Court which passed the decree. Any order made by the Court to which the decree has been sent for execution does not fall within section 239, because such orders, when appealable, are appealable to the Court having ordinary appellate jurisdiction over such Court. See section 228—*Mobaruck Ali* vs. *Soomee Runga*, 3 Alla., 168.

Practice.—Before issuing process, the Court is bound to see that the provisions of the Code have been strictly complied with by the Court transmitting the decree for execution. The documents required are—(1) a copy of the decree; (2) a certificate of any sum remaining due; and (3) a copy of the order of execution—*Venkatasubia* vs. *Sivaramappa*, 4 Mad., 331, and nothing more should be sent—*Lootifoolah* vs. *Keeru*

Chund, 21 W. R., 330; so a *roobacaris* declaring petitioner is entitled to execute, without a copy of the decree and certificate, does not give the second Court jurisdiction—*Dhunesh Koeree* vs. *Oolfut Hossein*, 21 W. R., 219.

A certificate which contains all the information requisite, though irregular in form, is a good certificate—*Mooktakeshee Debea* vs. *Luchmeeput Sing*, 10 W. R., 137.

See "EXCLUSIVE JURISDICTION," section 228, *ante*.

Stay the Execution.—Section 239 seems only to contemplate stay of execution on the application or objection of the judgment-debtor. This provision has been enacted to prevent precipitate execution when the decree itself or some order passed in execution is still under appeal, and also because the Court to which a decree has been sent for execution has no jurisdiction to decide such matters as the right of the decree-holder to execute the decree or the regularity of the transmission of the decree—*Shib Narain Singh* vs. *Gobind Dass*, 23 W. R., 155; *Beerchunder* vs. *Maymana*, I. L. R., 5 Cal., 736; or there is doubt as to the jurisdiction of the Court which passed the decree—*Chogolal* vs. *Trueman*, I. L. R., 7 Bom., 481; but see note under section 225, *ante*; or it has been obtained by fraud—*Subramanian* vs. *Panjamma*, I. L. R., 4 Mad., 324; or there is a doubt as to the amount for which it is sought to be executed—*Kishub Chunder* vs. *Khelat Chunder*, 9 W. R., 361. If execution is stayed under this section, the order does not affect the right to execute—*Srihary Mundul* vs. *Murari*, I. L. R., 13 Cal., 257.

The Court to which the decree has been sent for execution can only stay execution temporarily—*Ram Lal* vs. *Radhey Lal*, I. L. R., 7 Alla., 330; yet it is often the better course for the latter Court to stay execution and refer the objector to the Court passing the decree, instead of deciding the objections itself—*Jassoda Koer* vs. *Land Mortgage Bank*, 11 C. L. R., 348; I. L. R., 8 Cal., 916.

A Court should stay execution if the debtor signifies his intention to apply for a re-hearing of the suit, which has been decreed against him *ex-parte*—*Mirtoonjoy* vs. *Cochrane*, 8 W. R., 202; 4 Wy., 93.

Where a debtor objects that the decree is barred, and he had no notice under section 248, *infra*, the Court executing the decree may stay execution that he may apply to the original Court—*Srihary Mundul* vs. *Murari*, I. L. R., 13 Cal., 257.

An objector obtained time to place his objections before the Court from which the decree had been sent, instead of doing so, appealed: *Held*, he should pay all costs—*Jassoda Koer* vs. *Land Mortgage Bank*, 11 C. L. R., 340; I. L. R., 8 Cal., 916.

Terms.—See section 240, *infra*.

Restitution or Discharge.—See section 241, *infra*.

Appeal.—See note under section 243, *post*.

Power to require security from, or impose conditions upon, judgment-debtor.

240. Before passing an order under section 239 to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

Act VIII of 1859, section 291. This section applies to H. C. and P. S. C. C.

A pledged certain property to stay execution in the case of B *vs.* C, and afterwards sold the property conditionally to D, who obtained a decree for foreclosure and possession. Subsequently the lands were put up for sale in execution of the decree for which A had pledged them as security. D objected: *Held*, that the property was, in the first instance, liable for the lien on it under the security bond—*Mudon*, Petitioner, S.D.A., Sum. Decis., April 25, 1843.

Liability of judgment-debtor discharged to be re-taken.

241. No discharge under section 239 of the property or person of a judgment-debtor shall prevent it or him from being re-taken in execution of the decree sent for execution.

Act VIII of 1859, section 293. This section applies to H. C. and P. S. C. C.

Ordinarily, a debtor once discharged after arrest cannot be re-arrested in execution of the same decree—*Secretary of State* vs. *Judah*, I. L. R., 12 Cal., 652. See section 341, *post*.

242. Any order of the Court by which the decree was passed, or of such Court of Appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Order of Court which passed decree or of Appellate Court to be binding upon Court applied to.

Act VII of 1859, section 292. This section applies to H. C. and P. S. C. C.

But the ordinary Court of Appeal would still exercise its jurisdiction in respect of any order passed by the Court to which a decree was sent for execution. Section 228.

See the case of *Ghazidin* vs. *Fakir*, I. L. R., 7 Alla., 73, p. 76, as the relative position of the Original Court to the Court executing the decree.

243. If a suit be pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may (if it think fit) stay execution on the decree, either absolutely or on such terms as it thinks fit, until the pending suit has been decided.

Stay of execution pending suit between decree-holder and judgment-debtor.

Act VIII of 1859, section 209. This section applies to H. C. and P. S. C. C. It does not apply to a case in which execution has already been carried out—*Ghazidin* vs. *Fakir*, I. L. R., 7 Alla., 73.

Any Court.—Any Court to which a decree is transmitted for execution shall proceed under this section and stay execution if the suit between the judgment-debtor and holder of the decree is pending in such Court and not in the Court which transmitted the decree—*Cooke* vs. *Hissebu Bibee*, 6 Alla., 181. It is not limited to a Court executing its own decree—*Kassa Mal* vs. *Gopi*, I. L. R., 10 Alla., 389.

The holder of a mortgage-decree has nothing to do with disputes between the representatives of his mortgagor, and suits respecting such disputes form no ground for staying execution of the mortgage against the mortgaged property—*Krishna Mohinee Dasi* vs. *Shyama Churn Nag*, 9 C. L. R., 344; I. L. R., 7 Cal., 733.

Fraud.—Execution cannot be stayed on the ground that a stranger to the decree impeaches it on the ground of fraud. He should file a suit and obtain an injunction for the purpose—*Purshotam* vs. *Purshotam*, I. L. R., 8 Bom., 532.

Appeal.—An appeal lies from an order staying execution—*Steel* vs. *Ichchamoyi*, I. L. R., 13 Cal., 111; *Kassa Mal* vs. *Gopi*, I. L. R., 10 Alla., 339.

D.—Questions for Court executing Decree.

244. The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely):—

Questions to be decided by Court executing decree.

(*a*) questions regarding the amount of any mesne profits as to which the decree has directed inquiry:

(*b*) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of decree, or the expiration of three years from the date of the decree:

(*c*) any other questions arising between the parties to the suit in which the decree was passed, or their representatives,

and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof.

Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.

If a question arises as to who is the representative of a party for the purposes of this section, the Court may either stay execution of the decree until the question has been determined by a separate suit or itself determined the question by an order under this section.

Act XXIII of 1861, section 11. This section applies to H. C. and P. S. C. C.; and to execution of a decree passed under section 53, Act XX of 1866 *Shibullav* vs. *Baburam*, I. L. R., 12 Cal., 511; *Bhikambat* vs. *Fernande*, I. L. R., 5 Bom., 673; but not to proceedings under Act X of 1859—*Brojo* vs. *Busirun Nissa*, I. L. R., 15 Cal., 183.

The words "or to stay of execution thereof" and the last paragraph have been enacted by Act VII of 1888, section 26.

Court Executing the Decree.—This includes both the Original Court and the Court if any to which the decree has been sent for execution *Ghazidin* vs. *Fakir*, I. L. R., 7 Alla., 73.

Suits of a Small Cause Court Nature.—See Section 586, *post*.

Representatives.—This would refer to persons by whom or against whom the decree may be executed under sections 231, 232, and 234—*Bishto Narain* vs. *Gunga Narain*, 11 W. R., 368; and there is no distinction between the positions of legal representatives added to the suit before and those added after decree—*Seth Chand* vs. *Durga*, I. L. R., 12 Alla., 313. The term includes subsequent representatives in point of interest, and is not confined to heirs or executors and includes assignees by private sale, but not purchasers at execution-sale—*Gour Sundar* vs. *Hem Chunder*, I. L. R., 16 Cal., 355; *Vishranath* vs. *Subraya*, I. L. R., 15 Bom., 290. But if an interest comes into existence before the decree, the owner of it is not a representative—*Kameshwar Pershad* vs. *Run Bahadur*, I. L. R., 12 Cal., 458; *Rash Behary* vs. *Surnomoyee*, I. L. R., 7 Cal., 403; *contra*—*Purmanandas* vs. *Vallabdas*, I. L. R., 11 Bom., 506; *Ramchandra* vs. *Mahadji*, I. L. R., 9 Bom., 141; not followed in *Behari* v. *Ganput*, I. L. R., 10 Alla., 1; so where executors under an order of Court borrowed a sum from A for the funeral expenses of the testator, and the will was set aside by the heir, the latter was held not to be the representative of the executors—*Fanindro* vs. *Jugudishwari*, I. L. R., 14 Cal., 317. A purchaser of plaintiff's interest not on the record is not a representative—*Mohabir Singh* vs. *Ram*, I. L. R., 11 Cal., 151; *Huloodhur* vs. *Hargobind*, I. L. R., 12 Cal., 105; *Sambasiva* vs. *Srinivasa*, I. L. R., 12 Mad., 511; *Behari* vs. *Ganput*, I. L. R., 10 Alla., 1; but see *Ramchandra* vs. *Mahadji*, I. L. R., 9 Bom., 141; neither is an auction-purchaser a representative—*Shiram* vs. *Jiva*, I. L. R., 13 Bom., 34; *Vishranath* vs. *Subraya*, I. L. R., 15 Bom., 290, but a person attaching a decree represents the decree-holder—*Peary Mohun* vs. *Romesh*, I. L. R., 15 Cal., 371; though it is not so with the assignee of a judgment-debtor's right in property—*Jagat Narain* vs. *Jagrup*, I. L. R., 5 Alla., 452; *Raynor* vs. *Mussoorie Bank*, I. L. R., 7 Alla., 681; *Zanki Lal* vs. *Jawahir Singh*, I. L. R., 5 Alla., 94; nor is the official assignee the representative of the insolvent judgment-debtor—*Kashi Prasad* vs. *Miller*, I. L. R., 7 Alla., 752. See note under section 232.

In a pre-emption suit, plaintiff claimed to have paid the purchase-money out of Court and asked for possession. On appeal, the purchase-money was fixed at a larger sum, and plaintiff not paying the balance, the decree became void. *Held*, the assignee of his right to recover the first sum was not plaintiff's representative under this section—*Kaji Ram* vs. *Ishar Das*, I. L. R., 8 Alla., 273.

Parties to the Suit.—The question must arise between parties to a *suit*, and on the record *Mohendro Narain* vs. *Gopal Mondul*, I. L. R., 17 Cal., 769, p. 777; *Raman* vs. *Muppil Nayar*, I. L. R., 14 Mad., 478; but where it does, it cannot be got rid of by adding unnecessary parties—*Kristo Mohinee* vs. *Kaliprosono*, I. L. R., 8 Cal., 402; nor does a decree-holder cease to be a party by becoming a purchaser—*Mutkia* vs. *Appasami*, I. L. R., 13 Mad., 504. In a suit for partition, the mother of the other parties claimed a share. The latter compromised the suit, and a decree was passed behind her back, under which she was dispossessed of certain property. *Held*, she was a party to the suit, and her objection that the decree did not bind her, and her claim to be restored to possession

should have been decided under this section—*Sankaravadivammal* vs. *Kumarasamya*, I. L. R., 8 Mad., 473; but see *Gour Kishore* vs. *Mahomed Hossein*, 10 W. R., 191.

A purchaser at a sale in execution of a decree is not a party—*Vishvanath* vs. *Subraya*, I. L. R., 15 Bom., 290; *Hira Lal* vs. *Gourmoni*, I. L. R., 13 Cal., 327; *Shivram* vs. *Jivu*, I. L. R., 13 Bom., 34, and the case cited, nor is the purchaser of the rights of the judgment-debtor, which were sold in execution of a money-decree obtained by the mortgagee, and subject to that mortgage, a party to the suit in which the decree was passed—*Narain Acharjee* vs. *Gregory*, 8 W. R., 304; nor is one who, though originally a defendant, has been released from the operation of the decree—*Gour Kishore* vs. *Mahomed Hossein*, 10 W. R., 191; but when an intervenor has been made a defendant, and exempted from the operation of the decree, but directed by the Appellate Court to pay costs, he still continues to be a party to the suit—*Huree Kishore* vs. *Kalli Kishore*, 8 W. R., 114. The purchaser of a decree in a question arising between him and his vendor, is not a party to the suit—*Soorasmony Dasees* vs. *Brijnath Mazoomdar*, 1 Wy., 29; *Mohabir Singh* vs. *Ram Bhaghowan*, I. L. R., 11 Cal., 151; nor are rival decree-holders all seeking to attach the same property as against one another—*Afzalonnissa Beebee* vs. *Perbutty Koonwur*, 1 Wy., 41, or disputing as to the distribution of the assets—*Missree Kowur* vs. *Buksh Singh*, Marsh., 527; *Deen Dyal* vs. *Radha Muddun*, 9 W. R., 223; *Sanjivi* vs. *Ramasami*, I. L. R., 8 Mad., 494; nor is a third party who objects to the sale of the attached property—*Luchmeeput Singh* vs. *Lekraj Roy*, 2 W. R., 56, Mis., under section 278, *post*, *Ragunath Das* vs. *Badri Prosad*, I. L. R., 6 Alla., 21; *Sevu* vs. *Muttusami*, I. L. R., 10 Mad., 53; nor a person claiming under a title created by the defendant subsequent to the institution of the suit—*Ameeroonnissa* vs. *Abedoonnissa*, 16 W. R., 307; nor a Collector seeking Court-fees under section 413, *post*—*Collector of Ratnagiri* vs. *Janardan*, I. L. R., 6 Bom, 590; *Collector of Ranava* vs. *Krishnappa*, I. L. R., 15 Bom., 77; otherwise in Allahabad—*Janki* vs. *Collector of Allahabad*, I. L. R., 9 Alla., 64; *The Secretary of State* vs. *Bhagwanti*, I. L. R., 13 Alla., 326; nor a person who becomes a surety for the appearance of a party himself a party to the suit—*Jikooram Agurwalla* vs. *Komolakant Dey*, 2 W. R., 65.

A party sued in a representative character is a party to the suit within the meaning of this section—*Chowdhry Wahid Ali* vs. *Jamaee*, 11 B. L. R., 149; 18 W. R., 185; *Osee-munissa* vs. *Ameeroonnissa*, 20 W. R., 162; *Buddu Ramaiya* vs. *Venkaiya*, 3 Mad., 263, and there is no distinction between the positions of a legal representative added to the suit before and those added after decree—*Seth Chand* vs. *Durga*, I. L. R., 12 Alla., 313. A obtained a decree against B as trustee for a temple and in possession. Subsequently by a decree his title was set aside in favour of C: *Held*, C was the representative of B—*Sudindra* vs. *Budan*, I. L. R., 9 Mad., 80. And so is a person who, before the passing of the decree becomes surety for the due performance of the same or any part thereof—*Ghoree Lall* vs. *Sheonarain*, 8 W. R., 24; *Sheik Suleman* vs. *Shiv Ram*, I. L. R., 12 Bom., 73.

If a legal representative sets up a title to property as his own in execution of decree the dispute fall swithin this section and not under section 278, *post*—*Seth Chand* vs. *Durga*, I. L. R., 12 Alla., 313; *Rajrup Singh* vs. *Ramgolam Roy*, I. L. R., 16 Cal., 1; *Kuryali* vs. *Mayan*, I. L. R., 7 Mad., 254; *Ravunni* vs. *Kunju*, I. L. R., 10 Mad., 117; *Nimba* vs. *Sitaram*, I. L. R., 9 Bom., 458; *Punchanan* vs. *Kamini*, I. L. R., 17 Cal., 823; unless that portion of the decree which is being executed does not bind the objector—*Jangi Nath* vs. *Phundo*, I. L. R., 11 Alla., 74; *Bukshi Ram* vs. *Sheo Pergash*, I. L. R., 12 Cal., 453; *Mungeshur Kuar* vs. *Jamoona*, I. L. R., 16 Cal., 603; but it has been held that if a debtor objects, that he holds the property attached as *wakf*—*Nathmal* vs. *Tajammul*, I. L. R., 7 Alla., 36, or in any right not personal to himself—*Ram Ghulam* vs. *Hazaru Kuar*, I. L. R., 7 Alla., 547; *Sita Ram* vs. *Bhagwan Dass*, I. L. R., 7 Alla., 733; such as holding not as owner but as trustee, he is not bound by the decision in execution—*Shankar Dial* vs. *Anir Haldar*, I. L. R., 2 Alla., 752; *Roop Lall* vs. *Kani*, I. L. R., 15 Cal., 437; and see judgment of Edge, C. J., in *Seth Chand* vs. *Durga*, I. L. R., 12 Alla., 324; *Gour Moni* vs. *Jugat*, I. L. R., 17 Cal., 57; see also *Punchanun* vs. *Dai Rabia Bibi*, I. L. R., 17 Cal., 711, and there is no difference between the position of a party to a suit and a stranger if the objection is in substance and not merely in form an objection under section 278—*Ravunni* vs. *Kunju*, I. L. R., 10 Mad., 117. Thus where a mortgagee sued the mortgagor and a third party who claimed the property, and obtained a money-decree against the mortgagor and an order to sell the property; after sale he proceeded against other property which the third party claimed as his own: *Held*, that the third party was not, save in regard to the mortgaged property, a party to the suit and the claim was under section 278, *post*—*Jangi Nath* v. *Phundo*, I. L. R., 11 Alla., 74. And generally where an objection has been made under 278, and the representative of the judgment-debtor becomes also the representative of the objector, the decision is not under this section—*Bahri Lall* vs. *Gouri Sahai*, I. L. R., 8 Alla., 626. But see section 248, cl. (*c*), *post*, and the cases under 278, *post*. "CLAIM TO PROPERTY," section 234, *ante*, and note under section 242, *ante*.

Question regarding the amount of any Mesne Profits as to which the Decree has directed Inquiry.—By section 212, *ante*, where a suit is for immoveable property and for mesne profits which have accrued prior to the institution of the suit, and the amount of such profits is disputed, the Court may either determine the amount by the decree itself or may pass a decree for the property, and direct an inquiry into the

amount of the mesne profits, and dispose of the same on further orders. But when the suit is for mesne profits *only*, the amount must be specified in the decree and cannot be left to be settled in execution—See *Bhoobunessuree Chowdrain* vs. *Munson*, 22 W. R., 160. See cases cited in the case of *Lati Kooer* vs. *Sobadra*, I. L. R., 3 Cal., 720.

Decree has directed an Inquiry.—It is only where mesne profits have been expressly given in the decree that the amount can be made the subject of inquiry; and, if they have been decreed, a new suit will not lie for them—*Mosoodun Lall* vs. *Bheekaree Singh*, 6 W. R., Mis., 109; *Huro Mohinee Chowdhrain* vs. *Dhunmonee*, 10 W. R., 62; 1 B. L. R., 138; *Eckowree Singh* vs. *Bijoynath*, 13 W. R., 11; 4 Ben., 111; *Sitaram Amrut* vs. *Bhagrani Jaganath*, 6 Bom., 109; *Subba Venkataramaiyan* vs. *Subraya Aiyan*, 4 Mad., 257; *Pillai* vs. *Pillai*, 2 Ind. App., 219; 7 Mad., 97. See note under sections 211, 212, *ante*.

Interpretation.—A decree declaring plaintiff entitled to possession of land with wasilat was held to mean wasilat which the Court could give, which was then up to the time possession was delivered—*Fakharuddin* vs. *Official Trustee*, 8 Ind. App., 197.

Powers of Court Executing Decree.—The only thing left to a Court of execution to try under this section is the amount of mesne profits, when mesne profits have been awarded by the decree—*Protap Chandra Burna* vs. *Rani Sarnamayi*, 4 B. L. R., 125; *Ram Kanye* vs. *Gooroo Prosunno*, 16 W. R. 30; and this inquiry should be held as provided for in sections 392, 393, 397–400. The decree-holder may not be concluded by what he may have stated in his plaint as to their amount—*Hurro Gobind* vs. *Digumburee*, 9 W. R., 217; *Jadoomoney Dabee* vs. *Hafez Mahomed*, I. L. R., 8 Cal., 295; *Gauri Prasad* vs. *Reily*, I. L. R., 9 Cal., 112; see *Sooriah Ross* vs. *Cotaghery*, 2 Moore, 113; but if the amount allowed in the decree is in excess of the amount at which the plaintiff valued the relief sought, the decree cannot be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the amount so decreed, shall have been paid to the proper officer—Court Fees' Act (VII, 1870), section 18; unless the case is under section 211, *ante*.—*Ram Krishna* vs. *Bhimabai*, I. L. R., 15 Bom., 416; but see *Mohini Mohan* vs. *Satis Chandra*, I. L. R., 17 Cal., 704. See "EXECUTION," section 245, *infra*.

Execution can issue to recover the amount of ascertained mesne profits, though inquiry may be still being held as to other mesne profits, but, in ascertaining the amount of mesne profits, the Court has no power to alter its decree as to the amount of interest awarded—*Arfunnissa* vs. *Rokibunnissa*, 24 W. R., 444. See note under section 212, *ante*.

"The Amount of any Mesne Profits or Interest which the Decree has made Payable."—Where the decree is silent in awarding interest on mesne profits, they cannot be obtained in execution of that decree, but application should be made for amendment of that decree either through a review of judgment or by appeal, or by a separate suit—*Pillai* vs. *Pillai*, 2 Ind. App., 219; and if it awards mesne profits but not interest, the latter cannot be given—*Hurro Doorga* vs. *Sarat Sondari Dabi*, 8 Ind. App., 1. If any such sum has been improperly realised, it should be recovered by application to the Court executing the decree and not by regular suit—*Partab Singh* vs. *Beni Ram*, I. L. R., 2 Alla., 61. See note on section 211, *ante*, and "*Jurisdiction*," *infra*.

Between the Institution of the Suit and the Execution.—Plaintiff claimed possession of land with mesne profits from date of dispossession to the date of recovery of possession and obtained a decree for possession with mesne profits up to date of suit: *Held*, a second suit would lie for the subsequent mesne profits.—*Mon Mohun* vs. *The Secretary of State*, I. L. R., 17 Cal., 968.

Interest.—See section 209, *ante*.

On the Expiration of Three Years from the Date of the Decree.—See section 214, *ante*.

Relating to the Execution of the Decree—See sections 232, 252, 258 and 264.

An order under section 87 of the Transfer of Property Act is within the section—*Kedar Nath* vs. *Lulji*, I. L. R., 12 Alla., 61, and so is an order under section 89 of the same Act—*Oudh Behari* vs. *Nageshar*, I. L. R., 13 Alla., 278.

Not Within the Section.—The scope of this section is limited to questions arising in the enforcement of an existing decree capable of execution under the Code, on the application of one or other of the parties to it—*Chowdhry Wahid* vs. *Jumaee*, 11 B. L. R., 149. Thus an order by a Judge confirming the report of a Commissioner taking accounts, by which he refuses to require the defendants to give inspection of certain books, does not fall within this section—*Rustomji* vs. *Kessowji*, I. L. R., 8 Bom., 287. And where an application was made for an order that certain moneys paid into the hands of the Court-receiver to the credit of one suit should be transferred by him to the credit of another suit in which he was receiver, and the application was refused, it was held that no appeal lay from the order of refusal—*Sreenath Roy* vs. *Radhanath Mookerjee*, I. L. R., 9 Cal., 773. A sued B, a Hindu widow, and C, next reversioner, on a mortgage-bond, and got a decree against B only as personally liable, B died, and in appeal C was

substituted in her place. The decree was confirmed. A attempted to execute the decree against the mortgaged property which had come to C as heir of the last full owner: *Held*, it was not a matter relating to the execution of the decree—*Kameshar* vs. *Run Bahadur*, I. L. R., 12 Cal., 458.

In a suit B was declared shebait as against C. A then sued B for debts contracted on behalf of the temple. Afterwards on appeal C was declared shebait. A then substituted C's name for that of B and took out execution: *Held*, C could not under this section raise the question whether the debt was contracted for the benefit of the temple—*Sudindra* vs. *Budan*, I. L. R., 9 Mad., 80.

Any question as to whether the decree was obtained by fraud or collusion is not within the section—*Sudindra* vs. *Budan*, I. L. R., 9 Mad., 80; nor is a question whether an agreement with a minor is not void for want of sanction under section 462, *post*—*Arunchallan* vs. *Muragappa*, I. L. R., 12 Mad., 503. See "*Fraud*," *infra*.

Decree Satisfied.—If the decree has been fully satisfied and the execution-proceeding closed, no orders could be passed under this section, and a regular suit will lie. Thus, where the defendant purchased property sold in execution, but instead of paying the purchase-money into Court, he, with the plaintiff's consent, retained the whole sum upon the understanding that he should give the Court a receipt for himself and on behalf of plaintiff, and afterwards return to plaintiff his portion of the amount; it was held the decree being satisfied by the sale of the property, and the execution-proceedings being at an end, a suit to recover the sum due to plaintiff would lie—*Ramanandan Chetti* vs. *Kunnapu Chetti*, 6 Mad., 304; followed in *Fakaruddin* vs. *The Official Trustee*, I. L. R., 10 Cal., 538. See also *Mahomed Hossein* vs. *Kokil*, I. L. R., 7 Cal., 91.

Where a sum of money was found due under a decree, and the decree was satisfied, it was held that the only way of objecting to the sum was by review—*Fakaruddin* vs. *The Official Trustee*, I. L. R., 10 Cal., 538, and where a ten-annas share of a money was sold benami for the debtors, but the remaining creditors executed the whole decree under section 231, on giving security the debtors who had purchased were allowed to sue for their share as the decree was satisfied—*Haragobind* vs. *Issuri*, I. L. R., 15 Cal., 187; see also *Mohendro Narain* vs. *Gopal*, I. L. R., 17 Cal., 769. A obtained a mortgage-decree against three out of four defendant members of a Hindu family and purchased their share: *Held*, the judgment-creditor who was opposed by the successful defendant could sue for partition—*Nagamuthu* vs. *Savari*, I. L. R., 15 Mad., 226.

It is said it does not apply to questions arising after a sale in execution of decree—*Ramchaibar* vs. *Bechu*, I. L. R., 7 Alla., 641. See "DECREE," section 11, *ante*, and "APPEAL," *infra*, p. 248.

Fraud.—Where matters affecting the validity of a sale have been brought about by the fraud of one of the parties, and give rise to a question between those parties such as apart from fraud, would be within the provisions of this section, a suit on the ground of fraud will not lie—*Mohendra Narain* vs. *Gopal Mondul*, I. L. R., 7 Cal., 709; *Siva Pershad* vs. *Nundoo Lall*, I. L. R., 18 Cal., 130, and generally any question under section 258, *post*—*Lingayya* vs. *Narasimha*, I. L. R., 14 Mad., 99, or that the decree-holder was induced by fraud to withdraw execution—*Paranjpe* vs. *Kanade*, I. L. R., 6 Bom., 148; *Sakharam* vs. *Damodar*, I. L. R., 9 Bom., 468; *Behary Lal* vs. *Kedar Nath*, L. R., 18 Cal., 469, or that the debtor attempted to defraud one creditor by getting another to certify a sum not paid—*Tarak Chunder* vs. *Divendra Nath*, 12 C. L. R., 566; or that the decree-holder fraudulently executed the decree in opposition to an agreement not to do so—*Ballooder Lall* vs. *Anadi*, I. L. R., 10 Cal., 411; or did so in any other fraudulent manner—*Viraragharke* vs. *Venkatachireyar*, I. L. R., 5 Mad., 217; *Rukhines Bullubh* vs. *Brojonath*, I. L. R., 5 Cal., 308; *Sutbaji Rau* vs. *Srinivasa*, I. L. R., 2 Mad., 264; *Mohendra Narain* vs. *Gopal*, I. L. R., 17 Cal., 769; but see *Ganga Narain* vs. *Tiluckram*, 15 Ind. App., 119; must be determined under this section. See "FRAUD," section 11, *ante*. See "*Fraud*," *infra*.

Orders Falling Within It.—The object of this part of section 244 is, as pointed ou tin the case of *Ossemunnissa* vs. *Ameeroonnissa*, 20 W. R., 162, "that the Court having the parties before it in the suit, it is proper that all questions between them relating to the execution of the decree should be determined, and that there should not be the expense of a separate suit to determine such questions. The most liberal interpretation ought to be given to the provision in order to carry out what was the design of the Legislature." Thus, all questions in connection with attachment or sale of property—*Polokdhari Roy* vs. *Radha Pershad*, I. L. R., 8 Cal., 28; or purchase by a creditor under section 294, *post*—*Chintamanrav* vs. *Vithabai*, I. L. R., 11 Bom., 588; or regarding the appointment or removal of a receiver appointed in an administration-suit—*Mithibai* vs. *Limji*, I. L. R., 5 Bom., 45; and see *Gnanasambanda* vs. *Visvalinga*, I. L. R., 13 Mad., 338; to give security under section 546—*Luchmeeput Singh* vs. *Sitha Nath*, I. L.R., 8 Cal., 477. and the amount thereof—*Mahant Ishwargar* vs. *Chudasama*, I. L. R., 12 Bom., 30; staying execution, either by the Court which passed it, or to which it was sent for execution—*Hotil Lall* vs. *Hardeo*, I. L. R., 5 Alla., 212; *Ghazidin* vs. *Fakir*, I. L. R., 7 Alla., 73; but see *Nihal Chand* vs. *Rameshari*, I. L. R., 9 Cal., 214; not followed, see I. L. R., 10 Alla., 391; I. L. R., 13 Cal., 112; or refusing to stay execution—*Musaji* vs. *Damodardas*, I. L. R., 12 Bom., 279; or that plaintiff is entitled to *khas* and not symbolical possession—

Nahjan vs. *Taki Khan*, 12 C.L.R., 571; I. L. R., 9 Cal., 872, but see I. L. R., 11 Cal., 931, or is not entitled to a greater quantity of land than sued for, though given by a consent decree —*Mohibullah* vs. *Immami*, I. L. R., 9 Alla., 229, fall within this section; and where in a partition-suit between Hindus, the parties except the mother entered into a compromise and in execution the mother was dispossessed, her objection was held to fall under this section—*Sankaravadivammal* vs. *Kumarasamya*, I. L. R., 8 Mad., 473. So the question whether defendant is entitled to a right of occupancy—*Ramgopal* vs. *Khiali*, I. L. R., 6 Alla., 448, or to a non-saleable tenure—*Janki Singh* vs. *Ablakh*, I. L. R., 6 Alla., 393; *Basti Ram* vs. *Fattu*, I. L. R., 8 Alla., 147; or that the decree was fraudulently executed when barred by limitation falls within it—*Najabut Ali* vs. *Buseeroollah*, 20 W. R., 5; 11 B. L. R., 42; *Zumeer Sirdar* vs. *Asseemooddeen Sirdar*, 23 W. R., 257; *Rangji* vs. *Bhaji*, I. L. R., 11 Bom., 57.

Subsisting Decree.—Money unduly recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the degree or judgment under which it was recovered remains in force; but this rule of law rests upon the ground that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding—*Partab Singh* vs. *Beni Ram*, I. L. R., 2 Alla., 61. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and is recoverable either by summary process or by a new suit or action — *Kalianasundram* vs. *Egnavedeswara* I. L. R., 11 Mad., 261; *Mookoond Lal* vs. *Mahomed*, I. L. R., 14 Cal., 84. And see the cases of *Shama Purshad* vs. *Hurro Purshad*, 10 Moore, 203; 3 W. R., P. C., 11, and *Kalichurn Dutt* vs. *Jogesh Chunder Dutt*, 1 C. L. R., 5, in which such suits were allowed. In the former case, plaintiff obtained a decree, declaring that he was entitled to a certain share of a certain debt due to the family of which he was a member, but, on appeal to the Privy Council, it was held that he was bound by a compromise by which the amount of that debt was settled at a smaller sum than he claimed. Pending the decision he obtained decrees for various sums of interest calculated on the larger sum, and received payment. The payer then brought a suit to recover the moneys paid under those decrees, and this suit was allowed by the Privy Council. In the latter case, a landlord having got a decree against his tenant for rent at an enhanced rate in the High Court, obtained on the basis of that decree further decrees for subsequent instalments, which he realized. Subsequently the original decree was set aside by the Privy Council, and the tenant brought a suit to recover moneys which he had been compelled to pay in excess of the rent which the Privy Council had declared him to be liable to pay. A majority of the High Court held, on the authority of the case of *Shama Purshad* vs. *Hurro Purshad*, 10 Moore, 203; 3 W. R., P. C., 11, that such a suit would lie. In a similar case restitution was granted in execution and not by a regular suit—*Mahomed Elahe* vs. *Kally Mohun*, I. L. R., 5 Cal., 589; see also *Narayana* vs. *Narayana*, I. L. R., 13 Mad., 437; and compare *Waghela* vs. *Shaik Masludin*, I. L. R., 13 Bom., 330.

See "EXISTING DECREE," section 11, *ante*.

Dispossession.—A party to the suit has no remedy except process of execution, if he is wrongfully dispossessed of property under colour of a decree—*Muttuvelu Pilai* vs. *Vythilinga*, 5 Mad., 185; *Kattama Nachiar* vs. *Bothagurusami*, 6 Mad., 293. So also, where the judgment-debtor complained in the execution-proceedings that the decree holder had been put into possession of lands that were not covered by the decree, and his objection was disallowed by the Court executing the decree, a separate suit could not be brought by the judgment-debtor to obtain possession of those lands—*Jogendro Narain* vs. *Surno Moyee*, 41 W. R., 39; *Prannath Roy* vs. *Preonath Roy*, 8 W. R., 398. But in the case of *Rash Beharee Lall* vs. *Wajun*, 11 W. R., 516, it was held that if the officer executing the decree should act contrary to its terms, his act could not be considered to be an act done in execution of the decree, and therefore the judgment-debtor could bring a separate suit to set aside such proceedings. See, however, 14 W. R., 40. Where the debtor claimed the surplus sale-proceeds relating to a previous decree under a compromise effected in another suit between him and other debtors, it was held that this was a matter that should be determined by the Court executing the decree—*Velayet Hossein* vs. *Wullee Ahmed*, 23 W. R., 207.

Plaintiff in possession under a decree for land and mesne profits, or for land and the value of the crops, must enforce the mesne profits or the value of the crops in execution—*Lakshmi Narasimhalu* vs. *Chatrazu*, 3 Mad., 287; *Sungara Narayana Pillay* vs. *Sandira*, 6 Mad., 13; and if a party gets a decree for possession and does not execute it within time, he cannot bring a new suit against his opponent or his assignee for the same, and his right is extinguished; for this section takes away from the parties the right to raise by a fresh suit any question as to their rights and liabilities under the decree—*Kisan* vs. *Anandrum*, 10 Bom., 433; *Ranganasary* vs. *Shappani*, 5 Mad., 375; *Fakirapa* vs. *Pandurangapa*, I. L. R., 6 Bom., 7. Where in execution of the decree the decree-holder obtained more lands than were given by the decree, and in proceedings in execution, was compelled after some delay to relinquish them, he was also compelled to deduct mesne profits, due therefrom from the amount of mesne profits to which he was entitled in the decree—*Bama Soondaree* vs. *Tarinee Kant*, 20 W. R., 415.

In a suit for possession on an usufructuary mortgage, plaintiff obtained a decree to get possession of the property in order to repay himself out of the profits, keeping the usual accounts, and after satisfaction of his claim restored the property: *Held*, that he was bound to certify to the Court the amount received and outstanding, and that the Court executing the decree was empowered to deal with the matter as a matter relating to execution—*Golam Russool* vs. *Kishen Mohun*, 23 W. R., 156.

Regular Suit will lie.—But though the general rule is that a regular suit will not lie to set aside any orders passed in execution of decree which binds the parties—*Punchanun* vs. *Rabia*, I. L. R., 17 Cal., 711; this is not so if the order is passed without jurisdiction. Thus where, in execution of a decree for arrears of rent, the Court sold the judgment-debtor's immoveable property before his moveable property, it was held that he could sue to set aside the sale, although he had not opposed the illegal order passed in execution—*Rama Soondures* vs. *Mudhoo Soodun*, 25 W. R., 156.

Fraud.—It is not quite settled whether this section will prevent a suit to set aside a decision obtained by fraud—*Gungapershad* vs. *Gopal Singh*, 11 Ind. App., 234; *Brijo* vs. *Busirnunnissa*, I. L. R, 15 Cal., 189, and where a creditor in fraud of an agreement executed a decree, a suit to set aside the sale as fraudulent was allowed—*Ishan Chunder* vs. *Indro Narain*, 12 C. L. R., 390, but see *Mohendro Narain* vs. *Gopal*, I. L. R., 17 Cal., 769; *Siva Pershad* vs. *Nundo Lall*, I. L. R., 18 Cal., 139, and compare: *Gunga Naraian* vs. *Tiluckram*, 15 Ind. App., 119; the cases referred to under "REPRESENTATIVE," *ante*, and "FRAUD" under section 11, *supra*. The latest case is that of *Prosunno Coomar Sanyal* vs. *Kasi Das*, P. C., May 14th 1892, ; not reported. In this case plaintiff sued to set aside a sale, on the grounds that defendant No. 8 after receiving the amount due from him in collusion with defendants Nos. 1 to 7 caused certain property including plaintiff's share to be attached and falsely alleging that the notice of sale-proclamation and sale-notification was served, illegally and fraudulently caused the property of large value to be sold and purchased by defendants Nos. 1 to 5 collectively. He added that he had applied to have the illegal and fraudulent sale set aside, but failed. The first Court dismissed the suit. In appeal to the High Court, Tottenham and Ghose, J.J., held as follows: "We think that in so far as the suit is one to set aside the auction-sale it is barred by limitation. The sale was held on the 10th July 1883, and it was confirmed on the 30th of June 1884, after hearing all the objections urged by the judgment-debtors. The present suit was instituted on the 6th of March 1886, more than a year after the confirmation of the sale. If the plaintiffs had been able to make out a case of fraud they would then have a period of three years from the time of the discovery of the fraud. In our opinion they have entirely failed to do this. We think, therefore, that the limitation of one year must prevail. The fraud alleged is alleged against the decree-holder as having in breach of the agreement made by him after receiving plaintiff's quoto of the decretal debt, brought their share of the property to sale. The matter was adjudicated upon in the Execution Department and was decided against the plaintiffs. It is clearly a matter arising under section 244 of the Code, and therefore no separate suit on that part of the case can lie. Therefore, under section 244 also the present suit must fail. * * * * Then as regards the other defendants, namely, the plaintiff's co-sharers and purchasers at auction, there is really no case made out at all; there is no case even alleged in the plaint. There is nothing more than a general allegation of fraud and collusion between them and the decree-holder. But it is not enough to make a general allegation of that sort: the allegation must be specific and must be proved."

In appeal to the Privy Council it was urged "that the questions raised could not be enquired into in the Execution Department and the suit was maintainable," that the sale "was void" and the allegations "were specific enough to make a case of fraud against all the defendants." Their Lordships of the Privy Council in dismissing the appeal said as follows:—

"The allegation in the plaint is that the setting aside of the first sale, the revival of the attachment, and the second sale in which the shares of the plaintiffs were sold with the rest, were brought about by fraud and collusion on the part of the other co-sharers, the judgment-creditor and the auction-purchasers, who were all made defendants. No particulars of the alleged fraud and collusion are given. The charge is general and perfectly vague. If it means anything, it can only mean that the judgment-creditor broke his alleged agreement with the plaintiffs, and that the other persons alleged to have been implicated, being aware of the circumstances, took some part in the transaction.

"Both Courts have held that the question which the plaint seeks to raise could only have been determined by the order of the Court which executed the decree, and that in such a case as the present a separate suit for the purpose of setting aside an execution sale is expressly forbidden by section 244 of the Civil Procedure Code.

"Mr. Doyne who appeared for the appellants admitted that the question at issue was one 'relating to the execution, discharge, or satisfaction of the decree.' But he argued with much ingenuity that the suit was not barred by the provisions of section 244, because the question concerned the auction-purchasers as much as anybody, and therefore, he contended it could not properly be described as a question 'arising between the parties to the suit in which the decree was passed. At the same time he admitted

that he was unable to produce any authority for his contention, and he also admitted that it was the common practice to make the auction-purchaser a party to an application for setting aside an execution-sale.

"As the point appeared to be of some importance, and the respondents were not represented at the Bar, their Lordships thought it desirable, before giving judgment, to examine the reported cases which have arisen under section 244 of the Civil Procedure Code. An examination of those cases of which it is only necessary to mention *Sakharam Govind Kala* vs. *Damodhar Akharam Gujar*, I. L. R., 9 Bom., 408, and *Kunij Ali* vs. *Mayan*, I. L. R., 7 Mad., 255, has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in India have uniformly placed on the section in question.

"It is of the utmost importance that all objections to execution-sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed a narrow construction on the language of section 244, and when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser is no party to the suit, is interested in the result has never been held a bar to the application of the section." See "*Fraud*," *infra*.

Symbolical Possession.—Where a person takes symbolical possession by mistake, a suit for *khas* possession will lie—*Shama Churn* vs. *Madhab Chandra*, I. L. R., 11 Cal., 93.

Mortgage.—A having obtained a decree against a widow on a mortgage-bond applied to execute it against B, the reversioner as her legal representative. B denied that he was her representative, and the Judge, instead of deciding the point, put B on the record, directing that the dispute should be decided in a regular suit: *Held*, B could bring a suit to have it declared that the decree only bound the widow's estate—*Kanai Lall Khan* vs. *Sashi Bhuson*, I. L. R., 6 Cal., 777; followed in *Gourmoni* vs. *Jugut*, I. L. R., 17 Cal., 57. See, however, *Punchanan* vs. *Kamini*, I. L. R., 17 Cal., 711. As to redemption see the conflicting doctrines referred to in *Ramunni* vs. *Brahma*, I. L. R., 15 Mad., 366.

Conversion.—A sued for possession of certain lands and obtained a decree. A portion of those lands had been taken up by the Government for public purposes, and the price deposited in the Collector's Court was withdrawn by the defendants without the knowledge of the plaintiff after the institution of the suit but before decree: *Held*, that a subsequent suit for the money withdrawn would lie, and that it was not a question relating to the execution of the former decree. Limitation in such a suit held to be 12 years,—*Roy Nund Lall* vs. *Abu Syed*, 5 C. L. R., 45. So where A, having obtained a decree for certain property against B, agreed to sell the decree to the latter; but subsequently ignoring the agreement took out execution for costs which B paid: *Held*, B could sue for a decree on the agreement to sell—*Sitaram* vs. *Mohipal*, I. L. R., 3 Alla., 533, and note under section 258, *post*. See, however, *Prosunno Coomar* vs. *Rasi Das*, P. C. 14th May 1892.

A claim will lie for damages in respect of injury sustained by goods while under attachment in execution of a decree which was afterwards set aside—*Kashee Kishore* vs. *Noor Khan*, 7 W. R., 45. See note under section 258, *post*.

Declaratory Decree.—If the nature of the suit or the matter complained of is such as cannot be decided in execution, or is not directly connected with carrying it out, a suit will lie. Thus, if a decree is merely declaratory and not capable of being carried out in execution, it may be enforced by a regular suit—*Jugurnath* vs. *Balgobind*, 1 Alla., 154.

Jurisdiction; Irregularity.—Where a question, such as provided for by this section was not determined by an order of the Court executing the decree, under Act XXIII of 1864, section 11, but was made the subject of a regular suit in the same Court, it was held that though the form of the proceeding was wrong, there was not such want of jurisdiction as could be made the ground of objection in special appeal, and that such an objection should have been taken in the first Court—*Purmessurree Pershad* vs. *Jankee Kooer*, 19 W. R., 90; *Azizuddin* vs. *Ramnugra*, I. L. R., 14 Cal., 605. See also *Pillai* vs. *Pillai*, 2 Ind. App., 219; *Kellilamma* vs. *Kelappan*, I. L. R., 12 Mad., 228; *Sheo Golam* vs. *Beni Prosad*, I. L. R., 5 Cal., 27; see also "EXPLANATION III," section 13, *ante*, and *Vishnu* vs. *Krishnarao*, I. L. R., 11 Bom., 154; *Dinonath* vs. *Guru Churn*, 14 B. L. R., 287; *Arunachala* vs. *Sivagiri*, I. L. R., 7 Mad., 328; *Gilbert* vs. *Endean*, 9 C. D., 259.

Estoppel.—A petition to postpone a sale cannot be treated as an estoppel binding the judgment if the proceedings are irregular—*Mina Konwari* vs. *Juggat*, I. L. R., 10 Cal., 196; and an order under section 239, *ante*, staying proceeding does not prevent the debtor from pleading limitation afterwards in the first Court—*Srihary Mundul* vs. *Murari*, I. L. R., 13 Cal., 257.

Appeal.—Orders under this section are appealable. But no appeal will lie if the order is not final—*Nihalchand* vs. *Rameshari*, I. L. R., 9 Cal., 214; see, however, *Hoti Lal* vs. *Hardeo*, I. L. R., 5 Alla., 212; or is an interlocutory order, a mere matter of procedure not affecting the right of the parties—*Hirji Jini* vs. *Narran*, 12 Bom., 120, p. 137; *Behary Lal* vs. *Kedar Nath*, I. L. R., 18 Cal., 469; *Hulas Rai* vs. *Pirthi Singh*,

I. L. R., 9 Alla., 500; or is not clearly within the section, such as where it is interlocutory order on the report of a Commissioner taking accounts — *Rustomji* vs. *Kessowji*, I. L. R., 8 Bom., 287; *Behary Lal* vs. *Kedar Nath*, I. L. R., 18 Cal., 469; or where the applicant is not a representative—*Rash Behary* vs. *Surnomoyee*, I. L. R., 7 Cal., 403; or the question in dispute is as to the share of one of the co-decree-holders; otherwise if the dispute is as to the interest of a decree-holder whose co-sharer had sold his interest to the judgment-debtor—*Gyamonee* vs. *Radha Romon*, I. L. R., 5 Cal., 592; *In re Kally Soondury Dabee*, I. L. R., 6 Cal., 594; see also *Haragobind* vs. *Issuri*, I. L. R., 15 Cal., 187.

Small Cause Court Cases.—As to whether a second appeal is allowed in cases of a Small Cause Court nature, see *Sri Bullov Bhattacharji* vs. *Baburam*, I. L. R., 11 Cal., 169; and *Mahadev Narsing* vs. *Ragho*, I. L. R., 7 Bom., 292.

Limitation.—The provisions of the Limitation Act XV of 1877, regarding several questions relating to the execution of decrees, should be borne in mind. See Sched. II of that Act, Articles 161, 165, 166, 167, 172, 174.

An application for refund of money overpaid in execution is not barred by limitation—*Alli Hossein* vs. *Muzhur Hossein*, 4 C. L. R., 577. See on this case *Fakaruddin* vs. *The Official Trustee*, I. L. R., 10 Cal., 538.

E.—Of the Mode of Executing Decrees.

Procedure on receiving application for execution of decree.

245. The Court, on receiving an application for the execution of a decree, shall ascertain whether such of the requirements of sections 235, 236, 237, and 238 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow it to be amended then and there, or within a time fixed by the Court. If the application be not so amended, it shall be rejected.

Every amendment made under this section shall be attested by the signature of the Judge.

Procedure on admitting application.

When the application is admitted the Court shall enter in the register of the suit a note of the application and the date on which it was made, and shall order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for money, the value of the property attached shall, as nearly as may be, correspond with the amount for which the decree has been made.

Act XXIII of 1861, section 95. This section applies to H. C. and P. S. C. C.

As near as may be—See *Sorabji* vs. *Govind*, I. L. R., 16 Bom., 91, p. 114.

Prohibition of arrest or imprisonment of women in execution of decrees for money.

245A. Notwithstanding anything in the last foregoing section or in any other section of this Code, the Court shall not order the arrest or imprisonment of a woman in execution of a decree for money.

Inserted by Act VI of 1888, section 2.

245B. (1) Notwithstanding anything in section 245 or in any other section of this Code, when an application is for the execution of a decree for money by the arrest and imprisoment of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to jail in execution of the decree.

Discretionary power to permit other judgment-debtors to show cause against imprisonment.

(2) If appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

This section was inserted by Act VI of 1888, section 2.

Application.—The law does not require a copy of the decree to be filed with the application for execution—*Modhoo Dossia* vs. *Nobin Chunder*, 16 W. R., 25; it only requires an application in the form prescribed in section 235, and on it the Judge can pass orders for execution—*Sufur Ali* vs. *Mohesh Chunder*, 4 W. R., Mis., 16. If it corresponds with the terms of the decree, it should be admitted—*Bisheshur Roy* vs. *Bisheshur*, 8 W. R., 277; and if it is irregular in form it is still an application within the section—*Asgar Ali* vs. *Troilokya*, I. L. R., 17 Cal., 631; *Hari* vs. *Narayan*, I. L. R., 12 Bom., 427; and should not be rejected, but amended or returned for correction—*Purladh Mohapatur* vs. *Junardun*, 6 W. R., Mis., 15.

Where a decree declares that if the amount due is not paid within two months, certain property shall be sold: *Held*, no application should be allowed before the expiration of that period—*Har Dayal* vs. *Chadami*, I. L. R., 7 Alla., 194.

Oral Application.—See section 256, *post*.

Stamp.—An application should bear a stamp such as is required by the Court-Fees Act (VII of 1870), Sched. II, Art. 1.

If Application be not so Amended it shall be Rejected.—When an order to amend within seven days was not carried out, but no order rejecting the application was passed: *Held*, the Court could allow an amendment subsequently—*Kaminy Mohun* vs. *Gopal*, I. L. R., 8 Cal., 479. So where an order was made to amend within four days was not carried out, and the petition remained on the record, a subsequent amendment was allowed—*Fuzlur Rahman* vs. *Altaf*, I. L. R., 10 Cal., 541. See, however, *Asgar Ali* vs. *Troilokya*, I. L. R., 17 Cal., 631; *Weldon* vs. *Neal*, 19 Q. B. D., 394.

Amendment.—Amendment of an informal application may be allowed even after the period prescribed by the law of limitation has elapsed—*Macgregor* vs. *Keshub Roy*, I. L. R., 14 Cal., 124; *Syud Mahomed* vs. *Syud Abdoolah*, 12 C. L. R., 279; and where a decree-holder applied, in time, for execution against the person and property of his debtor generally, he was allowed on special appeal to file a list of the immoveable property he sought to sell after the period of limitation had expired—*Macgregor* vs. *Kesub Roy*, I. L. R., 14 Cal., 124; (overruled—*Asgar Ali* vs. *Troilokya*, I. L. R., 17 Cal., 631); but where the decree-holder specified certain property in his application, and subsequently, after the period of limitation had expired, filed another list of property to be sold and prayed that the property first mentioned should be released, the application was refused as barred—*Sreenath Gohoo* vs. *Gusuf Khan*, I. L. R., 7 Cal., 556; and when the decree-holder, instead of giving a list of the property referred to a previous application, execution was allowed against that property, but not against other property notified to the Court after the period of limitation—*Hurry Churn Bose* vs. *Subapdar*, I. L. R., 12 Cal., 161. See also *Asgar Ali* vs. *Troilokya*, I. L. R., 17 Cal., 631; *Weldon* vs. *Neal*, 19. Q. B. D., 394.

Limitation.—Before admitting an application, it will be necessary to see whether *primâ facie* it has been made within the proper time, and is not barred by limitation. See Act XV, 1877, Sched. II, Art. 179, under section 230 of this Code.

Under this section and 244 (*c*), the Court to which a decree has been transferred for execution has jurisdiction to determine whether or not such decree is barred by limitation—*Nursingh Dyal* vs. *Hurryhur Saha*, 6 C. L. R., 489; I. L. R., 5 Cal., 895.

The order of the Court under section 230 is conclusive evidence that the application is not barred—*Mungal Pershad Dichit* vs. *Grija Kant Lahiri Chowdhry*, 8 Ind. App., 123; *Annoda Proshad* vs. *Kurpan Ali*, 1 C. L. R., 408.

Several Decrees in One.—Limitation in a decree which is against several debtors, but makes each separately liable for specific sums, as mesne profits, must be separately calculated against each of the debtors, since execution for realization of the amount due from one debtor is no part of proceedings against another, but is a separate decree, and must be separately considered in determining the point of limitation—*Hureshur Singh* vs. *Hridoy Narain*, 25 W. R., 310, following the judgment of the Full Bench in the case of *Wise* vs. *Rajnarain Chuckerbutty*, 19 W. R., 30; 10 B. L. R., 258; in which it was held that a decree against A for the rent of one period, and against B for another, is in fact two decrees, and must be separately enforced to avoid limitation.

Joint Decree.—But where a decree has been passed against an number of persons jointly, the Court is not competent to treat it in any other way than as a joint decree, or to attempt (in executing it) to adjust the respective liability of each of the debtors, and restrict so what are the decree-holder's rights under the terms of the decree—*Kally Mohun* vs. *Dinonath*, 8 C. L. R., 34.

Register.—The register here referred to is the register prescribed by section 58, *ante*, the form of which is set forth in Sched. IV, No. 116, *post*.

When the Application is admitted, the Court shall order execution of the Decree according to the nature of the Application.—If the application is admitted, and the Court is not expressly given a discretion in the matter, as for instance, in sections 230 and 245B, the Court is bound to comply with the nature of the application made under this section in writing — *Davis* vs. *Middleton*, 8 W. R., 283; and see *Kally Mohun* vs. *Dinonath*, 8 C. L. R., 34, *supra*. And in the case of *Seton* vs. *Bijohn*, 17 W. R., 168; 8 B. L. R., 255, it was held on appeal from an order of Phear, J., on the Original Side of the High Court under Act VIII of 1859, that he was not competent to refuse to issue execution against the person of the judgment-debtor on the ground that he had reason to believe that the debtor had no means of satisfying the decree since previous attempts to execute it against his property had failed.

The fact that certain property stated to be that of the judgment-debtor is the subject of a pending suit, is no reason why it should not be attached in execution of a decree against him, though the Court will exercise its own discretion as to its sale at the most fitting and proper time—*Ram Chunder* vs. *Nund Lall*, 19 W. R., 132.

Execution.—Execution should be in accordance with law, and not by consent of the parties. Thus, where the judgment-debtor, a railway employé, with the consent of the decree-holder, gave orders on the paymaster of the railway company to pay into Court certain sums out of his monthly salary, such an arrangement should not have been accepted by the Court, and as the paymaster refused to recognize it, it could not be enforced—*In re Macfarlane*, 11 W. R., 69; but see the case of *Sadasiva Pillai* vs. *Ramalinga Pillai*, 2 Ind. App., 212. This section does not contemplate any inquiry whether the property belongs to the judgment-debtor or not—*Subjan Bibi* vs. *Sariatulla*, 3 B. L. R., 413. The procedure laid down applies to all applications for the execution of decrees whether made to the Court which passed the decree or to the Court to which it has been sent by that Court for execution (section 230). The different modes of executing decrees are set forth in the following sections, but it should be noted that it is discretionary with the Court to "refuse execution at the same time against the person and property of the judgment-debtor" (section 230); and "when a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one thousand rupees, the Court may, when passing the decree, on the oral application of the decree-holder, order immediate execution thereof by issue of warrant, directed either against the person of the judgment-debtor, if he is within the local limits of the jurisdiction of the Court, or against his moveable property within the same limits" (section 236).

It is not competent to a Court executing a decree to vary it in any way, though through carelessness in the mode of expression in the terms of the decree, a Court is often called upon to interpret it. Thus, where a decree was for payment of a certain sum of money as rents due, and, on non - payment within fifteen days, for ejectment of the tenant-debtor, the Court executing the decree was not competent to alter or extend the time fixed for payment—*Sunkur Singh* vs. *Huree Mohun*, 22 W. R., 460. See note on section 228, *ante*.

Liability of Nazir.—As to the liability of a Nazir for non-execution of a warrant of arrest, see *Kasturchand* vs. *Ravi*, I. L. R., 4 Bom., 65.

Mortgaged Property.—A mortgagee who attaches the mortgaged property cannot sell it for any claim save by a suit under section 67 of the Transfer of Property Act—*Kaveri* vs. *Ananthayya*, I. L. R., 10 Mad., 129.

Joint-Debtors.—The holder of a decree under which several persons are jointly liable can proceed against any one of the debtors—*Sreenath Ghose* vs. *Saheb Ram*, 12 W. R., 305. The fact that he may have given a release to some of the joint-debtors does not

prevent him from executing it against the others, who can sue their co-debtors for contribution whether a release has been granted or not—*Sheo Churn* vs. *Ram Surn*, 16 W. R., 49; *Nunkoo Lall* vs. *Dhunesh Kooer*, 17 W. R., 496. On the other hand, the person asked to contribute is not estopped by the joint decree from raising any equitable defence he may have against the person suing him—*Syed Ali Ahem* vs. *Mohun Mohton*, 1 Shome, 54; *Asman Singh* vs. *Ajnas Koer*, 2 C. L. R., 406. But as between the debtors jointly liable on a money-decree if one of them purchase the decree, it operates as a satisfaction of the entire decree, and execution can no longer be taken out—*Digambaree Debia* vs. *Eshan Chunder*, 15 W. R., 372. See also Full Bench, 9 W. R., 230; section 232, *ante*. It may also be objected in the course of proceedings taken in execution that the decree-holder is only the *benamedar* of one of the co-debtors, or that one of the co-debtors, is to some extent interested from having purchased a portion of the decree, and such objections may be taken at any time, and even if they were not taken in the course of previous proceedings—*Obhoy Churn Roy* vs. *Nobin Chunder*, 23 W. R., 95. See notes under sections 231, 132, and 235, *ante*.

Cross-decrees.

246. If cross-decrees between the same parties for the payment of money be produced to the Court, execution shall be taken out only by the party who holds a decree for the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

If the two sums be equal, satisfaction shall be entered upon both decrees.

Explanation I.—The decrees contemplated by this section are decrees capable of execution at the same time and by the same Court.

Explanation II.—This section applies where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

Explanation III.—This section does not apply unless—

the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

the sums due under the decrees are definite.

Illustrations.

(*a.*) A holds a decree against B for Rs. 1,000. B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this section.

(*b.*) A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this section.

(*c.*) A obtains a decree against B for Rs. 1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this section.

Act VIII of 1859, section 209. This section applies to H. C. and P. S. C. C.

Cross-Decrees.—This section deals with cross-decrees and not with cross-claims under one decree. That is provided for by section 247, *post*—*Kalka Prasad* vs. *Ram Din*, I. L. R., 5 Alla., 272.

Every transferree of a decree holds it subject to the equities (if any) which the

judment-debtor might have enforced against the original decree-holder (section 233)—See *Kaim Ali* vs. *Lukhy Kant*, 10 W R. (F. B.), 32; 1 B. L. R., 23; *Nund Coomar* vs. *Koonjo Kishore*, 6 W. R., Mis., 73. Where execution of A's decree against B was stayed pending the passing of a decree in B's cross-suit: *Held*, that no subsequent purchase of B's rights and interest in his cross-suit could be set up as a bar to A's rights to attach the whole of the decree in the cross-suit in execution of his decree against B—*Peeloo Chowdrain* vs. *The Court of Wards*, 7 W. R., 219; so where A obtained a decree against K and P, and assigned it to D, and prior to the assignment K and P had sued A and D: *Held*, K and P were entitled to set-off their decree against the unexecuted portion of the assigned decree—*Kristo Ramani* vs. *Kedar Nath*, I. L. R., 16 Cal., 619.

Execution shall be taken out · Irregularity.—Process should only issue for the difference. Where, however, process was allowed to issue for the smaller sum, it was held that the irregularity did not render subsequent proceedings null and void, nor sufficient to justify the setting aside of a sale held in execution of the decree—*Rewa Mahton* vs. *Ram Kishen*, 13 Ind. App., 106; I. L. R., 14 Cal., 18.

Explanation I.—It should be noted that both or all the decrees which it is intended to set-off against one another must be *produced* to the Court before which execution of any of them is being taken, or such Court will not have jurisdiction over them all—*Rewa Mahton* vs. *Ram Kishen*, 13 Ind. App., 106; see, however, *Mataadin* vs. *Chandi*, I. L. R., 10 Alla., 188. If one of them should have been passed by another Court, application for its transfer should be made under section 223. So, Act VIII of 1859, section 209, which provided for the set-off of cross-decrees, only applied to decrees of the same Court, or decrees sent to one Court for execution. Therefore, where, on an application for execution of a decree in the Court of a Principal Sudder Ameen, it was sought to set-off a decree obtained in the Judge's Court which had not been sent to the Principal Sudder Ameen for execution: *Held*, that there could be no set-off—*Grish Chandra Lahury* vs. *Fakir Chand*, B. L. R., F. B. 503.

Explanation III—The holder of the smaller decree, which it is intended to set off against another and larger decree, should be careful to do so before his own decree is barred by limitation, when his adversary can take advantage of this and execute his decree in full, unless steps have been taken in time to enter satisfaction for the smaller sum in the manner provided for by this section—*Rezaoodeen Hossein* vs. *Fuzloonissa*, 5 W. R., Mis., 12. A judgment-debtor is entitled to set-off a decree whether the judgment-creditor may or may not intend to appeal against the judgment-debtor's decree—*Huro Pershad Roy* vs. *Shama Pershad*, 5 W. R., Mis., 52.

Same Parties.—It has been held that, when one of the parties to a decree is said to be the *benamee* of a third party, the decree is not capable of being treated as a cross-decree—*Tara Chand Ghose* vs. *Anund Chunder*, 10 W. R., 450; 2 B. L. R., 110. Cross-decrees have been set-off where the parties to the decrees were not the same, but the debts on which the decrees were based were due between the same parties—*Bhagawan Kunwar* vs. *Lala Baijnath*, 2 B. L R., 84; and a decree obtained against a Hindu widow for a debt due by her husband has been set-off against a sum due to herself for costs—*Grish Chunder* vs. *Koomaree Dabea*, 1 W. R., Mis., 23; but where S and two others got a joint-decree for costs against A, it was held that A could not set-off a decree for money against S—*Murli Dhar* vs. *Parsotam Das*, I. L. R., 2 Alla., 91; but where A got a decree against B, and C got a decree against B and A, it was held that C could set-off his claim against A only—*Hury Doyal* vs. *Din Doyal*, [I L. R., 9 Cal., 479; and see *Ram Sukh* vs. *Tota*, I. L. R., 14 Alla., 339.

One Decree set aside in Appeal.—Where by agreement of the parties cross-decrees were set off against one another and satisfaction entered up, it was not competent to one of them, on getting the decree against him set aside on appeal, to take out execution of the decree that he held, as satisfaction had been entered up and there was no allegation that the adjustment had been obtained by mistake and contrary to the real intention of the parties, and that the conduct of the party who appealed had been *bonâ fide* and honest—*Gupinath Roy* vs. *Dinbandhu Nundy*, 3 B. L. R., App., 62; but in another case it was held that the procedure in this section should be followed in all cases even when one of the decrees has been appealed against, but should it be reversed in appeal, the appellate decree will be executed—W. R., 1864, Mis., p. 1.

Illustrations.—(*a*) Thus a decree for mesne profits, the amount of which has not been determined cannot be set-off as a cross-decree, see *Mataadin* vs. *Chandi*, I. L. R., 10 Alla., 188.

In the case of *D'Silva* vs. *Ameer Shaha*, 16 W. R., 303, it was questioned whether the provisions of Act VIII, as to setting-off decrees (section 209), applied to decrees passed under Act X of 1859.

Appeal.—An appeal lies from a decision under this section, see *Kristo Ramini* vs. *Kedar Nath*, I. L. R., 16 Cal., 619.

247. When two parties are entitled under the same decree to recover from each other sums of different amounts, the party entitled to the smaller sum shall not take out execution against the other party; but satisfaction for the smaller sum shall be entered on the decree.

Cross-claims under same decree.

When the amounts are equal, neither party shall take out execution, but satisfaction for each sum shall be entered on the decree.

By analogy to section 246, *ante*, where there is only one decree and not cross-decrees, the party entitled to the smaller sum cannot take out execution aginst the party entitled to the larger—*Jugo Mohun* vs. *Soorendronath Roy*, 13 W. R., 106; execution should only issue for the difference—*Amjud Ali* vs. *Fazul Hossein*, 19 W. R., 187.

The parties must hold the same character and identical rights of enforcing execution. Thus where A was entitled by execution against specified property of B, and B was entitled as against A to realize by proceeding against his person and property, the cross-claims were not allowed to be set-off — *Kalka Prasad* vs. *Ram Din*, I. L. R., 5 Alla., 272. See note under sections 214 and 221, *ante*.

Extension —This section does not apply to a case of pre-emption, but only to counter claims, in suits for money. Still the spirit of it is applicable and under an order to deposit the purchase-money, costs may be deducted — *Ishri* vs. *Gopal Saran*, I. L. R., 6 Alla., 351.

248. The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him—

Notice to show cause why decree should not be executed.

(*a*) if more than one year has elapsed between the date of the decree and the application for its execution, or

(*b*) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made:

Proviso.

Provided that no such notice shall be necessary—

in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed, or of the last order against the party against whom execution is applied for, passed on any previous application for execution, or

in consequence of the application being against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person, the Court has ordered execution to issue against him.

Explanation.—In this section the phrase "the Court" means the Court by which the decree was passed, unless the decree has been sent to another Court for execution, in which case it means such other Court.

Act VIII of 1859, section 216. This section applies to H. C. and P. S. C. C.

Forms.—The notice must be in the form given in Sched. IV, No. 135, and served in the manner provided for the service of summons, see section 94, *ante*.

Limitation—Limitation runs from the date on which the notice was issued and served—Act XV of 1877, Sched. II, Art. 179, cl. 5—*Koonj Behuree* vs. *Gridharee*, 22 W. R., 484. Where an application was filed and notice issued under this section, but nothing more was done: *Held*, the application was not granted within section 230, *ante*.—*Chengaya* vs. *Appasami*, I. L. R., 6 Mad., 172.

Application.—The judgment-creditor should ask for the execution of the decree, and not for the issue of a notice; it is the duty of the Court to issue the notice—*Gooroo Doss Aackholee* vs. *Modhoo*, 6 W. R., Mis., 98.

If Notice does not Issue.—Neglect to issue notice, if the judgment debtor dies after decree before attachment, vitiates all subsequent proceedings, at least when the rights of third parties have not been affected—*Romessuri Dassee* vs. *Doorgadass*, 7 C. L. R., 85; I. L. R., 6 Cal., 103; *Imamunnissa* vs. *Liakat Hossein*, I. L. R., 3 Alla., 424; *Sheo Prasad* vs. *Hira Lal*, I. L. R., 12 Alla., 440.

Waiver.—A judgment-debtor who appears in proceedings taken in execution cannot object that notice was not served upon him—*Grish Chunder* vs. *Bhanoo Motee*, 11 W. R., 329. As to where the objection can be taken, see the case of *Srihary Mundul* vs. *Murari*, I. L. R., 13 Cal., 257.

Proof of Service of Notice—It not unfrequently happens that after issue of notice under section 248, nothing further is done towards enforcement of the decree, and on a subsequent application to enforce the decree, the judgment-debtor takes advantage of the lapse of time, and, by denying due service of that notice, endeavours to put the decree-holder into a great difficulty to prove what may have escaped the recollection of the serving officer and those who may have witnessed the service. The Courts, however, have recognized this difficulty, and in the case of *Bimola Soonduree Dassee* vs. *Kalee Kishen*, 22 W. R., 5, it was held that a notice under section 216, Act VIII of 1859, corresponding to section 248, which it was the duty of the Court to issue, stood upon quite a different footing from a summons or other notice which a party is bound to serve, and a Judge is entitled to presume that the Court had issued notice, and it would lie upon the defendants to prove to the satisfaction of the Court that the notice did not in fact issue. And in the case of *Meer Lootf Ali* vs. *Aboo Bibee*, 15 W. R., 203, the report of the Nazir of due service of such a notice was held to be *primâ facie* evidence of the truth of the facts stated therein.

Enforcement against the Legal Representative of a Judgment-Debtor.—See sections 234, *ante*, and 252, *post*.

Previous Application.—A previous application which is pending must be looked upon as a continuous proceeding until it is disposed of—*Shurat Chunder* vs. *Abdoolt Khyr*, 23 W. R., 327. A decree in a regular suit brought by a judgment-creditor against his judgment-debtor and a third party under the provisions of section 246, Act VIII of 1859, was held not to be an order "passed on a previous application" within the meaning of Act VIII of 1859, section 216—*Peary Soonduree* vs. *Bhubo Soonduree*, 23 W. R., 31. See "STRUCK OFF," section 230, *ante*.

High Court.—An order for excution under this section or section 245, and made after notice to shew cause, has, on the Original Side of the High Court, the same effect of reviving the judgment as the *scieri facias* formerly had—*Ashootosh Dutt* vs. *Doorga Churn*, I. L. R., 6 Cal., 504; see, however, *Tincowrie* vs. *Debendro*, I. L. R., 17 Cal., 491; I. L. R., 7 Mad., 540.

Appeal.—If the suit in which notice issues is of a Small Cause Court nature, there is a first appeal to the District Judge—*Perumal* vs. *Vankatarama*, I. L. R., 11 Mad., 130.

Procedure after issue of notice.

249. If the person to whom notice is issued under the last preceding section does not appear, or does not shew cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

If he offers any objection to the enforcement of the decree, the Court shall consider such objection and pass such order as it thinks fit.

Act VIII of 1859, section 217. This section applies to H. C. and P. S. C. C.

Irregularity —The person against whom a notice under section 248 is issued and served is bound to appear and show cause against it, if he has any valid ground for objected to the execution against himself. In a case under section 216, Act VIII of 1859, corresponding to section 248, it was held that proceedings taken in execution after notice could not be treated as void, and the High Court refused to interfere in exercise of its extraordinary power under section 15 of the Charter Act—*Cochrane* vs. *Brojo Soonduree*, 23 W. R., 310; 14 B. L. R., 330.

Verification.—A petition of objection showing cause under this section need not be verified—*Sunt Gopal Chunder* vs. *Jugut Indur*, 8 W. R., 200; 4 Wy., 91.

Practice —When a petition of objection is presented under this section, the Judge is bound, whether a day for hearing has been fixed or not, to fix a day for consideration of it; and (even if the petitioner is not present, either personally or by a pleader) to consider those objections, and to pass such orders as may be just and proper, for it might be that the ground of objection raised would be of such a nature as that the Judge might, *primâ facie*, and without going further into the case, see reason for not proceeding with the execution *Raj Bullub Shaha* vs. *Ram Sudoy*, 14 W. R., 155; 5 B. L. R., App. 65.

Warrant when to issue.

250. When the preliminary measures (if any) required by the foregoing provisions have been taken, the Court, unless it sees cause to the contrary shall, subject to the provisions of section 245A and 245B, issue its warrant for the execution of the decree.

Act VIII of 1859, section 221. This section applies to H. C. and P. S. C. C.
The words between "shall" and "issue" have been introduced by Act VI of 1886, section 3.
Where the previous warrant has been unfructuous without any fault on the part of the judgment-creditor, the Court should not refuse to issue a warrant for the attachment of the person of the debtor—*Seton* vs. *Bijohu*, 8 B. L. R., 255. See also section 230, *ante*

Date, signature, seal and delivery.

251. Such warrant shall be dated the day on which it is issued, signed by the Judge or such officer as the Court appoints in this behalf, sealed with the seal of the Court, and delivered to the proper officer to be executed.

And a day shall be specified in such warrant on or before which it must be executed, and the proper officer shall endorse thereon the day and manner in which it was executed, or, if it was not executed, the reason why it was not executed, and shall return it with such endorsement to the Court from which it issued.

Act VIII of 1859 section 222. This section applies to H. C. and P. S. C. C.

Signed by the Judge.—As to the result if the warrant is not signed by the Judge, see *Ram Dayal* vs. *Mahtab Sing*, I. L. R., 7 Alla., 507.

Arrest —An officer cannot arrest without having the warrant in his possession—*Empress* vs. *Amar Nath*, I. L. R., 5 Alla., 318; but he cannot object to serve it on the ground that it has not been signed; but only initialled—*Queen Empress* vs. *Janki*, I. L. R., 8 Alla., 293.

Proof of Execution.—The receipt of a Chowkeedar or the report of a Nazir executing a process in execution of a decree is not evidence *per se*, but must be proved like other documentary evidence—*Okhoy Chunder* vs. *Erskine & Co.*, 3 W. R., 11 Mis.; *Shah Koondun Lall* vs. *Noor Ali*, 10 W. R., 3; *Mohunt Megh Lall* vs. *Shib Pershad* I. L. R., 7 Cal., 34.

If the Court be a Court to which the decree has been sent for execution, it "shall certify to the Court which passed it, the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure"- Section 223, *ante*.

Decree against representative of deceased for money to be paid out of deceased's property.

252. If the decree be against a party as the legal representative of a deceased person, and the decree be for money to be paid out of the property of the deceased, it may be executed by the attachment and sale of any such property.

If no such property remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.

Act VIII of 1859, sections 203, 210. This section applies to H. C. and P. S. C. C.

This section primarily refers to a party who has been substituted before decree for the original debtor, but it is equally applicable to a person who has been made a party in the execution-proceedings—See section 647, *infra*, and *Jafur Hossein* vs. *Hingun Jan*, 8 W. R., 161; but where a suit was brought and a decree obtained against a man who had died before the filing of the plaint, no execution was allowed to issue against his legal representatives—Petition of *Girindronath Tagore*, 14 B. L. R., 334, *note*. The Court will not give a decree against parties as representatives of a deceased debtor where the suit is brought not on the ground that the defendants are the legal representatives, but on the ground that they have property of the deceased in their possession—*Heera Lall* vs. *Digumburee Kuloonee*, 14 W. R., 431; 6 B. L. R., App. 100.

Legal Representative.—This includes the heir of an intestate—*Greender Chunder Ghose* vs. *Mackintosh*, 4 C. L. R., 210. See the second paragraph of section 366, *post*.

It is necessary that the party against whom the decree is passed should be the legal representative who has succeeded to the property of the deceased debtor; see also *Baswantapa* vs. *Banu*, I. L. R., 9 Bom., 86; *Sukh* vs. *Rennick*, I. L. R., 4 Alla., 192; unless the legal representative has put forward another as representative and is precluded from disputing the decree—*Baswantapa* vs. *Banu*, I. L. R., 9 Bom., 86; *Subbanna* vs. *Venkatakrishna*, I. L. R., 11 Mad., 408. Thus where a decree was given against one of two separate Hindu brothers as representative of the other who had died leaving a widow, it was held that execution could not be had against the property of the deceased in the hands of the widow, on the ground that the widow and not the brother was the legal representative—*Natha Hari* vs. *Jamni*, 8 Bom., 37. And where a decree was given against the widow of a deceased member of a joint Mitakshara family as his representative, it was held that execution could not be had under it against the property of the deceased, which has passed to the other members of the family by survivorship—*Sadabart Prasad* vs. *Phoolbash Kooer*, 3 B. L. R. (F. B.), 31; see also *Baswantapa* vs. *Banu*, I. L. R., 9 Bom., 86.

A person taking possession of the estate of a deceased Hindu, leaving a will, of which probate has not been granted, may be treated as a legal representative until probate is taken—*Prosunno Chunder Buttacharjea* vs. *Kristo Chytunno Pal*, I. L. R., 4 Cal., 342. But this case might have been decided on the principle laid down in 1 Moore, 442, 444.

Several Representatives.—See as to the difference between Hindu and Muhammadan law—*Jutadhari Lal* vs. *Raghoobeer*, I. L. R., 9 Cal., 508.

How Described.—Where a suit is brought under this section against the representative of a deceased person, the defendant should be described as stated in section 50, *ante*, and the plaint should contain an allegation that he is the representative of such deceased

person, and that the suit is brought against him as defendant on that account, and if the particulars in the plaint are made out, a decree will be passed against him—*Ameeroonissa* vs. *Meer Mahomed*, 20 W. R., 280; followed in *Janaki* vs. *Dhanu*, I. L. R., 14 Mad., 454; but see *Baswantapa* vs. *Banu*, I. L. R., 9 Bom., 86.

Irregular Description.—See *Bissessur Lall* vs. *Luchmessur Singh*, 6 Ind. App., 233; *Deva Singh* vs. *Ram Manohar*, I. L. R., 2 Alla., 747; *Jumoona* vs. *Dig Narain*, I. L. R., 10 Cal., 1.

Liability of.—The decree must in the first instance be executed or be attempted to be executed against the property of the deceased "in the hands of the representative"—*Shurfun Beebee* vs. *Collector of Sarun*, 10 W. R., 199. The private property of the representative cannot be attached and sold until it is shewn on the execution-proceedings that he has received assets of the deceased, of which he fails to prove a proper disposition—*Wahed Ali* vs. *Jumaee*, 18 W. R., 185; *Indro Narain* vs. *Kristo Chunder*, 14 W. R., 362; *Ameeroonissa* vs. *Meer Mahomed*, 20 W. R., 280; *Mooktakeshee Debia* vs. *Wooma Churn*, 12 W. R., 233. If he is proved to have received or if he has admitted assets, which he may do by implication (*e.g.*, by asking time to pay the amount of the decree—*Ghotta Sahyee* vs. *Gour Monee*, 21 W. R., 117,) and fails to account for their value, execution may be had by attachment and sale or by imprisonment, as in the case of any ordinary debtor—*Wahed Ali* vs. *Jumaee*, 18 W. R., 185; *Mahatab Chunder Bahadoor* vs. *Munmohinee Dossee*, 12 W. R., 517, whether the debt for which the decree was passed became due before or after the death of the debtor—*Mooktakeshee Debia* vs. *Wooma Churn*, 12 W. R., 233.

He is bound only to pay the full value of the assets which he received in that capacity, and if he has properly done so even though he may still hold property which originally belonged to the deceased judgment-debtor, the decree can no longer be executed. If a decree be passed against a person in his representative capacity, and he makes payments in satisfaction thereof, it is a legal and reasonable presumption, until the contrary is proved that such payments were made by him in that capacity in which alone he was liable to make them,—*i.e.*, in his capacity as representative - *Ram Golam* vs. *Ayma Begum*, 12 W. R., 177. See also *Jafur Hossein* vs. *Hingum*, 8 W. R., 161.

Personal.—Certain decrees against a deceased judgment-debtor are, however, only personal decrees. For instance, a decree to give accounts within a certain time, with an alternative in the shape of the payment of a sum of money in the event of refusal or neglect to do so, is a personal decree: and when the judgment-debtor has survived the period during which the amount was to be given, and no proceedings are taken against him either then or subsequently, the decree cannot be executed against his representative —*Bidhoo Mookee Dassee* vs. *Bajoy Keshu*, 12 W. R., 495.

Purchases from. — The legal representative of a deceased judgment-debtor is responsible, not for the property which came into his hands in such capacity but for its value. He can sell any such property to a third party, and a creditor cannot follow it into the hands of one who has purchased it in good faith, and for valuable consideration. The decree-holder can only make the legal representative personally liable for the debt to the extent of the assets he received—*Unno Poorna* vs. *Gunga Narain*, 2 W. R., 296; *Land Mortgage Bank* vs. *Bidyadhari*, 7 C. L. R., 460; *Land Mortgage Bank* vs. *Roy Luchmiput*, 8 C. L. R., 447; but if the purchaser is affected by a *lis pendens*, or a creditor's notice, the purchase is subject to the demand—*Bazayet Hossein* vs. *Mahomed*, I. L. R., 4 Cal., 402; 5 Ind. App., 211; *Narsing Dass* vs. *Najmooddin*, I. L. R., 8 Cal., 20; *Ramdhun* vs. *Mohesh Chunder*, I. L. L., 9 Cal., 406.

Judgment-Creditors.—Section 282 of the Indian Succession Act does not, in cases to which that Act applies, prevent a person who has obtained a decree under this section from having the whole of his decree satisfied out of the assets of the deceased, as far as they go, to the exclusion of other parties who have claims against it admitted to be correct, but who have not obtained decree—*Nil Komul Shaw* vs. *Reed*, 17 W. R., 513.

If no such Property remains in the Possession of the Judgment-Debtor. —These words confine the section to property remaining in the possession of the legal representative, and the creditor must follow property improperly alienated in a regular suit—*Greender Chunder* vs. *Mackintosh*, 4 C. L. R., 210.

Assets: Service Tenure.—Ghatwali lands are not liable to be seized in execution of a decree against the father as property by descent in the hands of his son—*Nilmoni Singh* vs. *Bakranath*, 9 Ind. App., 104; otherwise in Khurakpore, *Anundo Rai* vs. *Kali Prosad*, I. L. R., 10 Cal., 677; I. L. R., 15 Cal., 471. See also *Radhabai* vs. *Anantrav*, I. L. R., 9 Bom., 198.

Husband and Father's Debt.—There are, however, some cases in which a decree passed against a representative for a debt due by the deceased may be executed against property, which was passed to some one other than the representative who is sued, but is in the latter's possession. Thus, where a Hindu died, indebted on a bond, leaving a widow and a minor son, and a decree was obtained on the bond against the widow,

plaintiff having alleged that she was the guardian of the minor son, as was the case, it was held that a sale in execution of this decree, of the right, title and interest of the "debtor" carried the interest of the deceased, and not that of the widow, which was nothing—*Ishan Chunder* vs. *Buksh Ali*, Marsh., 614; W. R. (F. B.), 119, explained in *Baijun Dobey* vs. *Brij Bhookun*, I. L. R., 1 Cal., 133; L. R., 2 Ind. App., 275; *Sotish Chunder* vs. *Nil Comul*, I. L. R., 11 Cal., 45; *Hari Saran* vs. *Bhubaneswari*, I. L. R., 16 Cal., 40; *Jugol Kishore* vs. *Jotendro Mohun*, 11 Ind. App., 66. But where the decree is a personal decree, the purchaser cannot go behind it, and the sale-proceedings to show that the sale was not confined to her limited interest—*Radha Mohun* vs. *Soshi Bhoosun*, 3 C. L. R., 530; and where the decree did not describe the debt as that of the father, but simply that defendant was to pay it, and the widow was described in the plaint as "widow of Anund Mohun Surma Roy, deceased and mother of Denobundo and Bepin Chunder Roy, minors," it was held that the execution-sale did not pass the minors' interest or estop the widow as their heir from obtaining the property—*Alakmoni Debi* vs. *Banimadhab*, 3 C. L R., 473. Where a widow was sued as guardian of her minor son for a debt due by her husband, and a decree obtained against her as representative in possession, and ostensible owner of her husband's property, it was held that a sale under that decree nominally of the widow's interest, carried the interest of the deceased, the sale-certificate referring to the decree—*Court of Wards* vs. *Ramaput Singh*, 14 Moore, 605; 10 B. L. R., 294; 17 W. R., 459; but where a Hindu defendant died leaving a widow and a minor son, and the suit was continued against the widow, not as guardian of her son, and after the widow's death against sister of the defendant, who was not appointed guardian *ad litem* to the minor, or administrator of his estate, it was held that the minor was not bound by the decree—*Jatha Naik* vs. *Venktapa*, I. L. R., 5 Bom., 14.

Where, in Bengal, the heir is a widow, the test to be applied in determining whether a decree against her binds the reversioners is whether it was brought against the widow upon a cause of action personal to herself, or one which affects the estate of the reversioner—*Jotendra Mohun* vs. *Jogul Kishore*, I. L. R., 7 Cal., 357; *Gadgeppa* vs *Apaji*, I. L. R., 3 Bom., 237; *Ramasami* vs. *Mudaliar*, I. L. R., 4 Mad., 375; and also *Ramcoomar Mitter* vs. *Ichamoyi*, I. L. R., 6 Cal., 36; *Kristo Gobind* vs. *Hem Chunder*, I. L. R., 16 Cal., 511; *Sotesh Chunder* vs. *Nil Comul*, I. L. R., 11 Cal., 45; *Hurry Mohun* vs. *Gonesh Chunder*, I. L. R., 10 Cal., 822. And the question must be decided upon the decree and the record of the sale-proceedings—*Radha Mohun* vs. *Soshi Bhoosun*, 3 C. L. R., 530. The cases are not uniform. Thus some of the cases last cited profess to follow that of *Ishan Chunder Mitter* in Marsh., 614, but whether they do so is very doubtful; they are certainly opposed to the cases previously cited in this note, and to *Ramasami Chetti* vs. *Saluckai*, 8 Mad., 186, where it was held that proceedings against the widow alone of a deceased mortgagor in execution of a decree, obtained against the mortgagor (the widow having merely a right to maintenance) were not effectual to pass any right or interest in the property mortgaged to the purchaser at an execution-sale. See also *Subbanna* vs. *Venkata Krisna*, I. L. R., 11 Mad., 408; *Baswantapa* vs. *Ranu*, I. L. R., 9 Bom., 86.

Mahomedan—A decree passed against one heir does not bind the rest—*Sitanath Dass* vs. *Roy Luchmiput*, 11 C. L. R., 268. So where a Mahomedan died leaving a widow and two daughters and a decree was obtained against one of the daughters as representative of her deceased father for a debt due partly by herself and partly by her father, it was held that a sale under that decree carried only the share of the daughter against whom the decree was passed—*Hendry* vs. *Mutty Lall Dhur*, I. L. R., 2 Cal., 395; and see *Lutchmiput* vs. *Land Mortgage Co.*, I. L. R., 14 Cal., 464. And where a decree was obtained against a Mahomedan widow for a debt due by her husband who had died leaving a widow and a minor daughter, it was held (though the point was not directly before the Court) that the daughter was not bound by the decree—*Hamir Singh* vs. *Mussamut Zakai*, I. L. R., 1 Alla., 57; *Jafri Begam* vs. *Amir Muhammad*, I. L. R., 7 Cal., 822; but see *Khurshetbibi* vs. *Keso*, I. L. R., 12 Bom., 101. See also on this point, *Sham Coomar Roy* vs. *Juttun Bibee*, 14 W. R., 448; *Rajah Raj Kristo Singh* vs. *Bungshee Mohun Bibee*, 14 W. R., 448, *note*; *Hukum Bibee* vs. *Gowhur Ali*, 5 Wy., 27; and the cases in 15 B. L. R., 134. So also where a decree by consent was obtained against some of the heirs of a Mahomedan for a debt due by him, the decree only bound those who were parties to it — *Assamathem Nessa* vs. *Roy Luchmiput Singh*, I. L. R., 4 Cal., 143; explained in *Jutadhari Lal* vs. *Rughobeer*, I. L. R., 9 Cal., 508; *Shaikh Abdulla* vs. *Haji Abdulla*, I. L. R., 5 Bom., 8; see, however, *Motijan* vs. *Mesrigan*, 10 C. L. R., 347; I. L. R., 8 Cal., 370; *Khurshetbibi* vs. *Keso*, I. L. R., 12 Bom., 101, and compare *Jafri Begam* vs. *Amir*, I. L. R., 7 Alla., 822.

A sale of the widow's interest in the property of a deceased Mahomedan, under a decree obtained against her for a debt of her husband, the sale notification referring to the decree, was held to carry the interest of the deceased—*Mussamut Nuzerun* vs. *Moulvie Ameerooddeen*, 24 W. R., 3.

Appeal.—Under section 11, Act XXIII of 1861, an appeal lay from orders passed against a representative under section 203, Act VIII of 1859 (the section corresponding to the present one)—*Ameeroonissa* vs. *Meer Mahomed*, 20 W. R., 280; and it is under the present Code.

253. Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant :

Decree against surety.

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.

Act VIII of 1859, section 204. This section applies to H. C. and P. S. C. C.

This section applies to arrest and attachment before judgment which are regulated by sections 483—490, *post*, and to cases where a plaintiff may be called upon to give security for costs—See *Ram Coomar* vs. *Chunder Canto*, 4 Ind. App., 23; I. L R., 2 Cal., 233; and according to the High Courts of Allahabad, Bombay, and Madras, extends to all suretyships for the due performance of the appellate decree — *Bans Bahadur Singh* vs. *Mogla Begum*, I. L. R., 2 Alla , 604 ; *Tenkapa Naik* vs. *Baslingapa*, I. L. R., 12 Bom., 411 ; *Thirumalai* vs. *Ramayyar*, I. L. R., 13 Mad., 1 ; but see *Chandan Kuar* vs. *Tirkha Ram*, I. L. R., 3 Alla., 809 ; but this view has been dissented from in Bengal—*Radha Pershad* vs. *Phuljuri*, I. L. R., 12 Cal., 402 ; *Kali Churn* vs. *Balgobind*, I. L. R., 14 Cal., 497 ; see also *Chunder Canto Mookerjee* vs. *Ram Coomar Coondoo*, C. L. R., 505. In Madras, it has been held that this section only applies only to cases in which security has been given before decree—*Balaj* vs. *Ramesami*, I. L. R , 7 Mad., 285.

Appellate Decree.—As to how far the surety's liability may be modified by the decree of the Appellate Court—See *Shek Suleman* vs. *Shivram*, I. L. R , 12 Bom., 71.

This section gives an additional not an exclusive remedy against rety, and does not prevent the decree - holder from bringing a suit on the surety-b enforce the contract entered into—*Abdul Kadir* vs. *Huree Mohun*, 6 Alla., 261.

Decree.—The security must have been taken for the performance of the decree. And where the decree was varied by a private arrangement between the parties, and security was given to carry out the new arrangement, it was held that the surety was not liable under section 204, Act VIII, 1859—*Chundee Deen* vs. *Hussun Ali*, 3 Alla., 88.

Practice.—Where a surety objects to his liabilities being enforced under this section on the ground that he became surety after the decree, he should object under section 278, *post*, and not under section 312, *post*—*Hub Lal* vs. *Kanhia Lal*, I. L. R., 7 Alla., 365.

Security for Costs.—See sections 549, 610 as amended by Act VII of 1888.

Appeal.—An appeal lies from an order enforcing a claim against a surety under this section—*Shek Suleman* vs. *Shivram*, I. L. R., 12 Bom., 71.

254. Every decree or order directing a party to pay money, as compensation or costs, or as the alternative to some other relief granted by the decree or order, or otherwise, may be enforced by the imprisonment of the judgment-debtor, or by the attachment and sale of his property in manner hereinafter provided, or by both.

Decree for money.

Act VIII of 1859, section 201. This section applies to H. C. and P. S. C. C.

A Court should, as a rule, execute the decree as applied for by the decree-holders (see section 244, *ante*, and *note*), but it may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor—section 230, para. 2, or in a money-suit call upon the debtor to show cause why he should not be imprisoned—section 245B, and cannot arrest a woman on a money-decree—section 245A.

For costs, see sections 218—222, and notes thereunder.

Ordering a Party to pay Money.—A decree for maintenance to be paid at certain rate per month, stands on the same footing as a decree ordering payment by instalments, and may be executed from time to time as the instalments fall due — *Pearee-nath Brohmo* vs. *Juggessuree*, 15 W. R., 128.

Rent.—A mere decree for rent against a patnidar may be executed as a decree to pay money—*Tarini Prosad* vs. *Narayan*, I. L. R., 17 Cal., 301.

Alternative to some other Relief—That is, if the decree be for the delivery of moveable property, it shall also state the amount of money to be paid as an alternative if delivery cannot be had—section 208.

"**Otherwise.**"—This would include interest on the amount of the decree or on the costs—See section 209. The Court executing a decree is bound to execute it as it stands, and to adjudge interest or costs where the decree is silent on these points—*Forester* vs. *The Secretary of State*, 4 Ind. App., 137. See same case at p. 146 regarding payment of interest on money paid under an erroneous order of the first Court, the refund of which, in reversal of that order, was ordered by the Appellate Court; and see *Rodger* vs. *Comptoir d' Escompte de Paris*, L. R., 3 P. C., 465, 475. The Privy Council held in these cases that where money had been erroneously paid, interest should be allowed in the order of refund, so that the parties might be placed in the same position that they were before the erroneous order, but that in granting costs it was discretional with a Court to allow interest.

Attachment.—A sale is void unless the property has been properly attached—*Mahadeo* vs. *Bhola Nath*, I. L. R., 5 Alla., 87, (but see the case of *Olphels* vs. *Mahabi Prosad*, 10 Ind. App., 25, p. 29), unless it is under a decree for sale—*Dayachand* vs. *Hemchand*, I. L. R., 4 Bom., 515, and the cases referred to under section 312, *post*.

Imprisonment—As to the power of the High Court to commit for contempt, see *Martin* vs. *Lawrence*, I. L. R., 4 Cal., 655; I. L. R., 7 Bom., pp. 1, 9; I L. R., 8 Bom., 387; 10 Ind. App., 171.

Insolvent.—See *Tookee Bibee* vs. *Abdool Khan*, I. L. R., 5 Cal., 536, *Samarpuri* vs. *Parry*, I. L. R., 13 Mad., 150.

Wrongful.—A suit to recover damages on account of injuries caused by an arrest in accordance with a decree of a competent Court, can only be maintained when the original suit has been finally decided in favour of the plaintiff, when the arrest was made without reasonable or probable cause, and the injury he has suffered cannot be compensated by costs—*Raj Chunder* vs. *Shama Soondari*, I. L. R., 4 Cal., 583.

Decree for mesne profits or other matter, amount of which to be subsequently ascertained.

255. If the decree be for mesne profits or any other matter, the amount of which in money is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money.

This section applies to H. C. and P. S. C. C.

It is in accordance with the judgment in *Sharoda Moyee* vs. *Woma Moyee*, 8 W. R., 9.

In a suit for damages for mesne profits against several defendants, each of whom has taken possession of a distinct portion of a share, the damages may be apportioned amongst them; otherwise where the defendants have taken joint possession—*Krishna Mohun* vs *Kunjo Behari*, 9 C. L. R., 1.

Execution for mesne profits should not be allowed to issue against a *pro forma* defendant—*Monajan* vs. *Kashi Nath*, 5 C. L. R., 305.

The actual occupiers, as well as the lessors, will be held liable for mesne profits—*Mudun Mohun* vs. *Ram Dass*, 6 C. L. R., 357.

Decree Binding.—Where a decree declared a person entitled to mesne profits from A, but the amount was not ascertained during A's lifetime: *Held*, A's representatives were not liable unless they were made parties to the suit defining the liability—*Radha Prasad* vs. *Lal Sahab*, I. L. R., 13 All., 53, p. 65.

Power to direct immediate execution for decree for money not exceeding Rs. 1,000.

256. When a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one thousand rupees, the Court may, when passing the decree, on the oral application of the decree-holder, order immediate execution thereof by the issue of a warrant directed

either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court, or against his moveable property within the same limits.

Act XXIII of 1861, section 13. This section applies to H. C. and P. S. C. C.

It should be noted that, under this section, application for immediate execution of the decree passed cannot issue *simultaneously* against both the person and property of the judgment-debtor, nor against any property, except his moveable property within the local limits of the jurisdiction of the particular Court.

Moveable Property.—Tiled huts are not moveable property, and cannot be seized in execution under this section — *Nattoo Meah* vs. *Nund Ranee*, 17 W. R., 309 8 B. L. R., 508.

Privilege.—When a debtor attended at the Small Cause Court as a witness under a subpœna in a suit which was fixed for trial on that day, it was held that he was privileged from arrest while going to the Court, staying there, and returning from it—*In the matter of Omirtolall Dey*, I. L. R., 1 Cal., 78; and this is the general rule. See also *In re Soorendronath Roy*, I. L. R., 5 Cal., 105; *In re Seva Bux*, I. L. R., 4 Mad., 317; *In re Juggessur Roy*, 5 C. L. R., 170. But where a warrant is directed against the person under this section, the arrest may take place at any time and the debtor can claim no privilege—*De Penning* vs. *Debendronath Moitro*, 9 W. R., 549.

Modes of paying money under decree.

257. All money payable under a decree shall be paid as follows (namely):—

(*a*) into the Court whose duty it is to execute the decree; or

(*b*) out of Court to the decree-holder; or

(*c*) otherwise as the Court which made the decree directs.

Act VIII of 1859, section 206. This section applies to H. C. and P. S. C. C.

Part-payment into Court does not keep the decree alive—*Kally Prosunno Hazra* vs. *Heera Lall*, 1 Shome, 13.

Costs.—Costs ordered to be paid under section 218, *ante*, are not paid under a decree and should be paid under that section—*Shanks* vs. *The Secretary of State*, I. L. R., 12 Mad., 120.

Agreement to give time to judgment-debtor.

257A. Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

Agreement for satisfaction of judgment-debt.

Every agreement for the satisfaction of a judgment-debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.

Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt; and the surplus, if any, shall be recoverable by the judgment-debtor.

Jurisdiction.—The Court to which a decree has been transferred for execution cannot pass an order under this section—*Gandharap* vs. *Sheodarshan*, I. L. R., 12 Alla., 571.

Applies—This section applies only to agreements between parties to the suit or decree—*Ramji* vs. *Mahomed*, I. L. R., 13 Bom., 671.

Object of this Section.—This section is only intended to prevent any binding agreement between the judgment-debtor and judgment-creditor for extending the time for enforcing decrees by execution, and does not prevent the parties from entering into a fresh contract for the payment of the debt in instalments or in any other way—*Jhabar Mahomed* vs. *Modan*, I. L. R., 11 Cal., 671, or to give time for such payment, or for the payment of a larger sum than may be covered by the decree if it be for a proper consideration—*Hukum Chand* vs. *Taharunnessa*, I. L. R., 16 Cal., 504, and the cases there mentioned; and presupposes the existence of a decree which is be executed—*Srripatrav* vs. *Govind*, I L. R., 14 Bom., 390.

A obtaining one decree against B and C, and another against B alone, took, without sanction, a bond from B for the amount of both decrees: It was held to be void —*Ganesh Shivram* vs. *Abdulla*, I. L. R., 8 Bom., 538, and an agreement to pay the sum decreed and interest not decreed is void—*Davlatsing* vs. *Pandu*, I. L. R., 9 Bom., 176, otherwise in Bengal—*Jhabar Mahomed* vs. *Modhan*, I. L. R., 11 Cal., 671. As to the difference between the Bombay and Calcutta High Courts on the meaning of this section, see *Swamirao* vs. *Kashinath*, I. L. R., 15 Bom., 419. See "UNDER A DECREE," section 258, *post*.

Before this section was enacted it was held that a Court could not execute a decree on the footing of a kistbundi, but only the original decree—*Madhub Chunder* vs. *Madhub Lall*, 15 W. R., 542; see *Ameerunnissa* vs. *Meer Mahomed*, 2 C. L. R., 143; and the same opinion was expressed by Markby, J., in *Ram Runjan Chuckerbutty* vs. *Rajah Jowhurrenaib Khan*, 23 W. R., 129, nor take notice of any compromise in execution—*Debi Ray* vs. *Gokul Prasad*, I. L. R., 3 Alla., 585. There were, however, decisions to the contrary, founded upon cases in the English Courts, in which a Judge by consent decided facts which ought to be disposed of by a jury—*Bickett* vs. *Morris*, L. R., 1. H. L., 47; *Stewart* vs. *Forbes*, 1 Mac. & G., 145; *Morris* vs. *Davies*, 5 Cl. & F., 163; and instead of dismissing a suit, proceeded on consent to decide the adverse claims of the defendants, even though some of them were minors—*Pisani* vs. *Attorney-General of Gibraltar*, L. R., 5 P. C., 516. In the case of *Sadasiva Pilla* vs. *Ramalinga Pillai*, 2 Ind. App., 219, their Lordships of the Privy Council following these decisions declared that a party could by his acts or words equitably estop himself from denying that he was not bound to pay mesne profits under a decree, and that they were in nowise pressed by the decision of Justice Markby referred to above, and reported at 4 B. L. R., 113. See also *Lakshmana* vs. *Sukiya*, I. L. R., 7 Mad., 400. Looking at those two decisions of the Privy Council, it may be considered as decided that parties are bound by any agreement that the questions between them shall be dealt with in a manner contrary to the ordinary practice of the Court, if the Court has jurisdiction over the subject, and does not assume the duty of another tribunal. And so where a judgment debtor entered into an arrangement with his creditor to pay in instalments, and the parties acted on it, he was declared estopped from saying that the creditor was bound to execute the original decree, or bring a suit on the kistbundi—*Dinonath Sen* vs. *Gooroo Churn*, 21 W R., 310. And where an instalment bond was executed without objection in the Lower Courts, the High Court refused to entertain any such objection in special appeal—*Khedo* vs. *Kalee Sahoo*, 12 W. R., 71.

SANCTION.—As regards the time to sanction, see *Naru* vs. *Chima*, I. L. R., 13 Bom., 54.

Sureties.—If the original contract is indivisible and wholly void, sureties are not bound—*Davlatsing* vs. *Pandu*, I. L. R., 9 Bom., 177; *Vishnu* vs. *Hur Patel*, I. L. R., 12 Bom., 499; but see the case of *Yella* vs. *Munisami*, I. L. R., 6 Mad., 101.

How Enforced.—The new agreement can be executed as a decree—*Sita Ram* vs. *Dasrath*, I. L. R., 5 Alla., 492; *Sham Karan* vs. *Piari*, I. L. R., 5 Alla., 596; *Champut Rai* vs. *Pitambar Dass*, I. L. R., 6 Alla., 16; *Makund Ram* vs. *Makund Ram*, I. L. R., 6 Alla., 228; *Yella* vs. *Munisami*, I. L. R., 6 Mad., 101; *Muhammad* vs. *Shukki*, I. L. R., 11 Alla., 228; see also *Lakshmana* vs. *Sukiya*, I. L. R., 7 Mad., 400; not so unless it is an instalment decree—*Ramlakhan* vs. *Bakhtaur*, I. L. R., 6 Alla., 623.

Appeal.—An appeal lies from an order passed under this section—*Ranji* vs. *Baiji*, I. L. R., 11 Bom., 57.

Limitation.—Is under Art. 178 of the Limitation Act, and runs from date of default—*Sham Karan* vs. *Piari*, I. L. R., 5 Alla., 596; *Champut Rai* vs. *Pitambar Das*, I. L. R., 6 Alla., 16.

Payment to decree-holder.

258. If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of

the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in section 267A, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree.

The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after due service of such notice, the decree-holder fails to appear on the day fixed, or having appeared fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree.

Act VIII of 1859, section 201. This section applies to H. C. and P. S. C. C. The last paragraph has been inserted by Act VII of 1888, section 27.

Object of the Section.—This section does not govern payments made in execution of decrees passed under Act X, 1859, in the Revenue Courts—*Ram Chunder* vs. *Ram Churn*, 9 W. R., 372; *Protab Chunder* vs. *Kanaye Lall*, 3 W. R., Act X, 7.

Money-Decree.—It is not limited to money-decrees. In execution of a decree, by which the decree-holder was declared entitled to a specific share of land to be allotted on partition, it was objected by the judgment-debtor that the decree-holder had already obtained possession and had granted him a lease of the land covered by the decree: *Held*, that this section prevented the Court from entertaining the objection—*Baba Mahomed* vs. *Webb*, 8 C. L. R., 36; I L. R., 6 Cal., 786.

Surety.—This section does not apply to the case of a surety, who having paid the amount due under a decree afterwards sues the principal—*Balaji* vs. *Dada*, I. L. R., 12 Bom., 235.

Under a Decree.—This section presupposes that there is a decree in existence. A sued B and obtained a decree, which was reversed in the first Appellate Court. B was about to file a special appeal when A compromised the case, and gave up the property. It was held that the compromise, having been effected after the decree in favour of B had been reversed, it need not have been certified to the Court—*Hari Sadashiv* vs. *Bapu*, 5 Bom., 78.

By section 210, *ante*, the Court may, within six months from the date of passing the decree (Act XV of 1877, art. 75), and with the consent of parties, direct that the amount payable under a decree for the payment of money be paid by instalments, and the modified decree may be executed in the usual manner; but if the parties enter into any other compromise, so as to extinguish the decretal demand, the agreement cannot be enforced in execution, but only by a regular suit—*Pran Kristo* vs. *Sujeeun*, 18 W. R., 279; unless it has been sanctioned under section 257, *ante*, or it has been filed, and the judgment-debtor has, by treating it as a decree for a long time, precluded himself from raising any objection to its execution—*Dinonath Sen* vs. *Guru Churn*, 14 B. L. R., 287; 21 W. R., 310; and cases cited.

Instalment Decree.—See section 210, *ante*.

Oral Evidence.—The creditor may give oral evidence of payments out of Court of instalments not certified, in order to defeat the plea of limitation—*Za'ur Khan* vs. *Bakhtawar*, I. L. R., 7 Alla., 327; *Sham Lal* vs. *Kunahia Lal*, I. L. R., 4 Alla., 316; (not so—*Mitthu Lal* vs. *Khairati Lal*, I. L. R., 12 Alla., 569,) or in a suit to set aside a sale held on the ground that the decree was satisfied—*Pat Dasi* v. *Sharup Chand*, I. L. R., 14 Cal., 376, or in a suit for the amount paid—*Balaji* vs. *Dada*, I. L. R., 12 Bom., 235, or in a criminal proceeding against the judgment-creditor for fraudulently executing a satisfied decree—*Queen-Empress* vs. *Pillala*, I. L. R., 9 Mad., 101.

Into Court.—Payments into Court were not confined under section 206, Act VIII of 1859, to such payments as were made into the Court itself; but were interpreted to

cover payments to the officer of the Court under the authority of the Court's process. Thus, where a warrant issued to an officer, directing him to arrest the debtor, unless he paid a certain amount, it was held that the debtor was on payment entitled to the protection of that section—*Bidhoo* vs. *Keshub Chunder*, 9 W. R., 462; a similar case would now be dealt with under section 257 (*c*). When money is paid into Court by a judgment-debtor in satisfaction of the decree, the Court is bound to pay it over on the application of the decree-holder, and also to inform the judgment-debtor, when such information is required, what amount is still due under the decree—*Luchmun Pershad* vs. *Sreeram*, 21 W. R., 271; but if the payment is made by the debtor to prevent his arrest, it is not a voluntary payment, and he is entitled to be heard on whatever objections of law and fact he may desire to make, before the money is paid out. He is not restricted to the objections he may have stated when making the payment—*Prosunnonath* vs. *Binode Ram*, 13 W. R., 29; 4 B. L. R., App., 25.

Representatives.—Where the creditor is dead, his ordinary legal heirs should get the money. A decree-holder died, leaving a widow, a son's widow claiming power to adopt, a person claiming under a deed of gift: *Held*, the money should be paid to the widow, and the other parties left to regular suit—*Pearmonee*, Petitioner, S. D., Sum. Decs., Sept. 27, 1836.

Satisfaction by one Decree-holder.—Where there are several decree-holders, the Court should not recognise any payment out of Court unless it is certified to be for the benefit of all the decree-holders—*Taruck Chunder* vs. *Divendro Nath*, I. L. R., 9 Cal., 831, *Bebee Budhun* vs. *Hafezah*, 4 Cal. R., 70. As to the effect of payment or release by one joint-creditor, see section 231, *ante*.

Decree-holders shall Certify.—Payments or adjustments made out of Court must be, to give them validity, certified by all the decree holders, though if a payment is certified by the principal decree-holders, the other decree-holders should not be allowed to issue execution unless they should shew good cause, namely, that they did not know of the alleged payment, and if made, that it was to defraud them and that the judgment-debtor was privy to the fraud—*Nyna Kooer* vs. *Dooles Chand*, 22 W. R., 77; and so strongly has this doctrine been adhered to by the Courts that when the judgment-debtor stated that he had paid the creditor, who gave him a letter to his vakil to certify, and petitioned that the creditor might be called on to answer, his application was refused—*Thakoor Lall* vs. *Kanye Lal*, 7 W. R., 510. So where the decree-holder having realized a portion of his debt, gave the judgment-debtor a release, but without consideration, and a letter directing his vakil to certify, it was held that the release being without consideration had no legal effect; that the direction to the vakil to certify was not equivalent to certifying, and that there was no bar to execution—*Bhobun Mohun* vs. *Sadhoo Churn*, 15 W. R., O. C., 5; 6 B. L. R., 339; and see *Kunhi Moidin* vs. *Ramen*, I. L. R., 1 Mad., 203. So an uncertified sale of the decree, in execution under a Revenue Court decree, where the purchaser was not put on the record, did not bar execution by the decree-holder—*Barut Chunder* vs. *Nazir Ali*, 10 W. R., 354; though where an execution-creditor entered into a compromise with his debtor, and thereupon, but without certifying the terms of the compromise, petitioned for the release of the debtor, and he was so released, the High Court at Bombay refused to allow execution without an inquiry into the facts connected with the release—*Chango* vs. *Kalaram*, 4 Bom., 120; *Baksu* vs. *Govinda*, I. L. R., 4 Bom., 594, pp. 601, 607; and where a creditor while admitting the creation of a separate contract to satisfy a decree, asked that the decree be kept alive, and the existing attachment continued, it was held not to be a compliance with this section and execution was allowed—*Fateh Muhammad* vs. *Gopal Das*, I. L. R., 7 Alla., 424.

The decree-holder is not subject to any limitation, and may certify after any lapse of time—*Fakir Chand* vs. *Madan Mohan*, 4 B. L. R., 130; *Bhubaneswari Debi* vs. *Dinanath*, 2 B. L. R., 320; 11 W. R., 232. The ordinary way of certifying a payment or adjustment is by petition made by the decree-holder to the Court—*Saadoollah* vs. *Kalee Churn*, 12 W. R., 358; but it can also be certified on an application to execute the decree —See section 245 (*e*).

Not be Recognised.—The prohibition only extends to Courts executing decrees and not to Courts having to try the allegation of the parties on the merits—*Kalyan Singh* vs. *Kamta Prasad*, I. L. R., 13 Alla., 339; *Swamirao* vs. *Kashinath*, I. L. R., 15 Bom., 419, and "*Separate Suit*," *infra*.

Remedies of the Debtor.—*Certify.*—If the decree-holder does not certify, the debtor may apply within ninety days from the date of the adjustment—Art. 173, Act XV of 1877, to compel him to do so, and the Court, after hearing the parties and those persons who are acquainted with the facts of the case, may pass such orders as may seem proper—*Paresehut* vs. *Ragho*, 2 Alla., 48; *Chango* vs. *Kalaram*, 4 Bom., 120; the application can be made to the Court executing the decree—*Rajendronath* vs. *Chunno Mal*, I. L. R., 5 Cal., 448; and in a late case where the uncertified purchase of a decree by the legal representative of the judgment-debtor was not recognised as an adjustment

of the decree, it was held that a Judge in Chambers could take notice of the contract and compel the seller to execute a power-of-attorney in favour of the purchaser so as to enable the latter to appear and claim under section 295, *post*—*Mun Mohan Das* vs. *Vizba*, I. L. R., 13 Bom., 171; but an adjustment of a decree not certified by either party within the time limited by law (see Limitation Act, Sched. II, Art. 161) cannot be recognized as a bar to execution—*Chedumbara* vs. *Ratna Ammal*, I. L. R., 3 Mad., 113.

Separate Suit.—If the debtor fails, he can bring a separate suit to recover compensation for the money or other property given to the judgment-creditor—*Shadi* vs. *Ganga*, I. L. R., 3 Alla., 538; *Guni Khan* vs. *Koonjoo Behary*, 3 C. L. R., 414; *Malamma* vs. *Venkappa*, I. L. R., 8 Mad., 277; *Poromanand* vs. *Khepoo*, I. L. R., 10 Cal., 354; or if the creditor has purchased to set aside the sale—*Ishan Chunder* vs. *Indro Narain*, 12 C. L. R., 390; I. L. R., 9 Cal., 788; and he may do so even if the purchaser is a stranger—*Pat Dasi* v. *Sharup Chand*, I. L. R., 14 Cal., 376; not followed—*Mothura Mohun* v. *Akhoy*, I. L. R., 15 Cal., 557; or if an agreement not to sue has been entered into he may sue for an injunction restraining the creditor from execution—*Nubo Kishen* vs. *Debnath Roy*, 22 W. R., 194; or if the decree-holder has agreed not to execute for specific performance of the contract—*Nujeem Mullick* vs. *Erfan Mollah*, 22 W. R., 298; or for a declaration that the decree has been paid—*Poromanand* vs. *Khepoo*, I. L. R., 10 Cal., 354; *Bairagulu* vs. *Bapanna*, I. L. R., 15 Mad., 302; but in Bombay a suit would not, before the amendment by Act VII of 1888, lie to enforce an uncertified agreement of adjustment of a decree against a judgment-creditor—*Patankar* vs. *Devji*, I. L. R., 6 Bom., 146; *Haji Abdul Rahiman* vs. *Khoja Khaki*, I. L. R., 11 Bom., 6; *Hormusji* vs. *Burjorji*, I. L. R., 10 Bom., 155, and in Madras it was decided that a mortgage granted in satisfaction of a decree, which adjustment was not certified, could not be enforced—*Thirumalai* vs. *Sundara*, I. L. R., 11 Mad., 169, but this seems to have been doubted in *Sellamayyan* vs. *Muthan*, I. L. R., 12 Mad., 61.

Section 244.—If the compromise was induced by fraud, the Court can set it aside under section 244, *ante*, and deal with the decree as if it had no existence—*Paranjhe* vs. *Kanede*, I. L. R., 6 Bom., 148.

Restitution.—If the decree is set aside in appeal, the decree-holder must on motion make restitution even though the payment has not been certified—*Vasudev* vs. *Vishnu*, I. L. R., 11 Bom., 724.

Criminal Proceedings.—If the creditor fraudulently executes a satisfied decree, and does not enter the satisfaction in his application to execute under section 235, *ante*, he is liable under sections 193 and 210 of the Penal Code—*Queen-Empress* vs. *Bapuji*, I. L. R., 10 Bom., 288; *Madhub Chunder* vs. *Nobodeep*, I. L. R., 16 Cal., 126; and even though the application may be barred and action cannot be taken under this section, that does not vitiate the order of a Munsif, sending a case for inquiry under section 643, *post*—*Queen* vs. *Muttaraman*, I. L. R., 4 Mad., 325.

Shew Cause.—This means to allege and prove sufficient cause, and the Court is bound to hear the evidence adduced—*Rung Lal* vs. *Hem Narain*, I. L. R., 11 Cal., 166.

Step in Aid of Execution.—An application by a judgment-creditor to certify a payment out of Court is a step in aid of execution—*Tarini Das* vs. *Bishtoo Lal*, I. L. R., 12 Cal., 608; *Muhammad Husain* vs. *Ram*, I. L. R., 9 Alla., 9; *Sujan* vs. *Hira Singh*, I. L. R., 12 Alla., 399.

Appeal.—An order under this section is appealable under section 244, clause (*e*), *ante*—*Rangji* vs. *Bhaiji*, I. L. R., 11 Bom., 57; *Lingayya* vs. *Narasimha*, I. L. R., 14 Mad., 99.

Decrees for specific moveables or recovery of wives.

259. If the decree be for any specific moveable, or for any share in a specific moveable, or for the recovery of a wife, it may be enforced by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the imprisonment of the judgment-debtor, or by attaching his property or by both imprisonment and attachment if necessary.

When any attachment under this section has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached

property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed under section 208, such amount, and in other cases, such compensation, as it thinks fit, and shall pay the balance, if any, to the judgment-debtor on his application.

If the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or if, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease to exist.

Act VIII of 1859, section 200.

This section applies to H. C., and with the exception of the words "or for the recovery of a wife," to P. S. C. C.

The Specific Relief Act (I of 1877), section 11, states in what cases a decree may be passed for the delivery of a "specific moveable."

A decree was given for certain immoveable and moveable properties specified in the schedule annexed to the plaint, and an order was passed that the Civil Court Ameen should ascertain the extent of the moveable property, should give possession of such moveable property specified in the decree as he could find, and further that he should inquire into the nature, amount, and value of such moveables as he could not find. In appeal against this order the Calcutta High Court remarked that when the extent and value of moveable property are not precisely ascertained before decree, it is obviously necessary to ascertain what the value of the moveables not delivered to the plaintiff is, in order that the Court may make, if necessary, a sufficient and not an excessive order by way of imprisonment of the party, or by attachment of his property in case of non-delivery. The Court added—"We must assume that the order of the Court below was made for a lawful purpose, and that the Court, on being informed by its officer, will make such further order as to it may seem just"—*Bhoobun Mohunee* vs. *Gobind Chunder*, 19 W. R., 82.

Decree for specific performance or restitution of conjugal rights.

260. When the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights or for the performance of or abstention from any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both.

When any attachment under this section has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, the property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and may pay the balance, if any, to the judgment-debtor on his application.

If the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or if, at the end of one year from the date of the attachment, no application to have the property sold has been made and granted, the attachment shall cease to exist.

Act VIII of 1859, section 200. This section applies to H. C.

This section meets the objection raised in the case of *Gatha Ram* vs. *Mohita Koorhin*, 23 W. R., 179; 14 B. L. R., 298; and *Yamunabhai* vs. *Narayan Moreshvar Pendse*, I. L. R., 1 Bom., 164, regarding the enforcement of a decree for restitution of conjugal rights—*Dadaji* vs. *Rukmabai*, I. L. R., 10 Bom., 301.

Specific Performance of a Contract.—See the views expressed in *Dhondiba* vs. *Ram Chandra*, I. L. R., 5 Bom., 554, and *Deokinandan* vs. *Sri Ram*, I. L. R., 12 Alla., 234, p. 285, in regard to the effect of a decree for specific performance of a contract of sale and payment of the purchase-money.

And as to the effect of the land being under the management of a Collector through section 326, *post*, see *Seth Jagdayal* vs. *Ram Sahai*, I. L. R., 17 Cal., 432.

Restitution of Wife—A Court may refuse to pass a decree for the restitution of a Hindu child-wife to her husband, unless he can prove that she has attained puberty if such be the custom—*Suntosh Ram* vs. *Gera Pattuck*, 23 W. R., 22, or for cruelty—*Matangini* vs. *Jogendra*, I. L. R., 19 Cal., 84; but non-cohabitation with the husband—*Dadaji* vs. *Rukmabai*, I. L. R., 10 Bom., 301, or his insanity is not a sufficient answer—*Binda* vs. *Kaursilla*, I. L. R., 13 Alla. 126. A woman, who had been directed by a decree to refrain from preventing her daughter returning to her husband, permitted the daughter, who was of age, to reside with her: *Held*, this was not such an interference with her daughter's return as would justify proceedings under this section—*Ajnai Kuar* vs. *Suraj Prasad*, I. L. R., 1 Alla., 501.

Remove Obstruction.—A decree was passed directing that "the defendants do, within six weeks after service on them of this decree, remove the obstruction and re-open the pathway, &c." After several unsuccessful attempts towards enforcing this decree, the decree-holder obtained an order from the Court directing the Ameen to execute the decree by removing the obstruction. On appeal, this order was set aside as contrary to law—execution being enforceable only in the manner prescribed by this section—see *Bhoobun Mohun* vs. *Nobin Chunder*, 18 W. R., 282; and the same procedure should be followed in executing a decree directing the removal of a building—*Protap Chunder* vs. *Peary Chowdhrain*, 9 C. L. R., 453; I. L. R., 8 Cal., 174.

Order to Manage.—By a decree it was directed that the plaintiff and defendant should manage certain property jointly, and that the names of both should appear in all papers connected with such property: *Held*, that the Court had, under this section, jurisdiction to order attachment of the defendant's property for disobeying the decree—*Gouri Proshad* vs. *Bholanath*, 8 C. L. R., 487.

Section 19 of the Specific Relief Act (I of 1877) provides that "Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance. If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract shall also be made to the plaintiff, it shall award him such compensation accordingly. Compensation awarded under this section may be assessed in such manner as the Court may direct."

Decree for execution of conveyances or endorsement of negotiable instruments.

261. If the decree be for the execution of a conveyance, or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance or endorsement in accordance with the terms of the decree, and deliver the same to the Court.

The Court shall thereupon cause the draft to be served on the judgment-debtor in manner hereinbefore provided for serving a summons, together with a notice in writing stating that his objections, if any, thereto shall be made within such time (mentioning it) as the Court fixes in this behalf.

The decree-holder may also tender a duplicate of the draft to the Court for execution upon the proper stamp-paper if a stamp is required by law.

On proof of such service the Court, or such officer as it appoints in this behalf, shall execute the duplicate so tendered, or may, if necessary, alter the same, so as to bring it into accordance with the terms of the decree, and execute the duplicate so altered :

Provided that, if any party object to the draft so served as aforesaid, his objections shall, within the time so fixed, be stated in writing and argued before the Court, and the Court shall thereupon pass such order as it thinks fit, and execute, or alter and execute, the duplicate in accordance therewith.

Act VII of 1859, section 202.

Officer shall Execute.—The Registrar of the High Court can, if directed by the Court, execute a conveyance, but cannot enter into covenants on behalf of the judgment-debtor—*Ram Chunder* vs. *Dwarkanath Bysack*, I. L. R., 16 Cal., 330.

Objections to draft-conveyances or draft-endorsement can be made the subject of appeal—section 588, cl. (15).

Where registration of conveyances of immoveable property are by law compulsory, it will probably be necessary to have any such conveyance executed by the Court, duly registered under the Registration Act (III of 1877). See *Kanahia Lal* vs. *Kali Din*, I. L. R., 2 Alla., 392.

Limitation.—See *Chatur Kusalchand* vs. *Mahadu*, I. L. R., 10 Bom., 91.

Form and effect of execution of conveyance by Court.

262. The execution of a conveyance, or the endorsement of a negotiable instrument by the Court under the last preceding section may be in the following form : "*C. D.*, Judge of the Court of (*or as the case may be*), for *A. B.*, in a suit by *E. F.*, against *A. B.*," or in such other form as the High Court may from time to time prescribe, and shall have the same effect as the execution of the conveyance or endorsement of the instrument by the party ordered to execute or endorse the same.

Act VIII of 1859, section 202. This section applies to H. C.

A held shares in a company, which were duly seized and sold in execution of a decree against him to B. The Judge acting under section 267, Act VIII of 1859, executed deeds of transfer to the purchaser, and the company was ordered to register the transfer in their books, but refused to comply with the order. The purchaser was unable to obtain from A the certificates of the shares. *Held* that, although the company's deed of settlement (under which the Act of Parliament declared that the company should be regulated), gave to the Board of Directors a power of approval or disapproval of intending shareholders, they have no option as to registering a shareholder who purchased a share in execution, and that they were bound to grant him, under the circumstances, new share certificates—*The Queen*, on the prosecution of *Toolsee Doss Nundy* vs. *East Indian Railway Company*, 1 Ind. Jur., N. S., 258.

The conveyance by the Judge on the back of a mortgage-deed above Rs. 100 in value requires registration—*Kanahia Lal* vs. *Kali Din*, I. L. R., 2 Alla., 392.

Decree for immoveable property.

263. If the decree be for the delivery of any immoveable property, possession thereof shall be delivered over to the party to whom it has been adjudged, or to such person as he appoints to receive

delivery on his behalf, and, if need be, by removing any person bound by the decree who refuses to vacate the property.

Act VIII of 1859, sections 199, 223. This section applies to H. C.

This section, it should be observed, relates to the delivery of what is known as *khas* (immediate or direct) possession of immoveable property under a decree of Court. Where such immoveable property is in the occupancy of a tenant or of some other person entitled to occupy the same, a delivery of possession should be given, as provided by the next section, 264; sections 328—331 provide for any resistance or obstruction to the delivery of possession complained of by the decree-holder; and section 323, to any complaint on the part of a third party to his being dispossessed in execution of the decree.

When, the Court gave the plaintiff a decree to recover the shares held in certain immoveable property by some of the defendants without determining or specifying the extent of those shares, it was held that no inquiry in execution of that decree could be made as to the extent or amount of the shares, but that the plaintiff should be left to seek, as against the other co-sharers, whatever remedy he might be entitled to—*Annoda Pershad* vs. *Troyluckhonath*, 13 W. R., 123.

If the cases under Act VIII of 1859 apply, the fact that a decree-holder has obtained possession only under section 264 is no bar to his applying for and obtaining *khas* possession under section 263, even though he may have given an acknowledgment of his having received possession, and the execution-case has been struck off accordingly—*Banee Muhtoon* vs. *Gopee*, 12 W. R., 285; *Adoremonee Dossee* v. *Premchand*, 9 W. R., 454; a second suit will not lie for this purpose—*Ramsurn Muhton* vs. *Jinonauth Bhuggut*, 10 W. R., 396.

Where an adverse title is unsuccessfully set up, the plaintiff is entitled to a decree for *khas* possession under section 263—*Raj Mungul Roy* vs. *Anundmoyee*, 11 W. R., 63; and having set up only an adverse title in the suit, the defendant cannot be allowed for the first time when the decree is being executed to plead his occupancy as a tenant—*Banee Muhtoon* vs. *Gopee*, 12 W. R., 285.

Possession should, however, not be given unless it is so ordered by the decree. So, where the decree merely declares that a certain right and title adverse to the plaintiff was null and void, the Court was not competent to put the decree-holder in possession, since he had neither asked for nor obtained consequential relief—*Ameeroonnissa* vs. *Abedoonnissa*, 16 W. R., 307.

Khas Possession against Co-Sharer.—Much difficulty has been felt in this country in executing a decree obtained by the proprietor of an undivided share in immoveable property for *khas* possession as against his co-sharers and their lessee, he being no party to such a lease. It has always been held that such possession should be given, or as stated by the Calcutta High Court in the case of *Brohmo Moyee Debia* vs. *Raj Chunder*, 5 W. R., Mis., 15, "until a partition takes place, she is entitled, incidently, to the enjoyment of her rights as co-proprietor in the talook, to partake in the joint possession of all the land which was held *khas* by the co-sharers, or would be now so held by them, if they had not made the lease." And this rule was followed in the case of *Shama Soonderee* vs. *Jardine, Skinner & Co.*, 7 W. R., 376, in which also *khas* possession was given under section 263 as regards a portion of the claim, and as regards another portion in the occupancy of ryots possession was given under section 264. The lessee in such a case, if he cannot settle with the dissentient co-sharer, has no remedy but to obtain a partition, so that that the shares of his lessors may be defined and separately held by him. A similar difficulty has been felt where a decree is given to a stranger for possession of a share in a family dwelling-house, but as pointed out in the judgment of the Full Bench of the Calcutta High Court—*Koonwur Bijoy Keshub* vs. *Shama Soondures*, 2 W. R., 31, Mis., B. L. R., Sup. Vol., 172—"if the petitioner (that is, the opposing member of the family) is subjected to any inconvenience, she has only herself to blame. She might have purchased the share of the execution-debtors at the sale or sued for partition, instead of resisting to the uttermost the claim of the purchaser, and setting at defiance the decrees of the Court." The Court, in that case, directed the Ameen who had been appointed to execute the decree, to divide the property so as to give each of the parties a specific share. But see *Rajani Kanth* vs. *Ram Nath*, I. L. R., 10 Cal., 24. These decisions will have to be reconsidered in the light of the late rulings of their Lordships of the Privy Council in *Watson & Co.* vs. *Ramchand*, 17 Ind. App., 110 and *Luchmeswar Singh* vs. *Manowar Hossein*, 19 Ind. App., 48. See "**Co-Sharers**," p. 15, *ante*.

Breaking Open.—When a decree was given for possession of an undivided moiety of a house and premises, and the co-sharer, the defendant, left locking them up, the Court should, in executing the decree, direct possession to be given by breaking open the locks or doors—*Gunesh Chunder* vs. *Ramdhunee*, 22 W. R., 283; but it should not demolish any building standing on the premises, when possession can be given by

removing any obstructing defendant. It is for the decree-holder, when he has obtained possession, to determine how he should deal with the building—*Radha Gobind* vs. *Brijendro Coomar*, 18 W. R., 527.

Identification of Land.—It not unfrequently happens that, through carelessness, decrees for possession of land fail to describe the land accurately, and therefore objections are raised in execution, regarding the land which is covered by the decree. Where the plaintiff in his plaint describes the land that he claims as amounting to a certain area, lying within specified boundaries, and obtains a decree for the same within those boundaries, he is entitled to be put into possession, although the area of such lands may exceed the area stated by him—*Zeenut Ali* vs. *Ram Dyal*, 18 W. R., 25.

Where earthworks, described in the plaint as the boundaries of the lands for possession of which a decree was obtained, have ceased to exist, the Court executing the decree may take evidence to ascertain their former position—*Kalee Dabee* vs. *Modhoosoodun*, 16 W. R., 171. In that case the Court distinguished and explained the case of *Dwarknath Haldar* vs. *Kumla Kant Haldar*, 12 W. R., 99, to mean that a plaintiff cannot be allowed to go into evidence for the purpose of contradicting a decree, or ascertaining in execution what ought to have been determined in the trial of the suit. Where, however, on inquiry, a boundary cannot be ascertained from obscurity in the plaint, and because it has been built upon by the judgment-debtor, that fact will not necessarily throw on the latter the onus of proving the pre-existent state of things, if the decree-holder has been guilty of laches in allowing the building and consequent obliteration without bringing it to the notice of the Court, (1) during the progress of the suit by getting the existing state of things properly defined to prevent dispute; or (2) after decree obtained, by taking out execution forthwith—*Radha Gobind* vs. *Brijendro Coomar*, 18 W. R., 527. The present Code, it should be noted, in re-enacting section 223, Act VIII of 1859, in section 263, has omitted the words (immoveable property) "in the occupancy of a defendant, or of some person on his behalf, or of some person claiming under a title created by the defendant, subsequently to the institution of the suit" which appeared in section 223.

Lis Pendens.—See "RIGHTS AND LIABILITIES," section 316, *post*.

Neither party to the litigation can alienate the property in dispute so as to affect his opponent after he has notice of the filing of the plaint—*Abhoy* vs. *Annamalai*, I. L. R., 12 Mad., 180, for otherwise it would be impossible that an action could be brought to a successful issue—*Bellamy* vs. *Sabine*, 1 DeG. and Jo., 566; *Lakshmandas* vs. *Dasrat*, I. L. R., 6 Bom., 168; *Bazayet Hossein* vs. *Doolichand*, 5 Ind. App., p. 218. In England, this doctrine has a narrow operation, for there, unless a *lis pendens* is duly registered, it will not bind a purchaser or mortgagee without express notice. There is nothing analogous to this in India, where the doctrine applies generally in the form in which it existed before the English Statute, 2 Vic., cap. 2—*Balaji Ganesh* vs. *Khushalji*, 11 Bom., 26; *Kashim Shaw* vs. *Unnodprosad Chatterjee*, 1 Hyde, 160; *Gulab Chand Manick Chand* vs. *Dhondi*, 11 Bom., 67. A grantee or vendee *pendente lite*, cannot question the decree or any proceeding in the cause which from the nature of the suit and the relief prayed for he might expect would take place—*Kussemunnissa* vs. *Nilratna Bose*, I. L. R., 8 Cal., 79; 9 C. L. R., 173; 10 C. L. R., 113; *Kishory Mohun* vs. *Mahammed*, I. L. R., 18 Cal., 188; a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser for value, to whom it has been alienated by the heir-at-law; but where the alienation is made during the pendency of a suit, in which the creditor obtains a decree for payment of his debts out of the assets, the property may be followed if the alienee took with notice or under such circumstances as to affect him by the doctrine of *lis pendens*—*Bazayet Hossein* vs. *Mahomed Wajid*, I. L. R., 4 Cal., 402; 6 Ind. App., 211. See on this case *Venkatesh* vs. *Maruti*, I. L. R. 12 Bom., 217; and where of several properties mortgaged only one is sold and a part owner has a right of contribution against the others, a suit for contribution binds the mortgaged property—*Baldeo Sahai* vs. *Baij Nath*, I. L. R., 13 Alla., 371.

Purchaser under Decree.—The doctrine does not apply to a purchaser at a sheriff's sale—*Gour Money Dabee* vs. *Reid*, 2 Tay. and Bell., 108, p. 121; *Anund Moyee* vs. *Dhurundo Chunder*, 1 W. R., 103; 14 Moore, 101; *Naffer Merdha* vs. *Ramdan*, 15 W. R., 308; *Chunder Nath* vs. *Nilakant*, I. L. R., 8 Cal., 690; *Kristo Mohinee* vs. *Kaliprosono*, I. L. R., 8 Cal., p. 412. (This is doubtful—*Nilakant* vs. *Suresh*, 12 Ind. App., 173, p. 179.) It does—*Pranjivan* vs. *Baju*, I. L. R., 4 Bom., 34; *Radha Madhub* vs. *Monohur*, 15 Ind. App., 97. *Parvati* vs. *Kisansingh*, I. L. R., 6 Bom., 567; *Robia Khanum* vs. *Wise*, 23 W. R., 329; *Rajkishen* vs. *Radha Madhub*, 21 W. R., 349; (this was a consent decree), and was followed in *Kunhi Uma* vs. *Amed*, I. L. R., 14 Mad., 491; but doubted as regards a consent decree in *Kishory Mohun* vs. *Mahammed*, I. L. R., 18 Cal., 188; *Vythina Dayyan* vs. *Subramanya*, I. L. R., 12 Mad., 439.

Procedure.—Practically there is no difference between *lis pendens* and having notice of a suit—*Kasumunnissa* vs. *Nilratna*, I. L. R., 8 Cal., 79; but the doctrine does not depend on notice—*Lakshmandas* vs. *Dasrat*, I. L. R., 6 Bom., 168; and the alienee need not be made a party to the suit, and it is a matter of indifference whether or not at the

time of his becoming grantee or vendee he had *actual* notice of the existence of the suit —*Gulabchand* vs. *Dhondi* valad *Bhau*, 11 Bom., 64; *Umamoyi Burmonsea* vs. *Tarini Prashad*, 7 W. R., 225; *Manual Fruval* vs. *Sanagpalli*, 7 Mad., 105.

As to the distinction between the procedures to be followed where an equitable lien is created *pendente lite* and when there is an absolute sale by which the legal estate is transferred, see *Kasim Shaw* vs. *Unnodapersaud Chatterjee*, 1 Hyde, 160; 2 Sev., 811; *Gourmoney Dabee* vs. *Reid*, 2 Tay. and Bell., 100.

Diligence.—But the party seeking relief against a purchaser without notice must come within reasonable time; he must prosecute the case closely and continuously—*Kasim Shaw* vs. *Annodaproshad Chatterjee*, 1 Hyde, 160; *Varden Seth Ram* vs. *Appundi*, 6 Mad., 75; *Gourmoney Dabee* vs. *Reid*, 2 Tay. and Bell., 100, *Venkatesh* vs. *Maruti*, I. L. R., 12 Bom., 217.

Registration.—When the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale mortgaged the house by a registered mortgage to another person, it was held that the second mortgagee had no title against a purchaser under a decree for sale in the suit, although such purchaser was plaintiff in the suit—*Gulabchand* vs. *Dhondi*, 11 Bom., 64. See 5 Alla., 166. See also *Lachmin Narain* vs. *Koteshar*, I. L. R., 2 Alla., 826; and *Pranjivan* vs. *Baju*, I. L. R., 4 Bom., 34; *Kailas Chundra Ghose* vs. *Fulchand Johuri*, 8 B. L. R., 474; and *Ram Lochun* vs. *Ramnarain*, 1 C. L. R., 296.

Pending Appeal.—In the case of *Chunder Koomar* vs. *Gopee Kristo Gossamee*, 20 W. R., 204, Glover, J., held, that the alienation of property, the subject of a suit, after that suit had been dismissed, but before an appeal was preferred, was not opposed to the doctrine of *lis pendens*, as there was then no suit before the Court: but Dwarkanath Mitter, J., held *contra*, that the purchaser was bound to wait until the term of appeal had expired; but see *Kishory Mohun* vs. *Mahammed*, I. L. R., 18 Cal., 188. See also *Radhika* vs. *Radhamoni*, I. L. R., 7 Mad., 96.

Litis Contestatio—As to when it ceases, see *Venkatesh* vs. *Maruti*, I. L. R., 12 Bom., 217.

Delivery of immoveable property when in occupancy of tenant.

264. If the decree be for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property:

Provided that, if the occupant can be found, a notice in writing containing such substance shall be served upon him, and in such case no proclamation need be made.

Act VIII of 1859, section 224. This section applies to H. C.

The notes to the last preceding section are in many respects applicable here.

In executing a decree under this section, the Court should confine its action strictly to the terms of the law, and should not add to the decree an order directing the ryots to pay rent to the decree-holder—*Gibbon* vs. *Sheo Purshun*, 17 W. R., 236. "The substance of the decree in regard to the property" which must be "proclaimed to the occupant" may or may not be a declaration that the decree-holder is the immediate landlord of the occupant, and as such entitled to receive rent directly from him, or there may be an intermediate holder. Probably both the intermediate tenant as well as the cultivating tenant or actual occupant would come within the terms of this section.

In order to establish a legal possession under section 264, it is necessary that all the requirements of that section should be carried out. Thus, where it was not proved that a copy of the *hukmnamah* (warrant) was affixed in the village in dispute, though it had been affixed in other villages of the Raj, it was held that possession of that village was not a legal possession—*Court of Wards* vs. *Burra Lall*, 15 W. R., 99. But if the party in possession when the decree is being executed admits to the Court that the decree-holder

has formally obtained possession he cannot afterwards plead a title on adverse possession denying that the decree holder ever received possession — *Bindoobashinee* vs. *Rainey*, 15 W. R., 307; 7 B. L. R., App., 20.

Limitation.—Symbolical possession is as against a party to the suit as good as actual possession for the purposes of limitation—*Joggobundhu Mukerjee*, vs. *Ram Chunder*, I. L. R., 5 Cal., 584; 5 C. L. R., 548; *Mozafer Wahid* vs. *Abdus Samad*, 6 C. L. R., 539; *Lokessur Koer* vs. *Purgun*, I. L R., 7 Cal., 418; *Mohinudin* vs. *Munchershah*, I. L. R., 6 Bom., 650; and a suit for *khas* possession will lie if brought within twelve years from that date—*Sama Charan* vs. *Madhub*, I. L. R., 11 Cal., 93; but symbolical possession does not affect the right of the lessee of a party and others, holding under a perpetual lease—*Gossain Dalmai* vs. *Bepin Behary*, I. L. R., 18 Cal., 520. See note on sections 319 and 335, *post*.

Purchaser.—The same principle applies when an auction-purchaser is put in possession—*Joggubundhu Mitter* vs. *Purnanund*, I. L. R., 16 Cal, 530.

Partition of estate or separation of share.

265. If the decree be for the partition or for the separate possession of a share of an undivided estate paying revenue to Government, the partition of the estate or the separation of the share shall be made by the Collector and according to the law, if any, for the time being in force for the partition, or the separate possession of shares, of such estates.

Act VIII of 1859, section 225. This section applies to H. C.

Partition of a family dwelling-house may be claimed as of right by a Hindu—*Hullodhur Mookerjee* vs. *Ramnath Mookerjee*, Marsh., 35.

Estate paying revenue to Government.—This word "Estate" must be read in its ordinary signification—*The Secretary of State* vs. *Nundun Lall*, I. L. R., 10 Cal., 435; but it does not include a ryotwari holding in Madras—*Muttuchidambaru* vs. *Karuppa*, I. L. R., 7 Mad., 382; nor a share of a certain defined portion of a mahal *Ram Dyal* vs. *Megu Lal*, I. L. R., 6 Alla, 452; and see *Narayan* vs. *Vithu*, I. L. R., 8 Bom., 539.

A decree may be made for partition of a revenue-paying estate, but not for a portion, and must be carried out by the Collector—*Ramjoy Ghose* vs. *Ram Runjun*, 8 C. L. R., 367; even to putting the parties in possession of their respective shares—*Partudas* vs. *Sankarbhai*, I. L. R., 11 Bom., 662, for the execution is entirely in his hands — *Dev Gopal* vs. *Vasudev*, I. L. R., 12 Bom., 373, and cannot be interfered with by the Civil Court —*Shrinivas* vs. *Gurunath*, I. L. R., 15 Bom., 527; but see *Ganoji* vs. *Dhondu*, I. L. R., 14 Bom., 450; *Dev Gopal* vs. *Vasudev*, I. L. R, 12 Bom., 373, unless plaintiff does not seek to have his joint liability for the revenue to Government disturbed—*Chundernath* vs. *Hur Narain* I. L. R. 7 Cal., 153; *Debi Singh* vs. *Sheo Lale*, I. L. R., 16 Cal., 203; *Sahrun* vs. *Gowri Sunker*, I. L. R., 15 Cal., 198.

Where a party obtained a decree from the Civil Court declaring his right to certain shares in the village and directing a partition, but did not execute his decree within the prescribed period,—*Held*, that he was not entitled to partition under Act XIX of 1863, section 47—*Kishen Singh* vs. *Dabeer Singh*, 2 Agra, 272.

In a decree for partition the right of each individual is determined, and an application by one party to execute may be continued by another—*Sheikh Khoorshed* vs. *Nubbee Fatima*, I. L. R., 3 Cal., 551; see, however, *Mohun Chunder* vs. *Mohesh Chunder*, I. L. R., 9 Cal., 569; doubted—*Hikmat Ali* vs. *Waliunnissa*, I. L. R., 12 Alla, 506.

As to whether a Court in carrying out a partition case can depart from the decree, see *Rajcoomaree Dassee* vs. *Gopal Chunder*, I. L. R., 3 Cal., 514.

In the North-West a suit for partition and possession of the share in an isolated plot in a joint zemindari by a co-sharer cannot be brought in the Civil Court — *Ijrail* vs. *Kanhai*, I. L. R., 10 Alla., 5.

F.—Of Attachment of Property.

Property liable to attachment and sale in execution of decree.

266. The following property is liable to attachment and sale in execution of a decree (namely), lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundies, promissory-notes, Government securities

bonds or other securities for money, debts, shares in the capital or joint stock of any railway, banking or other public Company or Corporation, and, except as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, and whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale (namely) :—

(*a*) the necessary wearing apparel and bedding of the judgment-debtor, his wife and children ;

The words "and bedding" have been added by Act VII of 1888, section 28.

(*b*) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may in the opinion of the Court be necessary to enable him to earn his livelihood as such ;

The words "and seed grain" have been added by Act VII of 1888, section 28.

(*c*) the materials of houses and other buildings belonging to and occupied by agriculturists ;

(*d*) books of account ;

(*e*) mere rights to sue for damages ;

(*f*) any right of personal service ;

(*g*) stipends and gratuities allowed to military and civil pensioners of Government, and political pensions ;

(*h*) the salary of a public officer or of any servant of a Railway Company, or local authority to the extent of—

(i) the whole of the salary where the salary does not exceed twenty rupees monthly ;

(ii) twenty rupees monthly where the salary exceeds twenty rupees and does not exceed forty rupees monthly ; and

(iii) one moiety of the salary in any other case.

This clause has been substituted by Act VII of 1888, section 28.

(*i*) the pay and allowances of persons to whom the Native Articles of War apply ;

(*j*) the wages of labourers and domestic servants ;

(*k*) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;

(*l*) a right to future maintenance.

(*m*) any allowance declared by any law passed under the Indian Councils Act, 1861, by a Governor or a Lieutenant-Governor in Council to be exempt from liability to attachment or sale in execution of a decree ;

(*n*) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which under any law applicable to him is exempt from sale for the recovery of an arrear of such revenue.

Clauses (*m*) and (*n*) have been introduced by Act VII of 1888, section 28.

Arms—Spears and daggers are goods—*Wala Hiraji* vs. *Hira*, I. L. R., 9 Bom., 518.

Explanation.—The particulars mentioned in clauses (*g*), (*h*), (*i*), (*j*) and (*m*) are exempt from attachment or sale whether before or after they are actually payable :

The words "and (*m*)" have been inserted by Act VII of 1888, section 28.

Provided also that nothing in this section shall be deemed—

(*a*) to exempt the materials of houses and other buildings from attachment or sale in execution of decrees for rent, or

(*b*) to affect the Army Act, 1881, or any similar law for the time being in force.

Act VIII of 1859, section 205. This section applies to H. C. and also to P. S. C. C. except so far as it relates to immoveable property. For the changes made by Act VII of 1886, section 28, see above. As to Oudh, see Act XVIII of 1876, section 20.

Disposing Power.—A cover containing notes in the Post Office is in the disposing power of the addressee—*Narasimhulu* vs. *Adiappa*, I. L. R., 13 Mad., 242 ; but the trustee of a religious endowment has not a diposing power over the corpus of the estate —*Bishen Chand* vs. *Nadir Hossein*, 15 Ind., App., 1 ; I. L. R., 15 Cal., 329. See "RELIGIOUS TRUSTS, *supra*.

Non-Alienable.—And where land was assigned to a widow for her maintenance with a proviso against alienation or charging, it was held that she had no saleable interest in the usufruct—*Diwali* vs. *Apaji*, I. L. R., 10 Bom., 342 ; but where property was devised with a clause that it should be held impartible, the debtor's share was allowed to be attached—*Narayanan* vs. *Kannan*, I. L. R., 7 Mad., 315.

For his Own Benefit.—These words do not prevent an attachment in a suit against the father of a Hindu family affecting the interest of his sons—*Jaghabai* vs. *Vijbhukandas*, I. L. R., 11 Bom., 37.

Other Saleable Property.—A decree of Court is property within this section—*Golam Mahomed* vs. *Indrachand Jahuri*, 7 B. L. R., 318, and see note on section 273, *post* ; but account - books are not—*In re Pestanji Curseiji Shroff*, 3 Bom., 42 ; though if a judgment - debtor attempts to make away with his account - books in order to defeat the creditor, the Court may require him to produce them and leave them in the custody of the Court—*Adjoodhya Pershad* vs. *Middleton*, 3 Alla., 334 ; *Bhoza Rughbur* vs. *Bhoza Raj*, 3 Alla., 319.

Portions of Property.—The doors and windows of a building cannot be separately attached — *Peru Bepari* vs. *Ronua Maifarish*, I. L. R., 11 Cal., 164. See also *Queen-Empress* vs. *Shaik Ibrahim*, I. L. R., 13 Mad., 518 ; *Purushottama* vs. *Municipal Council of Bellary*, I. L. R., 14 Mad., 467.

A portion of a saleable tenure cannot be sold for arrears of rent—*Reily* vs. *Huro Chunder*, 12 C. L. R., 398.

Equity of Redemption. — The equity of redemption in mortgaged property can be attached and sold in execution of a decree against the mortgagor—*Gossain Munraj* vs. *Deen Dyal*, 20 W. R., 20 ; *Saraswati Debi* vs. *Nabadwip*, 5 B. L. R., 380, unless the person applying for attachment and sale is also mortgagee—*Bhuggobutty Doss* vs. *Shama*

Churn, I. L. R., 1 Cal., 337; *Dosabai* vs. *Ishvardas*, I. L. R., 15 Bom., 222; *Kamini Debi* vs. *Ram Lochun Sircar*, 5 B. L. R., 450; but see *Khub Chand* vs. *Kalian Das*, I. L. R., 1 Alla., 240; The debtor's interest in money or other securities deposited by him as a security for the performance of his duty is saleable—*Karuthan* vs. *Sabramanya*, I. L. R., 9 Mad., 203.

Partnership.—In a partnership suit the accounts were submitted to arbitration: *Held*, the claim under the award before award made was not property that could be attached—*Tuffuzul Hossein* vs. *Ragunath*, 14 Moore, 40.

The share held by the judgment-debtor in the assets of a partnership business with the decree-holder, the business being in the hands of the Receiver of the Court under a decree for dissolution and winding up, cannot be attached—*Abbott* vs. *Abbott and Crump*, 5 B. L. R., 382; *Karimbhai* vs. *Conservator of Forests*, I. L. R., 4 Bom., 222, nor can the share in the undivided assets be attached—*Dwaika Mohun* vs. *Luckhimoni*, I. L. R., 14 Cal., 384; otherwise in Madras—*Parvathoesam* vs. *Bapanna*, I. L. R., 13 Mad., 447. See also *in re Bambridge*, 8 C. D., 218; *Tuffuzul Hossein* vs. *Ragunath*, 14 Moore, 40, p. 51; but where a decree-holder attached and seized certain goods which belonged to the judgment-debtor in partnership with another person, who alone at the time of attachment was in actual possession, it was held that such attachment must be limited to the share of the judgment-debtor, and should not be by nominal seizure but by prohibitory order—*Thama Singh* vs. *Kalidas Roy*, 5 B. L. R., 386.

Tenant's Interest.—Plaintiff permitted B to erect a thatched house with mud walls on his land and dwell in it for forty years; it was held that B had a saleable interest in the house and land—*Durgapershad Misser* vs. *Brindaban Sookul*, 7 B. L. R., 159; 15 W. R., 274.

Goods Sold.—Where A contracted to lay down a certain quantity of pavement for B, and, having carted paving stones to the works to the value of Rs. 100, received an advance of that sum fro n B,—*Held*, that the materials had vested in B as purchaser, and could not be attached under a decree against A—*Reference*, 2 Alla., 337.

Hindu Family.—The interest of an undivided member of a Hindu family subject to Mitakshara law is liable to attachment; the purchaser should sue out a partition—*Jeallidar Singh* vs. *Ram Lall*, I. L. R., 4 Cal., 723; *Deendyal* vs. *Jugdeep Narain*, L. R., 4 Ind. App., 247; *Raj Narain* vs. *Nownit Lall*, I. L. R., 4 Cal., 809. As to the effect of such an attachment, see *Madho Pershad* vs. *Meharban*, 17 Ind. App., 194, p., 196.

Uncertain right in.—Where A was only entitled to only a life-interest in the residue of the real and personal property of B after all charges had been satisfied and full administration had taken place,—*Held*, his interest could not be sold in execution—*Bebee Tokai Sherob* vs. *Beglar*, 6 Moore, 510.

Tenant's Trees.—Trees growing on the lands of an expropriatory tenant in the North-West cannot be sold—*Jugal* vs. *Deoki*, I. L. R., 9 Alla., 88.

Insolvent.—After a vesting order made under section 7 of the Insolvency Act, a debtor has no saleable interest in his previous property—*Denobundhoo* vs. *Shushi Mohun*, 12 C. L. R., 60.

Transfer of Property Act.—As to what property may be transferred, see section 6, Act IV of 1882. The right to claim specific performance of an agreement to transfer land is attachable—*Rudra Perkash* vs. *Krishna Mohun*, I. L. R., 14 Cal., 241.

Religious Trust.—The right to manage a religious trust—*Appancheri* vs. *Acholathil*, I. L. R., 5 Mad., 89, or a religious office—*Kuppa Gurukal* vs. *Dorasami Gurukal*, I. L. R., 6 Mad., 76, is not saleable, see *Khetter Chunder* vs. *Hari Das*, I. L. R., 17 Cal., 557; nor can any portion of the corpus of the trust property be taken out of the hands of the trustee—*Bishen Chand* vs. *Nadir Hossein*, I. L. R., 15 Cal., 329; 15 Ind. App., 1, See "ANY RIGHT OF PERSONAL SERVICE," *post*.

Cattle as may in the opinion of the Court.—Only beasts declared to be necessary by the Court are exempted—*Bakir Mohomed* vs. *Durga Churn*, 13 C. L. R., 200.

Necessary Wearing Apparel.—This is in accordance with the law laid down in the case of *Gungaram* vs. *Parbhu*, 9 Bom., 272. There is nothing in the law to prevent property in a zenana from attachment—*Doorga Churn* vs. *Huree Mohun*, 17 W. R., 86; see also section 271, *post*; but ornaments on the person of a Hindu wife, forming part of her stridhan, cannot be taken in execution of a decree against her husband, On certain occasions, under Hindu law, a husband may take them, but his right is a personal one—*Tukaram* vs. *Gunaji*, 8 Bom., 129. Ordinary trinkets, such as neck ornaments cannot be seized for a woman's debt—*Appana* vs. *Tangamma*, I. L. R., 9 Bom., 106.

Materials of Houses.—This does not prohibit the sale of property specifically mortgaged, although the property be materials of a house belonging to or occupied by an agriculturist—*Bhagvandas* vs. *Hathibai*, I. L. R., 4 Bom., 25 A rent-decree has priority over an ordinary money-decree if executed against the house for which the rent was claimed—*Maniklal* vs. *Lakha*, I. L. R., 4 Bom., 429.

The exemption extends to any house in which an agriculturist dwells, or in which his representatives dwell after his death, and no further—*Badhakisan* vs. *Balvant*, I. L. R., 7 Bom., 530, but is limited to agriculturists in the strict sense—*Jivan Bhaga* vs. *Hira*, I. L. R., 12 Bom., 363.

Right to sue for Damages.—It has been held generally that the right to bring a suit or prefer an appeal cannot be attached and sold—*Bipro Protab* vs. *Deo Narain*, 3 W. R., Mis., 16; *Tuffuzul Hossein* vs. *Ragunath*, 7 B. L. R., 186; *Shyam Chand* vs. *Land Mge. Co.*, 12 C. L. R., 440; I. L. R., 9 Cal., 695. But if a decree has been passed, it is capable of being attached and sold in satisfaction of the debts of the decree-holder—*Prince Gholam Mahomed* vs. *Indro Chand Johuree*, 15 W. R., 34; 7 B. L. R., 318. See "OTHER SALEABLE PROPERTY," above.

Debts.—A debt is a liquidated money obligation for which, speaking generally, a suit will lie—*Webster* vs. *Webster*, 31 Beav., 393, and probably as is the rule in England since the Judicature Act, there is no distinction in this country between legal and equitable debts—*Webb* vs. *Stenton*, 11 Q B. D., 518. But as the sum must be liquidated, unliquidated damages after verdict do not constitute a debt unless judgment has been given so as to make it a judgment-debt—*Randall* vs. *Lethgow*, 12 Q. B. D., 525; *Jones* vs. *Thompson*, 27 L. Q. B., 234; and see the cases under "RIGHT TO SUE FOR DAMAGES," *supra*.

Debts are of two kinds, payable at present, and payable in future. In England they are called "owing and accruing"—*Tapp* vs. *Jones*, L. R., 10 Q. B., 591.

This division was known before Act VIII of 1859, and is probably sound under the Code. In the case of *Tuffuzul Hossein* vs. *Ragunath*, 7 B. L. R., 186; their Lordships of the Privy Council said in regard to the law before Act VIII of 1859. "It appears plainly * * that a mere expectancy, or a mere right of suit cannot be attached, that the attachment must operate at the time of the attachment and not be anticipatory so to fasten on some future state of property in which the suit may result. Thus if the land of A be held by A subject to an option in B to take it at a definite price or sum the attachment must be of the land and not of the price. An existing debt—though payable at a future day, may be attached, whilst a salary, wages, or money claim accruing due may not." Public salaries are now on a different footing; but in other respects this description of the law resembles the law in England, where a salary not yet due, or wages, rent, or an annuity is not a debt—*Hall* vs. *Pritchett*, 3 Q. B. R., 215; *Webb* vs. *Stenton*, *supra*; otherwise if the sum is owing—*Mitchell* vs. *Lee*, L. R., 2 Q. B., 259; for money owing by a person who cannot refuse to pay it is a debt—*Booth* vs. *Trail*, 12 Q. B. D., 8, p., 10.

A thing incapable of being estimated or valued, such as "all the claims of Ramanath against all his debtors" cannot be attached—*Tuffuzul Hossein* vs. *Ragunath*, 7 B. L. R., 186. So where A, for valuable consideration contracted with B to satisfy a decree outstanding against him, and, instead of carrying out his agreement, purchased the decree, executed it and brought B's property to sale, it was held that the purchaser of B's right under the contract had no title to relief for the breach—*Mahomed Hadee* vs. *Sheo Sevuk*, 6 Alla., 95.

Claims over which no Court in British India has jurisdiction are not debts liable to be attached under this section, though the mere circumstance that the garnishee is at the time of the application for attachment beyond the limits of British India would not, of itself, render the debts not liable to be attached—*Ghamshamlal* vs. *Bhansali*, I. L. R., 5 Bom., 249.

A Railway Company sanctioned a gratuity to A; the money was in the hands of the paymaster; *held*, it could not be attached, as the gift was not complete, and there was no debt due—*Janki Das* vs. *E. I. Ry. Co.*, I. L. R., 6 Alla., 634.

The judgment-creditor who attaches is not an assignee and is subject to any equities against the debtor—*Megji* vs. *Ramji*, 8 Bom., 169.

Whether arrears of interest due on a Government promissory note, blank endorsed and payable to bearer under the terms of the instrument, is a debt seizable is not quite clear—*Bysack* vs. *Batty*, 1 Tay. and Bell., 313.

Any Right of Personal Service.—*Birth Moha Bramines*, or the right to officiate at funeral ceremonies, cannot be attached, inasmuch as it is a thing intangible, impartible and incapable of transfer—*Jhummun* vs. *Dinoonath*, 16 W. R., 171; nor is the *apadhik pand vritti* of the Godavari in Nasick—*Ganesh Ramchandra* vs. *Shankar*, I. L. R., 10 Bom., 395; *Govind Lakshman* vs. *Ramkrishna*, I. L. R., 12 Bom., 366; similarly, the right of the shebait of a Hindu idol to perform the services and receive the remuneration is not subject to attachment—*Dubo Misser* vs. *Srinibas Misser*, 5 B. L. R., 617; *Kali Churn* vs. *Bungshee Mohun*, 15 W. R., 339; 6 B. L. R., 727; *Juggurnath Roy* vs. *Kishen Prasad*, 7 W. R., 266; *Narasimma* vs. *Anantha*, I. L. R., 4 Mad., 391; *Kuppa* vs. *Dorasami*, I. L. R., 6 Mad., 76; compare *Khetter Chunder* vs. *Hari Das*, I. L. R., 17 Cal., 556; and if sold the purchaser would have no interest as against the next shebait—*Trimbak* vs. *Narayan*, I. L. R., 7 Bom., 188; but if he is paid by the proceeds of landed property, and there is a surplus after providing for the worship

of the idol, that interest can be attached—*Ashutosh Dutt* vs. *Doorga Churn Chatterjee*, 6 Ind. App., 182; *Lotlikar* vs. *Wagle*, I. L. R., 6 Bom., 596; provided the extent of interest is decided in a suit to which all the persons interested are parties—*Bishen Chand* vs. *Nadir Hossein*, 15 Ind. App., 1, but apparently the purchaser could not be entitled to enter on the lands—*Sib Churn Dass* vs. *Bonerjee*, 1 Boulnois, 73; *Juggoo Shundery Dossee* vs. *Byakh*, 1 Boulnois, 269.

Ghatwally Tenures.—Ghatwally tenures are not liable in the hands of a Ghatwal for the debts of his father—*Rajah Nilmoney Singh* vs. *Bakranath Singh*, 9 Ind. App., 104; otherwise if the tenure lies in *Kharakpore* and the zemindar assents—*Kali Pershad* vs. *Anund Roy*, 15 Ind. App., 18. See *Anundo Rai* vs. *Kali Prosad*, I. L. R., 10 Cal., 677; 15 Cal., 471.

Stipends, &c.—This clause includes all pensions of a political nature paid directly by the Government—*Bishambar Nath* vs. *Nawab Imdad Ali*, 17 Ind. App., 181; I. L. R., 18 Cal., 216. Stipends allowed to military and civil pensioners of Government, and political stipends allowed by Government to the Members of the Mysore family, cannot be attached—*Hazee Mohamed* vs. *Shazada Mohamed*, 7 W. R., 169; nor can the stipends granted to the descendants of Azeem-oo-Dowlah, the Nawab of the Carnatic—*Mahomed Abdul* vs. *Comandur Ramasamy*, 4 Mad., 277; so the arrears of *yeomiah* pension due to a deceased zemindar are not liable to attachment—*Referred Case*, 5 Mad., 371; so also it has been held that allowances fixed under Act XI of 1843 (B.C.) cannot be attached in the hands of the Collector or other disbursing officer, but that as soon as it is in the hands of the hereditary officer himself, it is deprived of any special protection—*Gunpatlal* vs. *Sampatram*, 10 Bom., 400.

Government Pensions—A person who is only entitled to a gratuity falls within the exemption—*Bawan Das* vs. *Mulchand*, I. L. R., 6 Alla., 173. A bonus in addition to pension is not attachable—*Muhammad Kasim* vs. *Carlier*, I. L. R., 5 Mad., 272.

Private Pensions.—Can be attached as debts; but the sums attached must not be inchoate, but arrears existing and definite—*Tuffuzul Hossein* vs. *Ragunath*, 8 B. L. R., 186, pp. 195-96; *Bhoyrub Chunder* vs. *Madhub Chunder*, 6 C. L. R., 19.

Salary of a Public Officer or of the Servant of a Railway Company.—It can be done in advance—*Bhoyrub Chunder* vs. *Madhub Chunder*, 6 C. L. R., 19; and to the extent of half of the actual salary—*Beard* vs. *Egerton*, I. L. R., 6 Mad., 179. Under Act VIII of 1859, attachment could only be made of such portion as had actually become due—*Tajram Jugrupaji* vs. *Kusaji*, 7 Bom., 110.

Apart from the special provisions of this Act any money given by Government to its servants not only for past but also as a return for future service cannot be attached. Thus the pay of a Government Official is not attachable—*Rajbullub Seal* vs. *Mackenzie*, Fulton, 82; nor is half-pay, as the money is, to some extent, received for future services; but money actually due solely in respect of past services, such as a pension, is liable to sequestration—*Dent* vs. *Dent*, L. R., 1 P. & M., 366. As to the form of the order to get at the pension—See *Willcock* vs. *Ferrell*, 3 Ex. D., 323.

A Khot is not a "public officer," nor is the percentage he receives for collecting the assessment on lands "salary"—*Ravji* vs. *Sayajirao*, I. L. R., 13 Bom., 673.

Military Officers.—To justify attachment of pay under this section, the applicant must show that the pay is a debt due to, or in some form or other the property of, the judgment-debtor. It is a general rule that a debt which the debtor cannot sue for cannot be attached, and as an officer cannot maintain any such action, his pay cannot be attached under the Code. It may be under section 99 of the Mutiny Act, provided provision for its stoppage has been made in the decree—*Bansi Lall* vs. *Col. Mercer*, 7 Alla., 331.

Labourers.—Labourers are persons who earn their daily bread by personal manual labour, or in occupations which require little or no art, skill, or previous education—*Jichand Khasal* vs. *Aba*, I. L. R., 5 Bom., 132.

An Expectancy of Succession.—This clause would include the right and title of the next heir on the death of a Hindu lady having only a life-interest—See *Ram Chundra* vs. *Dhurmo Narain*, 15 W. R. (F.B.), 17; B. L. R., 341; but not those of Mahomedans taking under a deed of settlement by which a husband granted the lands in dispute to his wife on condition that if she had a child by him the grant should be taken as a makari, and if not, a life-makari to her with remainder to the sons—*Umes Chunder* vs. *Zahoor Fatimah*, 17 Ind. App., 201; or of a son under Mitakshara law whose rights co-exist jointly with his father from his birth—*Tuffuzul Hossein* vs. *Ragunath*, 7 B. L. R., 186, p. 196; As to the right of a purchaser at a sale under such an attachment, in the case of a Hindu member of a joint family, see *Deen Dyal* vs. *Jugdeep Narain*, 4 Ind. App., 247; 1 C. L. R., 49.

See, as to the effect of selling the interests of a widow and reversioner under Act VIII of 1859, *Jeebun Krishna Banerjee* vs. *Ramakant Roy Chowdhry*, 1 Shome, 35.

See, as to a future interest, *Ahmaduddin Khan* vs. *Moljisnal*, I. L. R., 3 Alla., 12.

Right to future Maintenance.—Although a mere right to future maintenance cannot be attached arrears due can—*Kasheeshuree Debia* vs. *Greesh Chunder*, 6 W. R., Mis., 64; and see the remark of Sir Barnes Peacock in *Ashutosh Dutt* vs. *Doorga Churn*, 6 Ind. App., 182, p. 183; *Hoymobutty Debia* vs. *Koroona Moyee*, 8 W. R., 41. But it has been held that, if an instalment of maintenance payable under a decree is about to become due, the Court may make an order for the non-payment of such instalment by the party chargeable and its non-receipt by the judgment-debtor, or may make an arrangement under section 268 for the collection or administration, if necessary, of the amount of the maintenance—*Monessur Doss* vs. *Beer Protab*, 15 W. R., 188; 6 B. L. R., 646; and that an annuity, which is a charge on an estate, can be attached in pa ment of debts due to the person who has inherited the estate from his grantor, and by whom such annuity is now payable—*Mahatab Chand* vs. *Dhun Coomaree*, 17 W. R., 254; so also where a deed grants a regular maintenance payable from the grantor's estate and recoverable in Court on non-payment, such allowance is property which can be attached—*Enaet Hossein* vs. *Nujeebonnissa*, 11 W. R., 138. But see *Koomaree Dabea* vs. *Greesh Chunder Lahoory*, Mars., 200. See also *Salamat* vs. *Luckhi*, I. L. R., 10 Cal., 521.

Power to summon and examine persons as to property liable to be seized.

267. The Court may, of its own motion or on the application of the decree-holder, summon any person whom it thinks necessary, and examine him in respect to any property liable to be seized in satisfaction of the decree, and may require the person summoned to produce any document in his possession or power relating to such property, and, before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued.

Act VIII of 1859, section 219. This section applies to H. C. and P. S. C. C.

Meaning of Decree—This inquiry is not for the purpose of ascertaining the meaning of a decree, and evidence outside the record is not admissible to determine its meaning. That should appear on the face of the decree itself, and if it does not, the decree cannot be executed. It is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court of execution to decide what the Judge intended to decree. If, by reason of an uncertainty in a mortgage-deed, or an uncertainty in the plaint, or an uncertainty in the evidence, the Judge could not ascertain what particular right the plaintiff was entitled to, he ought not to give the plaintiff a decree so uncertain that the Court of execution could not know what he intended to award—*Dwarkanath Haldar* vs. *Kumola Kant*, 12 W. R., 99.

Property covered by Decree.—But evidence may always be taken to ascertain what is the subject upon which the decree operates, as, for instance, when the judgment-creditor calls upon the Court to put him into possession of the property which has been decreed to him. Thus, where the judgment-debtor objects that the land of which the decree-holder applies to be put into possession is not identical with that which was decreed, an inquiry should be held in which the judgment-debtor is, at least in honesty, bound to point out what is the actual property the subject of the decree—*Bhugobat Singh* vs. *Ram Adhin*, 22 W. R., 330; the judgment-creditor may, if he has applied to attach debts, call upon the debtor to produce his account-books—*Ajoodhia Pershad* vs. *Middleton*, 3 Alla., 334. See also *Rajendro Kishore* vs. *Hyabul Singh*, 17 W. R., 379.

Where, however, a decree is given against two co-sharers in a property, it can be executed only as against them, and no inquiry can be made in executing that decree by delivery of possession in respect to the amount of the shares of those persons in relation to others. That should be determined, if necessary, in a separate suit—*Annoda Persad* vs. *Trayluckhonath*, 13 W. R., 123.

Attachment of debt, share and other property not in possession of judgment-debtor.

268. In the case of (*a*) a debt not secured by a negotiable instrument, (*b*) a share in the capital of any public Company or Corporation, (*c*) other moveable property not in the possession of the judgment-debtor, except property deposited in,

or in the custody of any Court, the attachment shall be made by a written order prohibiting,—

(*a*) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

(*b*) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon ;

(*c*) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

A copy of such order shall be fixed up in some conspicuous part of the Court-house, and another copy of the same shall be sent, in the case of the debt, to the debtor, in the case of the share, to the proper officer of the Company or Corporation, and in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

Small Cause Court.—A Court of Small Causes cannot attach, directly, a debt outside its jurisdiction—*Parbati Charn* vs. *Panchanand*, I. L. R., 6 Alla., 243 ; *Moonshee Hosselin Ali* vs. *Gangooly*, 3 C. L. R., 30. See note on section 223, *ante*.

Shall be sent to the Debtor.—It would seem as if service by affixing the copy to the wall of the dwelling-house would not be sufficient service—*Gobind Chunder Dutt* vs. *Khirode Chunder Mitter*, 10 B. L. R., App., 12.

A debtor prohibited under clause (*a*) of this section may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

In the case of the salary of a public officer or the servant of a Railway Company, the attachment shall be made by a written order requiring the officer whose duty it is to disburse the salary to withhold every month such portion as the Court may direct, until the further orders of the Court.

A copy of every such order shall be fixed up in a conspicuous part of the Court-house and shall be served on the officer. so required.

Every such officer may from time to time pay into Court any portion so with held, and such payment shall discharge the Government or the Railway Company, as the case may be, as effectually as payment to the judgment-debtor.

Act VIII of 1859, sections 236, 239, 240. This section applies to H. C. and P. S. C. C.

Regular Suit.—An execution-creditor cannot sue any person having property of his judgment-debtor in his possession. He must proceed under this section—*Mirza Mahomed* vs. *The Widow of Balmukund*, 3 Ind. App., 241, 245.

Moveable : Description.—In applying for an attachment of any moveable property belonging to the judgment-debtor, but not in his possession, the decree-holder must annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same—Section 236.

Salary how Attached.—It should be made by a written order of the Court prohibiting the creditor, that is, the public officer or servant of the Railway Company from recovering the sum, and the debtor from making payment until the further orders of the Court—See *Willcock* vs. *Terrell*, 3 Ex. D., 323; *Bhoyrub Chunder* vs. *Madhub Chunder*, 6 C. L. R., 19.

Until he has been served with a notice under section 268, a debtor is bound to pay to his creditor money due to him, and it is not his duty to ascertain whether such payment should be made to another—*Thakoor Doss* vs. *Luchmeeput*, 7 W. R., 10. If the attachment is made after a cheque for the amount has been given, the cheque cannot be stopped—*Bhagavandas* vs. *Abdul Hossein*, I. L. R., 3 Bom., 49. The judgment-creditor does not obtain a charge on the debts until the order has been served—*In re Stanhope Silkstone Collieries Co.*, 11 C. D, 160; but there appears to be no difference between an order absolute and an order *nisi*—*Ex-parte Joselyne*, 8 C. D., 333. See "SALARY OF A PUBLIC OFFICER," &c., under section 266, *ante*.

Effect of Attachment.—A creditor, who attaches a debt due to his judgment-debtor, is not in the same position as an assignee of such debt for value without notice of a prior assignment, but in respect to prior assignments stands in no better position than his judgment-debtor. An assignment prior to attachment that is good against the judgment-debtor is also, as a general rule, good against his attaching-creditor Notice to the holder of funds is not necessary to complete, *as against the assignor*, an equitable assignment of such funds—*Meggi Hansraj* vs. *Ramji*, 8 Bom., 169; *Sorabji* vs. *Govind*, I. L. R., 16 Bom., 91, p., 110. Nor does an attachment prevent the judgment-debtor from suing for it—*Shib Singh* vs. *Sita Ram*, I. L. R., 13 Alla., 76; though he cannot realise—*Collector of Etawah* vs. *Beti*, I. L. R., 14 Alla., 162.

Where the moveable property is money or other valuable deposited as security for the performance of their duty as servants, the attachment is subject to this lien, and the property cannot be sold by the judgment-creditor, though he may if his debtor is entitled to it get the interest—*Karuthan* vs. *Subramanya*, I. L. R., 9 Mad., 203.

Any bond barred by limitation before the date on which the sale can legally take place is not available for satisfaction of the judgment-creditor's debt—*Nursing Dass Rughunathdas* vs. *Tulsiram*, I. L. R., 2 Bom., 558.

Mortgage.—If the debt due on the mortgage is intended to be sold, or if it is sold jointly with the interest in immoveable property in order to recover it by a personal remedy, attachment should be under this section; otherwise if only the interest in the immoveable property is the subject of the sale—*Sami* vs. *Krishnasami*, I. L. R., 10 Mad., 169, see also "MORTGAGE," section 278, *infra*.

Procedure after Attachment.—The Court can summon any person, under section 267, to ascertain the nature and value of the property—*Harilal* vs. *Abhesang*, I. L. R., 4 Bom., 323, and if it finds a debt due, it should put such debt up for sale and make delivery under section 301, *post*—*Siriah* vs. *Muckanachary*, I. L. R., 10 Mad., 194; if the debtor denies the debt, the Court cannot make any order on him to pay; but must either appoint a receiver who can sue, or sell the debt—*Toolsa* vs. *Antone*, I. L. R., 11 Bom., 448. See also "APPLICATION OF THIS SECTION," section 278, *post*.

A person who, as debtor, is served with an order under this section cannot apply under section 278 to have the attachment removed—*Harilal Amthabhai* vs. *Abhesang Meru*, I. L. R., 4 Bom., 323.

Realised in Execution.—A debt attached under this section and paid falls within section 295, *post*—*Sorabji* vs. *Govind*, I. L. R., 16 Bom., 92, p. 98.

Revision.—Under Act VIII of 1859 a person was ordered to pay into Court 700 Rupees out of the debtor's salary. The former objected that there was no debt: *Held*, the Judge could only uphold or discharge the attachment; and the order to pay into Court was illegal—*Coomar Kishen* vs. *Bhowya Debya*, 18 W. R., 40.

Attachment of moveable property in possession of judgment-debtor.

269. If the property be moveable property in the possession of the judgment-debtor, other than the property mentioned in the first proviso to section 266, the attachment shall be made by actual seizure, and the attaching officer shall keep the

property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Proviso.

Provided that when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody will exceed its value, the proper officer may sell it at once.

Power to makes rules for maintenance of attached live stock.

The Local Government may, from time to time, make rules for the maintenance and custody, while under attachment, of live stock and other moveable property, and the officer attaching property under this section shall, notwithstanding the provisions of the former part of this section, act in accordance with such rules.

Act VIII of 1859, section 233. This section applies to H. C. and P. S. C. C.

Crops which have not been severed from the ground are not moveable property—*Sadhu* v. *Sambhu*, I. L. R., 6 Bom., 592; *Madayya* vs. *Yenkata*, I. L. R., 11 Mad., 193; *Cheda Lal* vs. *Mulchand*, I. L R., 14 Alla , 30; see also *in re Hormash Irani*, I. L. R., 13 Bom., 87; nor are tiled huts—*Raj Chunder Bose* vs. *Dharmo Chunder Bose*, 10 W. R., 416; nor trees—*Umed Ram* vs. *Daulat Ram*, I. L. R., 5 Alla., 564; nor the interest of a tree *patta* holder in Madras—*Reference*, I. L. R , 12 Mad., 203; but fruit—*Nazir Khan* vs *Karamet Khan*, I. L. R., 3 Alla., 168; and stone sugar mills are moveables—*Hurmungul Singh* vs. *Athul Singh*, 4 Alla., 15. But see *Miller* vs. *Brindabun*, I. L. R., 4 Cal., 946.

The High Court, Allahabad, empowered their subordinate Courts, acting under section 233, Act VIII of 1859, to issue process of attachment and sale against personal estate other than debts, either successively or simultaneously as might be deemed proper—Cir. Or. No. 6 of 1867. But see *Financial Assoc.* vs. *Pranjibandas*, 3 Bom., 25.

Effect of Payment.—A decree-holder attached money deposited in Court, which he considered as due to his debtor, and obtained payment and entered up satisfaction. Plaintiff in the suit in which the money was deposited obtained a decree declaring the money was not that of the other judgment-debtor. *Held*, entering up satisfaction did not prevent new execution—*Lakshmana* vs. *Appalu*, I. L R , 7 Mad., 167.

Seized.—Seizure does not mean actual seizure, and includes such constructive seizure as is referred to in section 268, *supra*—*Toolsa* vs. *The Bombay Tram Co.*, I. L. R., 11 Bom., 448.

Attachment of negotiable instruments.

270. If the property be a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to the further orders of the Court.

Act VIII of 1859, section 233. This section applies to H. C. and P. S. C. C.

Seizure of property in building.

271. No person executing any process under this Code, directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise, or shall break open any outer door of a dwelling-house. But, when any such person has

duly gained access to any dwelling-house, he may unfasten and open the door of any room in which he has reason to believe any such property to be :

Seizure of property in zanánás.

Provided that if the room be in the actual occupancy of a woman who according to the customs of the country does not appear in public, the person executing the process shall give notice to her that she is at liberty to withdraw ; and after allowing a reasonable time for such woman to withdraw, and giving her every reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

This section applies to H. C. and P. S. C. C.

Dwelling-house : Shop—A person executing a process of attachment of moveable property having gained access to a house has a right to remove the lock from the door of a room in which he has reasonable ground for supposing the moveable property to be locked—*Kondasawmy* vs *Krishtnasawmy*, 5 Mad., 189 ; and though he cannot break open the outer door of a dwelling-house, he may break open the door of a shop or godown *Damodhur* vs. *Ishvar*, I. L. R., 3 Bom , 89.

Under Act VIII, 1859, it was held that a Nazir authorized to execute a warrant by attachment of moveable property had power to remove locks put by the judgment-debtor on the doors of the godowns or other places where the property was stored, and to put on his own locks for the purpose of attachment and safe custody of the property—*Sowdamine* vs. *Jaggesur*, 5 B. L. R., App., 27, 13 W. R., 339.

Trespass—If the Nazir breaks open the door in execution, he is a trespasser if it turns out that the person or goods of the debtor are not in the house—*Reg.* vs. *Gazi*, 7 Bom., Cr., 83.

A judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages measured by the value of the property on the date of attachment—*Kishory Mohun* vs. *Hursook Dass*, 17 Ind. App., 17; I. L. R., 17 Cal., 436; even though he may have acted without motive and mistakenly—*Damodhur* vs. *Lall*, 8 Bom., 177. Every person who directs, orders, or procures the commission of a trespass is liable as wrong-doer and trespasser ; and under a system where any remedy against the officer executing the powers of the Court would be utterly nugatory, it is peculiarly necessary not to relax the rule as to the liability of the decree-holder for his own acts, or those of his agents in causing the decree to be executed—*Sulijan Bibi* vs. *Sheikh Sariatalla*, 12 W. R., 329; 3 B. L. R., 414; *Goma Mahad* vs. *Gokul Das*, I. L. R., 3 Bom., 74. See also *Rajbullub Gope* vs. *Issan Chunder*, 7 W. R., 355, which was distinguished and explained. A warrant authorizes the attachment of the goods of A; if the decree-holder points out to the officer of the Court, and causes him to attach and remove the goods of B, as the goods of A, he is a wrong-doer, and cannot in any way justify his proceedings under the warrant. In causing B's goods to be attached and taken out of his possession he procures a trespass to be done to B. If a man for his own profit and advantage wrongfully and without any warrant of law trespasses upon the land of another, takes away his goods, or procures his goods to be seized and taken out of his possession, he is responsible, even though he acts honestly or mistakenly. A party to a suit is liable, if by his order the officer takes the goods of the wrong person, a stranger, in execution ; and in like manner he is responsible if his attorney or agent, in taking a step necessary to enable his client to get the fruits of a decree, inadvertently or ignorantly cause the person or property of a stranger to be seized by the officer of Court—*Goma* vs. *Gokal Das*, I. L. R., 3 Bom., 74.

Limitation.—In a suit for damages time runs from the date of attachment—*Goma* vs. *Gokaldas*, I. L. R., 3 Bom., 74; *Mudvirapa* vs. *Fakirapa*, I. L. R., 7 Bom., 427.

Pardanasheen.—This section does not apply to the arrest of a *pardanasheen* lady —*Kadumbini Dossee* vs. *Koylash Kamini Dossee*, I. L. R., 7 Cal., 19. See section 336, *post*. See note under section 483, *post*.

Attachment of property deposited in Court or with Government officer.

272. If the property be deposited in, or be in the custody of, any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice issues:

Proviso.

Provided that, if such property is deposited in, or is in the custody of, a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

Act VIII of 1859, section 237. This section applies to H. C. and P. S. C. C. The Court has no power to refuse an application for attachment under this section—*Noor Jehan* vs. *Mashitly*, 8 C. L. R., 17.

Practice.—All questions relating to the appropriation of money deposited in a Court should be heard by the Court, and not by the Court making the order of attachment—*Goopee Nath* vs. *Achcha Bibi*, I. L. R., 7 Cal., 553.

The claims should be dealt with in the manner laid down in sections 278-283, *post* — *Tikum* vs. *Sheo Ram*, I. L. R., 19 Cal., 286.

Effect of Order to Pay.—Where an order issued directing a Judge to pay certain monies to A, and the amount was attached by B before payment, it was held that the effect of the order being to vest the money in A, the Judge could not go into any question of priority between A and B—*Gopee Nath* vs. *Achcha Bibi*, I. L. R., 7 Cal., 553; and compare *Saefoollah* vs. *Luchmeeput*, 13 W. R., 58.

Sufficient Attachment.—The fact that a notice of attachment has been served on the Court in which the money is deposited is sufficient to complete the attachment. The refusal of the Judge to receive such a notice cannot make that void which would otherwise be a good attachment—*Teil & Co.* vs. *Abdool Hye*, 19 W. R., 37.

Extent of.—An attachment is only good so far as it relates to a specified amount set forth in the request; it is not sufficient merely to request the officer to hold sums which are or might be payable to the debtor, subject to the order of Court—*Nilkunt Day* vs. *Hurro Soondary Dossee*, 1 Shome, 123. Nor can a right to receive money be attached—*Abdul Lateef* vs. *Doutre*, I. L. R., 12 Mad., 250.

In the Custody of a Court or Public Officer—Where the money attached is money deposited with the Collector and not in the Court, neither the Judge making the attachment nor that officer has authority to decide claims to the deposit; it must be done in a regular suit—*In the matter of Brojonath Mitter*, 13 W. R., 301; *Kristodass* vs. *Ramkant*, I. L. R., 6 Cal., 142. If an attachment has been made, the Collector is not competent to pay away the money to an attaching decree holder without the express order of the Court—*Saefoollah* vs. *Luchmeeput*, 13 W. R., 58.

Sheriff.—The balance in the hands of a Sheriff may be attached—*Woulfe* vs. *Minihane*, 4 L. R., Ir., 322.

Post Office.—Covers containing currency notes addressed to the judgment-debtor can be attached—*Narasimbrulu* vs. *Achappa*, I. L. R., 13 Mad., 243.

Notice.—The defendant should receive notice—*Abdul Lateef* vs. *Doutre*, I. L. R., 12 Mad., 250.

Regular Suit—An order made by a Court under this section is not final—*Tikum* vs. *Sheo Ram*, I. L. R., 19 Cal., 286.

Attachment of decree for money.

273. If the property be a decree for money passed by the Court which passed the decree sought to be executed, the attachment shall be made

by an order of the Court, directing the proceeds of the former decree to be applied in satisfaction of the latter decree.

If the property be a decree for money passed by any other Court, the attachment shall be made by a notice in writing to such Court under the hand of the Judge of the Court which passed the decree sought to be executed, requesting the former Court to stay the execution of its decree until such notice is cancelled by the Court from which it was sent. The Court receiving such notice shall stay execution accordingly, unless and until—

(*a*) the Court which passed the decree sought to be executed cancels the notice, or

(*b*) the holder of the decree sought to be executed applies to the Court receiving such notice to execute its own decree.

On receiving such application, the Court shall proceed to execute the decree and apply the proceeds in satisfaction of the decree sought to be executed.

Attachment of other decrees.

In the case of all other decrees the attachment shall be made by notice in writing, under the hand of the Judge of the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, when such decree has been passed by any other Court, also by sending to such Court a like notice in writing to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. Every Court receiving such notice shall give effect to the same until it is so cancelled.

Decree-holders to give information.

The holder of any decree attached under this section shall be bound to give the Court executing the same such information and aid as may reasonably be required.

This section applies to H. C. and also to P. S. C. C., as far as relates to decrees for moveable property.

Other Decrees.—The clause containing these words applies to decrees other than money-decrees—*Sultan Kuar* vs. *Gulzari*, I. L. R., 2 Alla., 290. It and not section 274 applies to the attachment of a decree for redemption—*Naigar* vs. *Bhaskar*, I. L. R., 10 Bom., 444. See "DECREE," section 274, *infra*.

Sale of Decree.—The Allahabad Court has held that the Code does not contemplate the sale of a decree in execution of another decree—*Sultan Kuar* vs. *Gulzari*, I. L. R., 2 Alla., 290; and the practice is the same in Madras—*Tiruvengada* vs. *Vythilinga*, I. L. R., 6 Mad., 418. This has not been the practice in Bengal—*Narain Coomaree* vs. *Boroda Sundurse*, 10 W. R. (P. C.), 21—*Gholam Mahommed* vs. *Indrochand Lahuri*, 7 B. L. R., 318; *Gonesh Lal* vs. *Sham Narain*, I. L. R., 6 Cal., 213; *Grish Chunder* vs. *Beseswari*, I. L. R., 6 Cal., 243; or in Bombay—*Naigar* vs. *Bhaskar*, I. L. R., 10 Bom., 444.

In Aid of Execution.—An application under this section is a step in aid of execution—*Lachman* vs. *Thendi Ram*, I. L. R., 7 Alla., 382.

Court which passed the Decree.—The Court can execute the attached decree on application of the attaching creditor—*Peary Mohun* vs. *Romesh Chunder*, I. L. R., 15 Cal., 371.

First Clause.—Although the two decrees are not passed in the same Court, yet if they are executed by the same Court, the first clause applies—*Sultan Kuar* vs. *Gulzari*, I. L. R., 2 Alla., 290.

Attachment of immoveable property.

274. If the property be immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise.

The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the Court-house.

When the property is land paying revenue to Government, a copy of the order shall also be fixed up in the office of the Collector of the district in which the land is situate.

Act VIII of 1859, sections 235, 239. This section applies to H. C.

Jurisdiction.—A Court can sell a mortgage-bond covering lands lying wholly outside its jurisdiction—*Balkrishna* vs. *Masuma*, I. L. R., 5 Alla., 142, p. 157; but not the land unless under section 19 *ante*—*Prem Chand* vs. *Mokhoda*, I. L. R., 17 Cal., 699.

Territorial of Munsifs.—Sections 237 and 238, *ante*, declare how application for attachments of immoveable property should be made. Where separate local jurisdiction was given to Munsifs under section 18, Act VI of 1871, one Munsif could not directly attach property wholly situated within the jurisdiction of another—*Obhoy Churn Koondoo* vs. *Golam Ali*, 9 C. L. R., 361; I. L. R., 7 Cal., 410; and the same rule applied to a Subordinate Judge —*Dakhina Churn* vs. *Bilash*, I. L. R. 18 Cal., 526; otherwise if it was partly within and partly without jurisdiction—*Ram Lall* vs. *Bama Sundari*, I. L. R., 12 Cal., 307; *Gopi Mohun* vs. *Doybaki*, I. L. R., 19 Cal., 13.

Mortgage-Debt.—A mortgage-debt must be attached under this section—*Appasami* vs. *Scott*, I. L. R., 9 Mad., 5; *Sami* vs. *Krishnasami*, I. L. R., 10 Mad., 169, and under section 268, *ante*—*Srenath* vs. *Gopal Chunder*, I. L. R., 9 Cal., 511; not so—*Naigar Bhaskar*, I. L. R., 10 Bom., 444; *Debendra Kumar* vs. *Rup Lal*, I. L. R., 12 Cal., 546; see also *Balkrishna* vs. *Masuma*, I. L. R., 5 Alla., 142, p. 157; 9 Ind. App., 182, p. 196; *Abdul Mujid* vs. *Mahommed*, I. L. R., 13 Alla., 89. But where a mortgage-bond was attached under this section and sold, it was objected that the bond had not been also attached under section 268, *ante*, and the sale was bad, it was held that the purchaser could realise the debt from the hypothecated property, though whether the purchaser could recover the debt by a personal remedy was not decided—*Sami Ayyar* vs. *Krishnasami*, I. L. R., 10 Mad., 169. See also *Balkrishna* vs. *Masuma*, I. L. R., 5 Alla., 142, p. 157; 9 Ind. App., 183, p. 196.

Sale under Mortgage.—It is not necessary to issue an attachment in the case of a mortgage-decree where the decree contains a direction to sell—*Dayachand* vs. *Hemchand*, I. L. R., 4 Bom., 515; see also *Vekut Nassamma* vs. *Ramiah*, I. L. R., 2 Mad., 112; *Naigar* vs. *Bhaskar*, I. L. R., 10 Bom., 444; *Maseyk* vs. *Steel & Co.*, I. L. R., 14 Cal., 661; but see *Dosibai* vs. *Ishwardas*, I. L. R., 15 Bom., 222; and the following cases in which the Code was followed: 14 Ind. App., 193; 12 Ind. App., 7; 16 Ind. App., 107; I. L. R., 15 Cal., 521, 717.

In Bengal execution of a mortgage-decree is governed by the rules made under the Transfer of Property Act.

Mortgage-Decree.—A mortgage-decree may be immoveable property within this section—*Hari* vs. *Ram Chandra*, 9 Bom., 64; *Bhawani* vs. *Gulab Ras*, I. L. R., 1 Alla., 348; but see *Balkrishna* vs. *Masuma Bibi*, *supra*.

By beat of drum or other customary mode.—In Bengal it is usual to notify this by sticking up a bamboo as well as by beat of drum. Omission to beat the drum is

a material irregularity—*Trimbak* vs. *Nana*, I. L. R., 10 Bom., 504. A copy must be affixed on a conspicuous part of the property attached—*Kalitara* vs. *Ram Coomar*, 9 C. L. R., 114; but not on every lot if the property is broken into lots for sale. See section 289, *post*, amended—*Antoneo* vs. *Jalbhoy*, I. L. R., 12 Bom., 368. The order under this section must precede the posting of notices under section 290, *post*—*Mohunt Megh Lall* vs. *Pershad*, I. L. R., 7 Cal., 34; but see the case of *Rahchunder* vs. *Kamta*, I. L. R., 4 Alla., 300. See note under section 290, *post*.

First Mortgagee in Possession.—The proper mode of attaching a factory pledged, subject to the claims of a prior mortgagee in possession, should be constructive, by issue of a written notice under this section. The decree-holder has no power to disturb the possession of the prior mortgagee by putting peons in possession—*Mudhun Mohun* vs. *Gokul Doss*, 10 Moore, 563, p. 571.

Interpretation.—An attachment without specifying the share is an attachment of the debtor's entire interest—*Suroop Narain* vs. *Ram Tobul*, 18 W. R., 106.

Order for withdrawal of attachment after satisfaction of decree.

275. If the amount decreed with costs and all charges and expenses resulting from the attachment of any property be paid into Court, or if satisfaction of the decree be otherwise made through the Court, or if the decree is set aside or reversed, an order shall be issued, on the application of any person interested in the property, for the withdrawal of the attachment.

Act VIII of 1859, section 245. This section applies to H. C. and P. S. C. C.

If the amount of the decree and costs, &c., have been paid and the attachment withdrawn, an assignee has a good title against persons claiming under section 295, *post*—*Durga Churn* vs. *Monmohini*, I. L. R., 15 Cal., 771, and the same result follows if the money has been paid although the attachment has not been withdrawn—*Gunga Din* vs. *Kushali*, I. L. R., 7 Alla., 702; *Sorabji* vs. *Govind*, I. L. R., 16 Bom., 92, p. 106. See also *Umesh Chunder* vs. *Raj Bullubh*, I. L. R., 8 Cal., 279.

Private alienation of property after attachment to be void.

276. When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.

This section applies to H. C. and P. S. C. C.

Scope of the Section.—The decisions under section 240, Act VIII of 1859, are not authorities on the construction of the present section—*Sorabji* vs. *Govind*, I. L. R., 16 Bom., 92, p. 104.

The law governing alienations by debtors is the *lex rei situ*—*Gopee Chunder* vs. *Ramkumul*, W. R., 1864, p. 179.

Effect of Attachment.—Until there is a sale in execution of the judgment-debtor's estate the right of property remains in him—*Waqji* vs. *Tharia*, I. L. R., 3 Bom., 61; and attachment does not create any interest or charge upon the properties in favour of the attaching creditor as against other creditors—*Soobul Chunder* vs. *Russick Lall*, I. L. R., 15 Cal., 202, and see section 295, *post*; but an order of sale in addition to attachment under a mortgage-decree creates a valid charge on the property—*Suraj Bunsi* vs. *Sheo Pershad*, I. L. R., 5 Cal., 148; and attachment by a creditor of the interest of a member of a joint family will support a partition—*Madho Pershad* vs. *Mehrban*, 17 Ind. App., 194, p. 196; I. L. R., 18 Cal., 157, p. 161.

But now an attaching creditor has a right to redeem a mortgage upon the property attached by him—S. 91, Act IV of 1882, and he may oppose probate of the debtor's will if

the probate has been obtained in fraud of creditors—*Nitmoni Singh* vs. *Umanath*, I. L. R., 10 Cal., 19.

Increment.—*Quære.* If between the time of attachment and the time of sale the interest of the judgment becomes enlarged or accelerated will it not pass by the sale? *Umes Chunder* vs. *Zahur*, I. L. R., 18 Cal., 164, p. 176, and compare *Muhammad* vs. *Kutub Hussain* I. L. R., 9 Alla., 136.

Death of Debtor.—If the judgment-debtor dies after attachment, his property may be sold without putting his legal representative on the record—*Sheo Prasad* vs. *Hira Lal*, I. L. R., 12 Alla., 440, and see *Mina Konwari* vs. *Juggat*, I. L. R., 10 Cal., 196, p. 206, and compare *Surendrakesav* vs. *Doorgasundari*, 19 Ind. App., 108, with *Radha Prasad* vs. *Lal Sahab*, I. L. R., 13 Alla., 53, p. 65.

Rent, Sharer.—The attachment of a tenure in execution of decree obtained by a fractional co-sharer for arrears of rent is not such an attachment as is contemplated by section 170 of the Bengal Tenancy Act—*Beni Madhub* vs. *Jaod Ali*, I. L. R., 17 Cal., 390.

During Continuance of the Attachment.—An alienation before attachment is good, even though the parties may know that a judgment-creditor was seeking to get process of execution against that property, provided that such alienation was *bonâ fide* and for valuable consideration—*Fegredo* vs. *Mahomed Mudessur*, 15 W. R., 75; *Ram Burun* vs. *Jankee Sahoo*, 22 W. R., 473; and a debtor may, although unsatisfied decrees be outstanding against him prior to attachment, give a preference to a particular creditor or class of creditors over others, and this notwithstanding that the effect of the alienation or preference may be to defeat the operation of an anticipated execution—*Stephenson* vs. *Bomgartner*, 3 Agra, 104; *Doorga Tewaree* vs. *Naipal*, 2 Alla., 224; *Khetta Mal* vs. *Chuni Lal*, I. L. R., 2 Alla., 173; *Rajan Horji* vs. *Ardeshir*, I. L. R., 4 Bom., 70. See *Sheo Proshad* vs. *Miller*, I. L. R., 2 Alla., 474; see, however, section, 53, Act IV of 1882. The leading case on the subject is that of *Puddomonee* vs. *Roy Muthooranath*, 20 W. R., 133; 12 B. L. R., 411, in which their Lordships of the Privy Council stated as settled law, that if an attachment has been permanently struck off and a new attachment has become necessary, a conveyance executed between the two attachments is valid; but it was thought doubtful whether, as a consequence of this, a conveyance executed whilst the first attachment was subsisting becomes valid by relation, or ceases to be void as against the execution-creditor and all who claim under him. Their Lordships further stated: "Generally, when the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not wish to lay down broadly that in all cases in which an execution is struck off the file, such consequences must follow. The reported cases sufficiently show that, in India, the striking an execution-proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative unless the circumstances are otherwise explained."

Where the decree-holder submitted to the order of the Court requiring a fresh attachment to be issued, though he had applied for the sale of certain properties under an attachment which he considered to be subsisting, it was held that, if the first attachment subsisted, the decree-holder should have contested the order for the second attachment by refusing to take it out and appealing against the order requiring it, and the rule laid down by the Privy Council was followed—*Matonginy* vs. *Chowdhry Junmunjoy*, 25 W. R., 513.

Sale Set Aside.—When an execution-sale is set aside on account of irregularity in the proceedings, the attachment remains, so that the decree-holder can again bring it to sale—*Gossain Munraj* vs. *Deen Dyal*, 20 W. R., 20.

Death of Judgment-Debtor.—The attachment does not cease on the death of the judgment-debtor—*Sheo Prasad* vs. *Hira Lal*, I. L. R., 12 Alla., 440; *Madho Prasad* vs. *Mehrban*, 17 Ind. App., 194, p. 197.

In the manner aforesaid.—It is necessary, in order to set aside any private alienation, to show that all the conditions mentioned in the section applicable to the case, have been fulfilled, and the purchaser bought at a sale in execution—*Dinendronath* vs. *Ram Kumar*, 10 C. L. R., 281; I. L. R., 7 Cal., 107; *Ganga Din* vs. *Khushal*, I. L. R., 7 Alla., 702; but if he bought the property attached privately—*Dinendronath* vs. *Ram Kumar*, *supra*; or had an interest in it, such as a mortgagee and buys on his own decree—*Poreshnath* vs. *Anathnath*, I. L. R., 9 Cal., 265, he would not be in the position of an auction-purchaser under an attachment and has no better title than his vendor possesses—*Dinendronath* vs. *Ram Kumar*, 8 Ind. App., 65. See also *Kishory Mohun* vs. *Mahomed*, I.L.R., 18 Cal., 188. Thus, when the property is land paying revenue to Government, it must be shown that (1) the written order has been proclaimed at some place on or adjacent to such property, and (2) has been fixed in a conspicuous part of the property and of the

Court-house, and (3) in the office of the Collector—*Indra Chundra* vs. *The Agra and Masterman's Bank*, 1 B. L. R., S. N., 20; *Nur Ahmad* vs. *Altaf Ali*, I. L. R., 2 Alla., 58. And where there was no attachment in the manner prescribed, but the property was advertised for sale, and the judgment-debtor encumbered the property with a lien, it was held that the sale only passed the property subject to the lien, which was not proved to be collusive—*Sahoo Chund* vs. *Gutum Singh*, 2 Agra, 206. See also *Rameswar Singh* vs. *Ramtanu Ghose*, 4 B. L. R., 124; *Gumani* vs. *Hardwar*, I. L. R., 3 Alla., 698.

Existing Decree.—There must be a decree in existence to support the attachment. A obtained a decree *ex parte* against B, and attached his property; while under attachment B sold the property to C, and afterwards applied for an order under section 119, Act VIII, 1859, to set aside A's decree and for a new trial. The order was granted: *Held*, that the effect of the order was to show that the decree was invalid, and that C's purchase was not null and void—*Lala Jagat* vs. *Tulsiram*, 1 B. L. R., 71; 10 W. R., 99; and see *Joobraj Singh* vs. *Buhooria*, 7 C. L. R., 424, p. 427.

Time and Mode of Objecting.—Objections on the ground that the proper formalities have not been carried out must be proved by the party raising them, and cannot be raised for the first time before the Privy Council—*Ram Krishna* vs. *Surfunnissa*, I. L. R., 6 Cal., 129.

Enforceable under the Attachment.—The alienation is null and void only as against the attaching creditor or persons who may acquire under or through the attachment, and not as against the whole world—*Anund Lall* vs. *Jullodhur*, 10 B. L. R., 134; 17 W. R., 313, and only so far as may be necessary to effect the execution of the decree—*Dinendronath* vs. *Ram Kumar*, I. L. R., 7 Cal., 107; so that if the decree is subsequently satisfied, the alienation is binding on the debtor—*Umesh Chunder* vs. *Raj Bullubh*, 10 C. L. R., 204; I. L. R., 8 Cal. 279. Thus, where property was attached on non-payment of an instalment which was paid by the debtor out of the proceeds of a private sale of the property, it was held that the Court could not continue the attachment so as to ensure payment of instalments not yet payable, and the alienation was good—*Ramdhun* vs. *Koylashnath*, 12 W. R., 457; 4 B. L. R., 20. So a sale to the creditor—*Annavundavun* vs. *Iyasawmy*, 6 Mad., 65, or the sale or mortgage of the attached property to pay off the judgment-debtor is not void—*Balay Ramchandra* vs. *Gajonan Babaji*, 11 Bom., 159; *Bulder Singh* vs. *Kanaha*, 1 Alla., 125; *Dinendronath* vs. *Ram Kumar*, *supra*; and the purchaser of the right, title and interest of the judgment-debtor in certain immoveable property at an auction-sale which took place at the instance of a second attaching creditor was held to take the property subject to an incumbrance created by the judgment-debtor pending the first but prior to the second attachment, although the first attaching creditor was paid out of the proceeds—*Guru Pershad* vs. *Binda Bibi*, 9 B. L. R., 180; and see the cases of *Gobind Singh* vs. *Zalim*, I. L. R., 6 Alla., 33; *Ganga Din* vs. *Khushali*, I. L. R., 7 Alla., 702; and *Umesh Chunder* vs. *Raj Bullubh*, I. L. R., 8 Cal., 279; see also *Subramanya* vs. *Rajaram*, I. L. R., 8 Mad., 573, and where a judgment-debtor raised a sum of money by a sale of part of attached property, and devoted some of the money to a payment on account of the judgment-creditor, who withdrew from the execution and attachment, it was held that the decree-holder, having assented to the sale, the vendee had a good title—*Prannath* vs. *Shumboo Chunder*, 7 W. R., 430; but in *Sorabji* vs. *Govind*, I. L. R., 16 Bom., 92, it was decided on a review of all the cases that the claims of subsequent execution-creditors under section 295, *post*, was enforceable under the attachment, and that an assignment of a debt subsequent to the first attachment was void, not only as regards the decree for which that attachment was made, but also the subsequent demands under section 295.

Purchase by Mortgagee.—If a mortgagee purchases privately, and his purchase is void as against the subsequent auction-purchaser, he can fall back on his mortgage—*Gopal Sahoo* vs. *Gunga Pershad*, I. L. R., 8 Cal., 530.

Effect of Removal of Attachment on Alienation made during its Continuance—Where there is an existing decree—*Juggut Narain* vs. *Toolsee Ram*, 10 W. R., 99; 1 B. L. R., 71; *Joobraj* vs. *Buhooria*, 7 C., L. R., 424, p. 426, the removal of an attachment does not render an alienation made whilst attachment was subsisting a valid one, as it could not have a restrospective effect—*Dheeraj Mahatab Chand* vs. *Surno Moyee*, 15 W. R., 222; 12 B. L. R., 414, *note*; *Indurjeet Kooer* vs. *Luchmun Singh*, 24 W. R., 56; *Ram Churn* vs. *Jhubboo*, 14 W. R., 25; and see the case of *Puddomonee Dossee* vs. *Roy Mothooranath*, 20 W. R., 133; 12 B. L. R., 411, decided by their Lordships of the Privy Council and referred to above.

Private Alienation.—This does not refer to an alienation effected by a vesting order for the Insolvent Court; such an alienation is rather an alienation by operation of law than one by the judgment-debtor—*Sarkies* vs. *Bundho Base*, 1 Alla., 172; *Sadayappa* vs. *Ponnama*, I. L. R., 8 Mad., 554. The renewal of an existing obligation is not an alienation—*Mahadevappa* vs. *Srinivasa*, I. L. R., 4 Mad., 417.

As to what is a private alienation, see *Qurban Ali* vs. *Ashraf*, I. L. R., 4 Alla., 219, and compare *Nil Madhab* vs. *Narattam*, I. L. R., 17 Cal., 826.

The effect of striking off an Execution-Case.—In the case of *Zahuran* vs. *Tayler*, 2 B. L. R., 86, Peacock, C. J., stated, p. 92: "I find no authority in Act VIII of 1859 for saying that an attachment is at an end because the execution case is struck off the file, and the effect of the order must depend on the circumstances of the case"—*Puddomonee* vs. *Roy Muthooranath*, 20 W. R., 133; 12 B. L. R., 411. When both parties had notice to appear on a certain date for the hearing and final determination of the execution-proceedings, and on their non-appearance the case was struck off, it was held, that that amounted to a "complete termination of the case," the order so made having the "effect of removing the attachment and putting an end to the execution-proceedings altogether"—*Binda Bibee* vs. *Lalla Gopeenath*, 21 W. R., 66; 14 B. L. R., 223; *Chumun Lall* vs. *Domun Lall*, 9 W. R., 205. Where, however, certain moneys, in deposit in Court, were attached in execution of a decree, and those execution-proceedings were struck off (there being some delay in consequence of litigation on account of a dispute as to the right to the decree), it was held that the order striking off the case would affect only the files of the Court, and would not interfere with the continuance of the attachment—*Syud Nadir Hossein* vs. *Pearoo Thovildarnee*, 19 W. R., 255, 14 B. L. R., 425, *note*: so in the case of *Jhoboo Sahoo* vs. *Ram Churn*, 11 W. R., 517; 3 B. L. R., App. 68, Macpherson, J., observed: "I confess that it appears to me that the question whether 'an execution-case' has or has not been struck off the file is of little importance as affecting the validity and continuance of an attachment, except in so far as the striking off may be a legal proceeding binding on the person at whose suit the attachment issued, and operating as a legal withdrawal of all the proceedings in execution or of the attachment. If the case arose, I should probably have the little hesitation in holding that a striking off, such as I fear often occurs when the proceedings are struck off by the Court of its own motion and without notice to the parties, on any legal ground whatever, in no way withdraws or affects the validity of an attachment, and is not binding on the judgment-creditor." See also *Golam Yaheya* vs. *Sham Soondures*, 12 W. R., 142; 3 B. L. R., App., 134; *Baroda Sundari* vs. *Fergusson*, 11 C. L. R., 17; *Biswa Sonan* vs. *Binanda*, I. L. R., 10 Cal., 416; *Mookheswr* vs. *Ramphul*, 5 Alla., 70; and this is in accordance with the opinion of the Privy Council in the cases of *Ram Kirpal* vs. *Roop Kuari*, I. L. R., 6 Alla., 269, p. 275, and in the case of *Raja Muhesh Narain* vs. *Kishanund*, 9 Moore, 328. At page 341, their Lordships say: "It would be contrary to general principles and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when, for any reason, satisfactory or not, the execution of a final decree in a suit fails, or is set aside, and the proceedings, as regards that execution, are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit." See also *Surdhares* vs. *Girindur Chunder*, 1 C. L. R., 475. If the decree-holder, at the instance and for the benefit of the debtor, consents to a postponement for a certain time to enable the debtor to meet his liabilities, on condition that the attachment remains in force, and the Court, merely with a view to keep its files clear, strikes off the case, such an order striking off the case which is not a proper order, cannot affect the attachment—*Mungul Pershad* vs. *Grija Kant*, I. L. R., 8 Cal., 51; *Jyam Singh* vs. *Baidyan Alli*, 13 C. L. R., 176; *Sheo Gholam* vs. *Bani Prosad*, 4 C. L. R., 29; *Chumun Lall* vs. *Domun*, 9 W. R., 205; see also *Binda Bibee* vs. *Lalla Gopeenath*, 14 B. L. R., 323; and if a Judge has struck a case off improperly, he can restore it again—*Zahoorun* vs. *Tayler*, 10 W. R., 380; 2 B. L. R., 86; *Biswas Sonan* vs. *Binanda*, I. L. R., 10 Cal., 416. Where the decree-holder, when called upon to furnish security before selling the attached property (there was an appeal to the Privy Council), failed to furnish that security, and the execution-case was struck off, it was held that the effect of that order was to leave intact all the proceedings which had been taken up to that stage—*Soondur Singh* vs. *Bahooria*, 24 W. R., 36. Where execution was taken out in 1862 and not struck off till 1868, but it appeared that the delay was due to the creditor waiting long and patiently for her money, and being desirous to give the debtors every indulgence and opportunity of repaying the debt, it was held that the presumption of abandonment did not arise—*Indurjeet Koer* vs. *Luchmun Singh*, 24 W. R., 57.

But where attachment having issued on an application for execution of a decree, proceedings were, on the 31st December 1873, stayed for a month, by consent, and the execution-case was "struck off for the present," and on the 30th a fresh application for *attachment* and *sale* was made: *Held*, that there was no attachment subsisting between the 31st of December 1873 and the 30th of November 1874—*Gangagotti Pal* vs. *Ram Sunder*, 8 C. L. R., 157; and see as to the general rule—*Puddomonee* vs. *Roy Muthooranath*, 20 W. R., 133.

An alienation null and void, because made when an attachment was subsisting, does not become valid merely by the removal of the attachment—*Ram Churn* vs. *Jhubbo*, 14 W. R., 25.

Attachment, Suspended or Removed, Revived.—Where property has been released from attachment in execution of a decree, and in a subsequent suit brought for the purpose a decree is obtained, declaring it liable to be attached and sold in execution of the former decree, the effect of the decree in the latter suit is to set aside the

order which released the property from attachment, thus leaving matters as they were before that order was passed—*Wooma Churn* vs. *Kadambini*, 3 C. L. R., 146; and any alienation in the meantime would be made *pendente lite*—*Dinendronath* vs. *Ram Kumar*, I. L. R., 7 Cal., 107; so in the case of *Mahomed Warris* vs. *Pitambur*, 21 W. R., 435, in which it was held that the effect of that decree must be to set aside the order of release which had been made, and therefore to make the property still subject to the attachment and to restore the state of things that had been disturbed by the order of release. See, however, *Krishna Chetty* vs. *Rami Chetty*, 8 Mad., 99

Limitation.—For execution in case the amount due has been paid out under an attachment to a party not entitled to satisfaction, see *Lakshmana* vs. *Appala*, I. L. R., 7 Mad., 167.

Court may direct coin or currency-notes attached to be paid to party entitled.

277. If the property attached is coin or currency-notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

Act VIII of 1859, section 242. This section applies to H. C. and P. S. C. C.

Investigation of claims to, and objections to attachment of, attached property.

278. If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

Postponement of sale.

If the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it, pending the investigation of the claim or objection.

Act VIII of 1859, section 246. This section applies to H. C. and P. S. C. C.

Postponement.—A refusal to postpone apparently does not affect limitation in a suit brought under section 283—*Sah Mukhun Lall* vs. *Sah Koondun*, 2 Ind. App., 210.

Surety.—See section 253, *ante*.

Application of this Section.—Before any claim can be investigated under this section, it is necessary to ascertain whether the claim of the intervenor is based on a right originating before or after the attachment made by the decree-holder—*Saheb Jehan* vs. *Syud Shah*, 5 W. R., Mis., 28; the Judge should not refuse to make an inquiry under this section in a proper case, and he will be compelled by the High Court to do so —*Greesh Chunder* vs. *Kashessuree*, 8 W. R., 26; *Jameela* vs. *Luchmun Panday*, 4 C. L. R., 74.

It may be noticed that a judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without malice and mistakenly—*Damodhar* vs. *Lallu*, 8 Bom., 177; *Goma* vs. *Gokaldas*, I. L. R., 3 Bom., 74.

Does not Apply.—This section does not affect attachments made under section 268, *ante*—*Harila* vs. *Abhesang*, I. L. R., 4 Bom., 323; *Rambutty Koer* vs. *Kamessur*,

22 W. R., 36, (See note under section 268, *ante*); nor to claims to property directed to be sold by a mortgage-decree under sections 86—88 of the Transfer of Property Act—*Deefholts* vs. *Peters*, I. L. R., 14 Cal., 631. It only applies to claims which, if successful, would have the effect of releasing the property from attachment. Thus, where the rights and interest of A in a certain mohal are attached, a claim by B to an undivided share in it should not be entertained—*Nito Kalee* vs. *Kripanath*, 8 W. R., 358; see, on this case, *Nga Tha* vs. *Burn*, 11 W. R. (F.B.), 8.

Does Apply.—Where property belongs to A and B jointly, and in execution of a decree against A, anything more than A's right and interest in the property is attached, B has a right to come in and claim that the attachment may be removed, *quoad* his share—*Raj Kumar Roy* vs. *Kadambini*, 4 B. L. R., 175; 13 W. R., 63; *Meenakshi* vs. *Immudi*, 16 Ind. App., 1; *Khub Lall* vs. *Ram Lochan*, I. L. R., 17 Cal., 260; *Ram Dayal* vs. *Durga Singh*, I. L. R., 12 Alla., 209; *compare Ramanandan* vs. *Raja Gopala*, I. L. R., 12 Mad., 389; *Burjorji* vs. *Dhunbai*, I. L. R., 16 Bom., 1; and the Court should investigate B's claim—*Issur Chunder* vs. *Mohinee Mohun*, 17 W. R., 74, no matter how B derives his title—*Hurish Chunder* vs. *Brajo Soonder*, 6 W. R., 164; or whether the property is moveable or immoveable—*Deanath Biswas* vs. *Issur Gine*, 14 W. R., 52. Where a suit resulted in two distinct orders for the payment of costs, one against the first set of defendants and another against the second, and the property of one of the former set was taken in execution of the order against the latter: *Held*, that the application of the aggrieved defendant for the release of his property fell within the provisions of section 246, Act VIII of 1859 (the section corresponding to this section)—*Binode Lall* vs. *Gireedhur*, 22 W. R., 392; and see also *Govind Pershad* vs. *Rajah Ram*, 8 W. R., 378. See note under section 280, *post*.

Official Assignee.—The application of the Official Assignee to release the property of an insolvent debtor falls within this section—*Kashi Prasad* vs. *Miller*, I. L. R., 7 Alla., 752; but see *Shibkristo* vs. Miller, I. L. R., 10 Cal., 150, p. 162.

Legal Representative.—Where, in execution of a decree for a debt due by a deceased person, property in the hands of his representative is attached, a claim by the representative to have the property released, on the ground that it is his own private property, does not fall within this section, but within section 244, *ante*—*Waheed Ali* vs. *Mussamut Jumaee*, 18 W. R., 185; *Meer Mohomed* vs. *Ameeroomissa Khatoon*, 12 B. L. R., 66; 20 W. R., 280; *Kuriyali* vs. *Mayan*, I.L.R., 7 Mad., 255; *Rajrup Singh* vs. *Ramgolam*, I.L.R., 16 Cal., 1; *Seth Chand* vs. *Durga*, I. L. R., 12 Alla., 313; *Punchanan* vs. *Rabia*, I. L. R., 17 Cal., 711; *Mungeshur Kuar* vs. *Jamoona*, I. L. R., 16 Cal., 603; otherwise if he objects as trustee of third parties not before the Court—*Roop Lall* vs. *Bekani*, I. L. R., 15 Cal., 437; and 16 Cal., 603; 17 Cal., 711; 12 Alla., 313; see notes under section 244 *ante*, and section 280, *post*.

Receiver.—If the debtor is declared insolvent and receiver is appointed under sections 351, 354, *post*, this does not prevent a person claiming under this section—*Paras Ram* vs. *Karam Sing*, I. L. R., 9 Alla., 232.

Attachment before Judgment.—By section 487, *post*, this section applies to attachment before judgment—see *Sava Ramji* vs. *Jadarji Nathu*, 2 Bom., 142; *Jaea Ramji* vs. *Jadarji Natha*, 1 Bom., 224; *In re Gocool Doss Soonderjee*, Bourke, 240; and *Kartick Chunder* vs. *Mookta Ram*, 10 W. R., 21. In this last case it was held that where a landlord, in a suit against his ryot for rent, attached before judgment certain growing crops under section 16, Act VI (B. C.) of 1862, the claim of an intervenor ought to be investigated in the same manner as if it were a claim made under section 246, Act VIII of 1859, to property attached in execution of a decree.

As if he was a party to the Suit.—The words in Act VIII, 1859, were "as if the claimant had been originally made a defendant to the suit," and these words were stated by a Full Bench of the Calcutta High Court to mean "that the Court is to have the same powers of investigation as if the claimant was a party to a suit, which would give them power to summon the claimant and to dispose of the case against him, if he should refuse to attend"—*Nga Tha* vs. *Burn*, 11 W. R., (F. B.), 8. See also *Shirapa* vs. *Dod Nagaya*, I. L. R., 11 Bom., 114; *Punchanan* vs. *Rabia*, I. L. R., 17 Cal., 711, p. 719.

Designedly or Unnecessarily Delayed.—It will be noticed that it is optional with a Court to allow a claim or objection to be made when there has been intentional delay in making it. Where a Court has refused or has neglected to adjudicate a claim, its order cannot act prejudicially to the claimant—*Roghoonath Doss* vs. *Bhydonath*, 14 W. R., 364; *Jugobundhoo Bose* vs. *Sashya*, 16 W. R., 22; 8 B. L. R., App., 39; *Sah Mukhun* vs. *Sah Koondun*, L. R., 2 Ind. App., 210; 24 W. R., 75; 15 B. L. R., 238.

Practice.—The claimant in a case under section 278 should begin. The *onus* is on him to prove his claim, that the goods or property attached belonged to him, and were in his possession, and therefore not in that of the judgment-debtor. His evidence must be confined to his own claim, and not to establish the right of a third party *Nga Tha* vs. *Burn*, 11 W. R., (F.B.), 8; 2 B. L. R., 91.

Where several persons, independently of one another, put in claims under section 278, and it appeared that they each claimed to be in possession of the same portion of the property under attachment, it was held that the Court was bound to try each claim separately as between the claimant and the decree-holder, and it should not have thrown out all the claims, because they were inconsistent with one another—*Sharoda Moyee* vs. *Nobin Chunder*, 11 W. R., 255; 2 B. L. R., 333.

Where an objection has been made and disallowed, it cannot be renewed by the same person in the same attachment—*Khelat Chunder* vs. *Bhoggobutty Churn*, 14 W. R., 144. If in a previous attachment against the alleged representative of the judgment debtor no objection has been raised to his responsibility as such representative, he cannot raise it on a subsequent attachment—*Dheeraj Mahatab Chand* vs. *Pearee Dossee*, 6 W. R., Mis., 61.

Res-Judicata—The contest is between the decree-holder and the intervenor, the decree-holder does not represent the debtor so as to make the decision binding between the debtor and the claimant—*Shivapa* vs. *Dod Nagaya*, I. L. R., 11 Bom., 114; *Kedar Nath* vs. *Rakhal*, I. L. R., 15 Cal., 674; otherwise in Madras—*Metritom* vs. *Damoden*, 4 Mad., 472; *Guruva* vs. *Subbarayudu*, I. L. R., 13 Mad., 367; see "OTHER SUITS: LIMITATION," section 283, *post*.

279. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Evidence to be adduced by claimant.

Act VIII of 1859, section 246. This section applies to H. C. and P. S. C. C.

Interest in.—The claimant comes into Court on the ground that at the date of the attachment the property was not capable of being attached as the property of the judgment-debtor. In order to have a *locus standi*, he must show not only that the property was not that of the judgment-debtor, but that he, the claimant, had an interest in it, or it was in his possession—*Nga Tha* vs. *Burn*, 11 W. R. (F. B.), 8. His position, therefore, is in every respect the same as that of a plaintiff in a suit in which the judgment-creditor would be defendant—*Nga Tha* vs. *Burn* 11 W. R., (F. B.), 8; *Sardhari Lall* vs. *Ambica Pershad*, I. L. R., 15 Cal., 521; 15 Ind. App., 123; *Sheoraj* vs. *Gopal*, I. L. R., 18 Cal., 290. But see *Shivapa* vs. *Dod Nagaya*, I. L. R., 11 Bom., 114.

Or was possessed of.—This section is not intended to be taken literally, but to be read with section 280. Thus the clause "or was possessed of" means was possessed of either for himself or as trustee for the judgment-debtor, and when the question of possession is disposed of in favour of the objector, the Judge should not go into that of title—*Hamid Buksh* vs. *Buktear Chand*, I. L. R., 14 Cal., 617.

Practice—The application ought either be dismissed or numbered and registered as a suit—*Sahoo Gokul* vs. *Zynuab*, 1 Alla., 255. The *onus* is on the applicant to prove his claim—*Gooroo Doss* vs. *Sona Monee*, 20 W. R., 345; *Hurrish Chunder* vs. *Bhoobun Moye*, 4 W. R., 99, by any kind of evidence sufficient for the purpose—*Binode Lall* vs. *Gireedhar*, 22 W. R., 392; and the Court is bound to receive the evidence offered in support of the claim—*Bhoiharinee Dabee* vs. *Nil Mony Sing*, 24 W. R., 422; provided such claim be made at a proper time, *i.e.*, before sale—*Maharajah of Burdwan* vs. *Heera lall Seal*, 11 W. R., 54.

280. If upon the said investigation the Court is satisfied that, for the reason stated in the claim or objection, such property was not, when attached in the possession of the judgment-debtor or of some person in trust for him, or in the occupany of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the

Release of property from attachment.

Court shall pass an order for releasing the property wholly, or to such extent as it thinks fit, from attachment.

Act VIII of 1859, section 246. This section applies to H. C. and P. S. C. C.

Jurisdiction.—This section contemplates not only the entire release of the property, but also the retention of the attachment to such extent as the Court thinks fit—*Yashvant* vs. *Vithoba*, I. L. R., 12 Bom., 231.

Form of Order.—Where the Court is of opinion that the property attached ought not to be sold, the proper order for the Court to make, is a simple order releasing the property from attachment. "It may be that the order of release is based on the fact that the Court considers it proved that the property belongs to the claimant, but nevertheless the order cannot, and certainly ought not to, contain any declaration of the claimant's title as against the judgment-debtor"—*Bhyrab Lall* vs. *Meer Abdool*, 8 W. R., 93; *Khelat Chunder* vs. *Bhuggobutty*, 14 W. R., 144. And where, under this section, property which has been attached is ordered to be released, the order for release is made with reference merely to the particular claimant who has obtained the order, the order is not to be looked on as a general decision (of which all the world can have the benefit) that the property does not belong to the judgment-debtor—*Imam Bandee Begum* vs. *Mahomed Tukee*, 8 W. R., 27. See "APPLICATION OF THIS SECTION," section 278, *ante*.

Against Whom.—And the only person against whom an order can be passed under the section is the decree-holder—*Surdhari Lal* vs. *Ambica Pershad*, I. L. R., 15 Cal., 521; 15 Ind. App., 123, referred to under section 283, *infra*; *Kedar Nath* vs. *Rakhal Das*, I. L. R., 15 Cal., 672; *Booliroonissa* vs. *Kureemoonnissa*, 21 W. R., 230; see, however, *Shivapa* vs. *Dod Nagaya*, I. L. R., 11 Bom., 114; *Guruva* vs. *Subbarayudu*, I. L. R., 13 Mad., 306; see "OTHER SUITS: LIMITATION," section 283, *post*. If the claimant proves that the property attached was at the date of attachment wholly or partly his, an order should be passed releasing the property to that extent—*Jummal* vs. *Tirbhee Lall*, 12 W. R., 41; *Rajcoomar Roy* vs. *Kadumbiny*, 5 B. L. R., 175; 13 W. R., 63; and that is the only order which should be passed—*Khellat Chunder* vs. *Gour Churn*, 18 W. R., 402; *Misree Begum* vs. *Punno*, 8 W. R., 362.

Co-Sharers.—Where in executing a decree against the father and eldest son of a joint Mitakshara family, the other sons, not on the record, claimed their shares, the case was held to fall within this section—*Sitanath* vs. *Land Mortgage Bank*, 12 C. L.R., 572; I. L.R., 9 Cal., 888; see also *Gooroo Dass Pyne* vs. *Ram Narain*, L. R., 11 Ind. App., 59; *Ramakrishna* vs. *Namasivaya*, I. L. R., 7 Mad., 295. So, where A got a partition decree against the *kurta* without making the other members parties, the latter obtained release of their shares under this section—*Tentappaya* vs. *Sattominarayana*, I. L. R., 6 Mad., 284; and where the half share in certain property was attached in execution of a decree as belonging to the judgment-debtor, and a third party objected on the ground that out of that share two-eighths belonged to him, and only one-eighth to the judgment-debtor, it was held that this claim was one that should have been investigated, and that if it were established that share should be released from attachment—*Rajcoomar Roy* vs. *Kadumbiny*, 13 W. R., 63; 5 B. L. R., 175. See also *Issur Chunder* vs. *Mohinee Mohun*, 17 W. R., 74; and see note under sections 244 and 278, *ante*.

In Trust partly on Account of some other Person.—This section must be read with section 266 *ante*, and only refers to such portion of the property as the trustee has a disposing power over. Khairunissia devised certain property in *wakf* to her grandson, Mahomed Ali, as trustee, who asserted her power to create the *wakf* and treated the property as disposed of by her for the purposes expressed in it. A purchaser of a decree against Mahomed Ali, sought to sell that property in execution against the heir of Mahomed Ali, who held as trustee, and it was argued that if there was a margin of profit, it could be sold. It was held that the margin of profit could not be determined unless in a suit in which all the persons interested in the endowment were parties, and as neither the property nor any specific portion of it could be taken out of the hands of the trustee his claim should have been allowed—*Bishen Chand* vs. *Nadir Hossein*, 15 Ind. App., 1; I. L. R., 15 Cal., 329. And where a claimant was found in possession of property as trustee in *wakf* it was held that the Court executing the decree could not go beyond the question of possession and decide that the deed was invalid and the property had devolved on the judgment-debtor as heir—*Hamid Bakhut* vs. *Buktiar*, I. L. R., 14 Cal., 617; followed in *Shsoraj Nandan* vs. *Gopal Suran*, I. L. R., 18 Cal., 290; and see *Burjaji* vs. *Dhanbai*, I. L. R., 16 Bom., 1, p. 12.

Where the decree-holder states that the claimant is only the *benamesdar* of the debtor, the Court is bound to enquire and find whether the property under attachment is or is not in the possession of the debtor or of some person in trust for him—*In re*

Hureehur Mookerjee, 20 W. R., 202. So, where a decree-holder sought to enforce his lien against certain mortgaged property, a third party intervened on the ground that he held under a *Ladavee* executed in his favour by the debtor, and the Judge found that the claimant was in possession not as the trustee of the debtor : *Held*, he should have released the property from attachment, leaving the decree-holder to enforce his lien against the party in possession by a regular suit—*Khellat Chunder* vs. *Gour Chunder*, 18 W. R., 402.

Where A contracted to lay down a certain quantity of pavement for B, and, having carted paving stones to the works to the value of Rs. 100, received an advance of that sum from A, it was held that the stones should be released from attachment on B's intervention—*Small Cause Court Ref.*, 2 Alla., 337. A bought certain premises from the judgment-debtor, stipulating that if he should repay the sum with interest and also settle his general account with the firm, the premises should be re-conveyed. Possession was given to A. The premises were afterwards attached in execution of a decree, but were released, it being held that A was not in possession as trustee for the debtor—*Kassiraw* vs. *Vithaldas*, 10 Bom., 100.

If upon the Investigation.—That is if upon the investigation of the claim of an objector—*Bishen Chand* vs. *Nadir Hossein*, 15 Ind. App., 1.

281. If the Court is satisfied that property was, at the time it was attached, in possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

Disallowance of claim to release of property attached.

Act VIII of 1859, section 246. This section applies to H. C.

Nature of the Decision.—The proper order to make under this section is that the claim be disallowed—*Mohadeb Mundul* vs. *Modhoo*, 16 W. R., 59.

When Sufficient.—This order will be correct in cases where the claimant does not appear in support of this claim—*Tripoora Soondures* vs. *Ijjutoonissa*, 24 W. R., 411 ; *Dhunput Singh* vs. *Indur Chunder*, 13 W. R., 121 ; or fails to produce any evidence —*Sreemunto Hazrah* vs. *Syud Tajjoodin*, 21 W. R., 409 ; *Gooroo Doss* vs. *Sona Monee*, 20 W. R., 345 ; as well as in cases where the claimant fails to produce evidence worthy of credit—*Lalla Goondur* vs. *Hubeeboonissa*, 15 W. R., 311. In all these cases there is an adjudication and an order adverse to the claimant or objector which may make it necessary for him to sue to have it set aside—*Kaminee Debia Issur Chunder*, 22 W. R., 39 ; *Brijo Kishore Nagh* vs. *Ram Dyal*, 21 W. R., 133 ; *Sardhari Lal* vs. *Ambica Pershad*, I. L. R., 15 Cal., 521 ; 15 Ind. App., 123 ; *Khub Lal* v. *Ram Lochun*, I. L. R., 17 Cal., 260. And see the cases under "LIMITATION," section 283, *infra*.

Whom it Affects.—An order passed under this section enures to the benefit of the person only in whose favour it is passed, *i.e.*, the attaching-creditor—*Khub Lal*, *supra*. Thus, the judgment-debtor, or persons claiming under him, cannot set up as a bar that a claim made by their adversary for the release from attachment of the property in dispute, was dismissed as against a jugdment-creditor who had attached it in execution of his decree—*Boolirooniss* vs. *Kureemoonissa*, 21 W. R., 230 ; *Gunga Narain* vs. *Haradhun*, 6 W. R., 157. And where the claimant is in actual possession, the effect of an order disallowing his claim is that he is in possession, without any title—*Brijo Kishore* vs. *Ram Dyal*, 21 W. R., 133. The fact that Government may have released certain lands from settlement in payment of revenue on the ground that they were appropriated to a religious endowment, does not exempt them permanently from being attached and sold in execution of a decree against the person who may hold them, if it be proved that he held them entirely for his own use—*Nimaye Churn* vs. *Jogendro Nath*, 21 W. R., 365. See also the cases under "LIMITATION," section 283, *post*.

Limitation.—The date of disposal of the claim is the date from which limitation in execution runs—*Becharam* vs. *Abdul*, I. L. R., 11 Cal., 55.

In Trust.—See "IN TRUST," section 280, *supra* ; *Bishen Chand* vs. *Nadir Hossein*, 15 Ind. App., 1, p. 11.

282. If the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or lien.

Continuance of attachment subject to claim of incumbrancer.

This section applies to H. C. and P. S. C. C.

Subject to a Mortgage.—A sale subject to mortgage means a sale made expressly subject by the sale certificate—*Nagindas* vs. *Halal Khan*, I. L. R., 5 Bom., 470.

If property is sold subject to a mortgage, and bought in by the mortgage, the debt is satisfied if the value of the property is sufficient to cover the debt—*Dulichand* vs. *Ram Kissen Singh*, I. L. R., 7 Cal , 648.

Where a mortgagee is in possession of the mortgaged property when it is attached in execution of a decree against the mortgagor, he can claim to have the attachment withdrawn—*Kassirab Saheb Holkar* vs. *Vithaldas Mangulji*, 10 Bom., 100; though an equity of redemption may be sold in execution of a decree—*Saraswati Debi* vs. *Nubadwip Chandra*, 5 B. L. R., 380.

283. The party against whom an order under sections 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Saving of suits to establish right to attached property.

Act VIII of 1856, section 246. This section applies to H. C. and P. S. C. C., and does not apply to the Calcutta S. C. C.—*Ismail* vs. *Mahomed*, I. L. R., 18 Cal., 296.

For remarks on the scope of this section, see *Rango Vithal* vs. *Rikhivadas*, 11 Bom., 174; and *Bank of Hindustan* vs. *Prem Chand Raichand*, 5 Bom., 83, 93; *Sheikh Eida* vs. *Ram Jug*, 19 W. R., 289.

Subject to the result of such Suit—This does not mean that the decree-holder who has obtained a decree in the first Court is precluded from selling until the appellate decision has been given—*Syed Fathula* vs. *Munyappa*, I. L. R., 6 Mad., 98.

Conclusive.—By this is meant that, unless the suit is brought, the unsuccessful party cannot assert his right in any capacity, whether as plaintiff or defendant—*Nilo Pandurung* vs. *Rama*, I. L. R., 9 Bom., 35; *Bauri Prosad* vs. *Mahamaed Yusuf*, I. L. R., 1 Alla., 381; *Bapu* vs. *Baji*, I. L. R., 14 Bom., 372, and is prevented from pleading adverse possession at the date of the order—*Velayuhan* vs. *Laksmana*, I. L. R., 8 Mad., 506; *Achuta* vs. *Mammavu*, I. L. R., 10 Mad., 357. See, however, *Gend Lall* vs. *Denonath*, I. L. R., 11 Cal., 673; *Seva* vs. *Muthasami*, I. L. R., 10 Mad., 53.

Res-Judicata.—The decision is only conclusive as to the property in dispute—*Dinkar* vs. *Hari*, I. L. R., 14 Bom., 206. See on this point *Radha Prasad* vs. *Lall Sahab*, I. L. R., 13 Alla., 53, p. 62.

Remedies.—If the claimant fails he is not compelled to bring a declaratory suit to establish his title; he may prevent execution by paying the decretal amount, and then sue for it as money paid under compulsion—*Dulichand* vs. *Ram Kishen*, I L. R., 7 Cal., 648; 8 Ind. App., 93; *Jugdeo Narain* vs. *Raja Singh*, I. L. R., 15 Cal., 656; *Javalsingji* vs. *The Secretary of State*, I. L. R., 14 Bom., 299.

Besides bringing a regular suit the party against whom the order is passed may apply for a review of the order—*Cochrane* vs. *Heera Lall*, 7 W. R., 79; and the order granting the review will be final—*Bhyrub Chunder* vs. *Madhub Ram*, 20 W. R., 84. And where a claim is made and dismissed for default, a fresh claim may be preferred—*Mahadeb Mundul* vs. *Modhoo*, 16 W. R., 59; but a fresh application, made after the previous one had been struck off at the instance of the claimant, was held to have been properly dismissed—*Gooroo Dass* vs. *Kamala Kant*, 20 W. R., 456; and a Judge has no jurisdiction to try a second time the same objector's claim under section 278, as against the same attachment, or to re-open a question finally decided on a former occasion—*Khelat Chunder* vs. *Bhuggobutty Churn*, 14 W. R , 144.

Revision.—In Madras, revision under section 622, *post*, of an order disallowing an objection is refused—*Ittiachurn* vs. *Velappan*, I. L. R., 8 Mad., 484, p. 493.

Appeal.—There is no appeal from an order dismissing a claim to attached property or fom an order releasing the property from attachment unless the claimant is the

representative in interest of the judgment-debtor, and comes under section 244, clause (*e*), *ante*—*Rash Behary* vs. *Surnomooyi*, 9 C. L. R., 79. And where land was attached in execution of a rent-decree, and on an application made either under Act VIII of 1859, section 246, or Act X of 1859, section 106, it was released from attachment by order of a Court of competent jurisdiction, such order was not subject to appeal, and could only be impugned by a regular suit—*Urjoon* vs. *Nilmoney Singh*, 20 W. R., 90. And see Notes under section 244, *ante*.

Shebait.—As to the power to attach the property of a religious trust for the debts of the trustee, see *Bishen Chand* vs. *Nadir Hossein*, I. L. R., 15 Cal., 329. "IN TRUST," section 280, *ante*.

Where, in execution of a decree against the judgment-debter, a *shebait*, the property of the idol, was attached, it was held that no appeal lay from an order rejecting an application made by the judgment-debtor to have the property released from attachment —*Namaye Churn* vs. *Jogendro Nath*, 21 W. R., 365; and so, where the judgment-debtor claimed to hold property on account of an endowment, and the property was released, the fact that the objection was made by the judgment-debtor was considered unimportant and no appeal was allowed—*Shankar Dial* vs. *Amir Haidar*, I. L. R., 2 Alla., 752; but see *Bagubai* vs. *Kazai Sayad Nizmuddin*, 6 Bom., 205, where an appeal was granted from an order releasing property from attachment at the instance of the judgment-debtor who had alleged that the property belonged to an idol and that he was only manager; see "LEGAL REPRESENTATIVE," section 278, *ante*; see also the cases under section 244, *ante*.

Costs.—Where an application was decreed with costs to be paid by the decree-holders, and the latter were declared in a subsequent suit to be entitled to sell the property, but no relief was asked in regard to the costs, it was held they could not be refunded by the Court executing the decree—*Ragunath* vs. *Badre Prasad*, I. L. R., 6 Alla., 21.

Suit to Establish Right; Nature of Suit.—The effect of this section is to exclude a party to an investigation under sections 280, 281 or 282, from any other remedy than that expressly provided for him by this section—*Settiappan* vs. *Sarat Singh*, 3 Mad., 220. The party against whom an order is passed under the previous sections must, if he sues, assert substantially the same right as that which was put forward in execution —*Colvin, Cowie & Co.* vs. *Elias*, 2 B. L. R., 212; 11 W. R., 40. Thus the decree-holder may sue to have his right to attach and sell the property declared—*Mitchell* vs. *Mathura Dass*, 12 Ind. App., 150, and a claimant may bring a declaratory suit to establish his right—*Narayanras* vs. *Brother*, I. L. R., 4 Bom., 529; *Kolasherri* vs. *Kolasherri*, I. L. R., 4 Mad., 131; and obtain any further relief he may be entitled to—*Sadu* v. *Ram*, I. L. R., 16 Bom., 608; even though the attachment has been withdrawn—*Sreeputee Mirdha* vs. *Kartick*, 11 C. L. R., 181, and need not wait till his possession is disturbed—*Shirram* vs. *Jimu*, I. L. R., 13 Bom., 34; but he cannot sue to set the order aside—*Kolesherri* vs. *Kolasherri*, I. L. R., 4 Mad., 131.

Defence.—In a suit by an execution-creditor to establish the title of his judgment-debtor to certain property which has been released from attachment on a claim preferred by an intervenor, the latter has no right to set up any irregularities in the execution-proceedings in answer to the execution-creditor's title—*Tofail Ahmud* vs. *Banee Madhub*, 24 W. R., 394; nor impeach the decree as collusive—*Gulibai* vs. *Jagannath*, I. L. R., 10 Bom., 659.

Evidence: Inadmissible.—The Judge is bound to find facts upon the evidence tendered and taken in the case, and not upon any evidence taken in the summary cause—*Lekhraj Roy* vs. *Mutty*, 14 W. R., 95; nor is the judgment in the claim case admissible—*Kishori Mohun* vs. *Hursook Dass*, I. L. R., 12 Cal., 696; I. L. R., 17 Cal., 436, p. 439.

Onus of Proof.—Where the regular suit is brought by the intervenor, the onus is on him to prove his title—*Nathu Sadashib* vs. *Ramchundra Annaji*, 5 Bom., 76; *Sreenarain* vs. *Miller*, 15 W. R., 7; *Govind* vs. *Santa*, I. L. R., 12 Bom., 270; *Mitchell* vs. *Mathura Dass*, 12 Ind. App., 150; but where property, in the possession of the attaching creditor at the date of attachment, was released from attachment at the instance of an intervenor, but allowed to remain in the creditor's possession: *Held*, in a subsequent suit by the intervenor (which was not a suit under this section), that the plaintiff must prove his title—*Madhoo Pershad* vs. *Durga*, 7 Alla., 85.

Evidence Required.—He should be prepared to prove that the claim which he puts forward and is seeking to have declared has been investigated and disallowed; and it is still in existence; that it has been infringed; and that he is seeking compensation or to recover possession—*Amjud Ali* vs. Kunkoo, 17 W. R., 304; *Mahomed Gazee* vs. *Shumboonath*, 22 W. R., 389; and a person whose property is wrongfully seized may obtain a declaration that the property is his, and damages for any loss flowing from the wrongful seizure such as depreciation in value—*Keshori Mohun* vs. *Hursook Dass*, I. L. R., 12 Cal., 697; 17 Ind. App., 17. He should prove purchase and subsequent dispossession, where these are the grounds of his claim—*Tulsee Monee* vs. *Peary Mohun*, 25 W. R., 79. Where he shows that a deed of sale has been executed in his favour by the judgment-

debtor, and that consideration-money has passed and possession has been given him, he starts his case sufficiently; if the defendant alleges that the sale was collusive and fictitious, it is for him to show that it was so—*Digumburee Dossee* vs. *Banee Madhub*, 15 W. R., 155. Where the certified purchaser of property, which had been a second time attached and sold in execution of a decree as the property of the judgment-debtor, sued to be confirmed in possession of the property by virtue of his certificate of sale, and to obtain the cancelment of the second sale and of the order disallowing his objection: *Held*, on an objection being made that his purchase was *benamee* for the judgment-debtor, that the certificate of sale was not conclusive evidence that his purchase was exclusively for his own benefit—*Gunesh Pershad* vs. *Sheo Churn Lall*, 6 Alla., 197. It is sufficient if he proves that he has been in peaceable possession for more than twelve years previous to the institution of the suit—*Nuffer Dass* vs. *Nil Madhub*, 11 W. R., 467; and his suit should not be dismissed merely on the ground that he failed to show he was in possession at the institution of the suit — *Mathoora Pandey* vs. *Ram Ruchya*, 3 B. L. R., 108; 11 W. R., 482; though, no doubt, that is an important question in the case—*Toofanee Doss* vs. *Mun Rukhun*, 15 W. R., 202; and if he can prove it, the creditor must show title in himself or his judgment-debtor—*Pemra* vs. *Narayan*, I. L. R., 6 Bom., 215; *Krisharao* vs. *Vasudeo*, I. L. R., 8 Bom , 371.

Hindu Joint-Family.—Where ancestral joint-property is attached, and one member of the joint-family sues to have it declared that the decree was personal and could not affect his interest, the question of the immorality of the debt does not arise—*Ram Doyal* vs. *Durga Singh*, I. L. R., 12 Alla., 209. See also *Meenakshai* vs. *Immudi*, 16 Ind. App., 1.

Relief by Injunction.—When the intervenor brought a regular suit under section 240, Act VIII of 1859, an *ad interim* injunction to stay the execution-proceedings could not be granted. The proper course was for the intervenor to present a petition in the execution-case, representing that he has brought a suit and praying for a postponement of the sale—*Roy Luchmeeput Singh* vs. *The Secretary of State*, 20 W. R., 11; and such a petition should be acceded to—*Doorga Churn* vs. *Ashootosh Dutt*, 24 W. R., 70; not so under the present Code—*Brojendro Kumar* vs. *Rup Lall*, I. L. R., 12 Cal., 515. See "WRONGFULLY SOLD," section 492, *post*.

Damages.—Measure of damages in case of moveable property—*Kissori Mohun* vs. *Hursukh*, I. L. R., 17 Cal., 436; 17 Ind. App., 17.

Parties.—Where the intervenor claims the property sold in execution as his own exclusive property, he should make the decree-holder a party to the suit, because the object of the suit is to restore all parties to the position which they occupied previously to the attachment and sale—*Bank of Hindustan* vs. *Premchand*, 5 Bom., 83; but in a suit by a creditor the debtor is not a party—*Kedar Nath* vs. *Rakhal*, I. L. R., 15 Cal., 674; *Shivapa* vs. *Dod Nagaya*, I. L. R., 11 Bom., 114; but see *Gurura* vs. *Subbarayudu*, I. L. R., 13 Mad., 366. Further if the claimant desire further relief by partition all the owners should be parties—*Sadu* vs. *Ram*, I. L. R., 16 Bom., 608.

Suit will not lie.—It has been held that if a person whose property is attached does not object under section 278, he cannot bring a regular suit to declare the property belongs to him and not the judgment-debtor—*Man Kuar* vs. *Tara Sing*, I.L.R., 7 Alla., 583.

A regular suit by an intervenor will not lie, under this section, for the purpose of establishing that the interest of a judgment-debtor which was put up for sale was that of a tenant only and not that of an usufructuary mortgagee—*Amjud Ali* vs. *Konkoo*, 9 Ben. App., 28; 17 W. R., 304. And where a regular suit was dismissed, which was brought under section 246, Act VIII of 1859, by an intervenor in possession, whose claim under that section had been disallowed, and a subsequent suit against the intervenor for possession was brought by the execution-purchaser, the fact that the intervenor had been more than twelve years in possession prior to the institution of this last mentioned suit was held to be a good defence—*Shridhar Vinayak* vs. *Babaji*, 6 Bom., 220.

Effect of Suit.—Where the attaching-creditor brought a suit and obtained a decree establishing his right of attachment, it was held that the effect of that decree was to set aside the order of release and to restore the state of things which it had disturbed—*Mahomed Warris* vs. *Pitambur*, 21 W. R., 435; and that an application for execution against the same property made after having obtained the decree, is, whatever be its form, in substance one for the continuation of the former proceedings, if an application has been made—*Rajarathnam* vs. *Shevalayammal*, I. L. R., 11 Mad., 103; and is not, therefore, an application to execute a decree within the meaning of Act IX of 1871, sched. II, art. 167—*Booboo Pyaroo* vs. *Nazir Hossein*, 23 W. R., 183: *Paras Ram* vs. *Gardner*, I. L. R., 1 Alla., 355; and *compare Raghunandan* vs. *Bhugo Lal*, I. L. R., 17 Cal., 268; and article 178, Act XV of 1877 now applies—*Basant Lal* vs. *Batul Bebee*, I. L. R., 6 Alla., 23; *Chandra Prodhan* vs. *Gopi*, I. L. R., 14 Cal., 385; *Kalyandhai* vs. *Ghanashamlal*, I. L. R., 5 Bom., 23; and see *Raghunandun* vs. *Bhugoo*, I. L. R., 17 Cal., 268; otherwise in Madras—*Krishna Chetty* vs. *Rama Chetty*, 8 Mad., 99; and article 179 applies—*Narayan Nambi* vs. *Pappi*, I. L. R., 10 Mad., 22; and article 179 applies in all cases in which execution is sought in the second time against other property or to arrest

the judgment-debtor, *id.*; *Krishnaji* vs. *Anandrav*, I. L. R., 7 Bom., 293; *Ram Soonder* vs. *Gopessur*, I. L. R., 3 Cal., 716. Where the same property is attached in execution of different decrees, and all the attachments are removed, it is not necessary for each attaching creditor to bring a separate suit. A decree obtained in a suit brought by one enures to the benefit of all—*Chintamonee* vs. *Issur Chunder*, 12 W. R., 221.

Stamp.—For the nature of suits brought under this section, the amount of stamp-duty required, and their valuation for purposes of jurisdiction, see *Dayachand Nemchand* vs. *Hemchand Dharamchand*, I. L. R., 4 Bom., 515; *Narainrao* vs. *Balkrishna*, I. L. R., 4 Bom., 529; *Kolasherri Illath* vs. *Kolasherri*, I. L. R., 4 Mad., 131; *Dhondo* vs. *Govind*, I. L. R., 9 Bom., 20; *Vithal* vs. *Balkrishna*, I. L. R., 10 Bom., 610; *Gulzari Mal* vs. *Jadaun Rai*, I. L. R., 2 Alla., 63, 799; *Ram Prasad* vs. *Sukh Rai*, I. L. R., 2 Alla., 720; *Dildar* vs. *Narain*, I. L. R., 11 Alla., 365; *Krishnama Chariar* vs. *Srenevasa*, I. L. R., 4 Mad., 339; and compare the case of *Ahmed Mirza* vs. *Thomas*, I. L. R., 13 Cal., 162; *Modhusudun* vs. *Rakhal*, I. L. R., 15 Cal., 104.

Jurisdiction.—It is the value of the property in dispute and not the amount of the decree that determines jurisdiction—*Durga Prasad* vs. *Bachla*, I. L. R., 9 Alla., 140. But see *Annaji Rau* vs. *Rama*, I. L. R., 10 Mad., 152; *Modhusudun* vs. *Rakhal*, I. L. R., 15 Cal., 104.

Small Cause Courts—Whether a party is to sue in the Civil Court or the Small Cause Court depends upon the nature of his claim and the right he seeks to enforce. A person whose goods have been illegally sold in execution may bring a suit in the Small Cause Court to recover them—*Shib Narain Singh* vs. *Madenally*, 9 C. L. R., 8; I. L. R., 7 Cal., 608; *Kalian* vs. *Kalian*, I. L. R., 9 Bom., 250; but where a decree-holder merely seeks to obtain a declaration that certain property is liable to attachment in execution of his decree must go to the Civil Court—I. L. R., 7 Cal., 608; *Akbarali* vs. *Jezuddin*, I. L. R., 8 Cal., 399; *Chhaganal Nagardas* vs. *Jesban Dass*, I. L. R., 4 Bom., 503; *Mahomed Koya* vs. *Rasmo*, I. L. R., 9 Mad., 206. And a regular suit to follow moveables attached, or to set aside an attachment, will not lie in a Small Cause Court in the North-West—*Godha* vs. *Naikram*, I. L. R., 7 Alla., 152; *Ilahi Buksh* vs. *Sita*, I. L. R., 5 Alla., 462; *Makund Lall* vs. *Nasiruddin*, I. L. R., 4 Alla., 416; otherwise in Bombay—*Pagt Purlip* vs. *Varaj Lal*, I. L. R., 8 Bom., 259, and Madras—*Damd Beg* vs. *Kullapa*, I. L. R., 11 Mad., 265.

Limitation.—The Code does not prescribe the extent to which an investigation should go under this section, and if there is an order of a competent Court, the limitation of one year will apply—*Sardhari Lal* vs. *Ambika*, 15 Ind. App., 123; I. L. R., 15 Cal., 521; *Yashvant* vs. *Vithoba*, I. L. R., 12 Bom., 231, whatever may be the form in which the suit is brought—*Shiboo Narain* vs. *Mudden Ally*, I. L. R., 7 Cal., 608; *Khub Lal* vs. *Ram Lochun*, I. L. R., 17 Cal., 260; but see *Kallu Mal* vs. *Brown*, I. L. R., 3 Alla., 504.

This limitation will not apply if the Judge has refused to make any investigation—*Chandra Bhusan* vs. *Ramkanth*, I. L. R., 12 Cal., 108; or the application has been struck off for default of prosecution—*Kallu Mal* vs. *Brown*, I. L. R., 3 Alla., 504; *contra*—*Sadut Ali* vs. *Ramdhone*, 12 C. L. R., 43; or if the decree has been paid off, and for this or any other cause the attachment has been removed—*Umesh Chunder* vs. *Raj Bullubh*, I. L. R., 8 Cal., 279; *Ibrahimbhai* vs. *Kabulabhai*, I. L. R., 13 Bom., 72; or if the order has not been against the plaintiff in the subsequent suit—*Adhikari* vs. *Gopinath*, 11 C. L. R., 352; or has been passed without jurisdiction—*Lala Gundhur* vs. *Habibunnissa*, 7 B. L. R., 235; see also *Suryanna* vs. *Durgi*, I. L. R., 7 Mad., 261.

A mortgagee sued his mortgagor on the mortgage-bond and got a decree. But before sale the property was sold in execution of another decree and purchased by the decree-holder who intervened and the property was released. The mortgagee then sued both for sale of the mortgaged property in satisfaction of his debt on the ground that his mortgage was prior to the purchase: *Held*, the suit in so far as it was not a suit to sell the property under the first decree against the mortgagee, was subject to the limitation of one year—*Bukshi Ram* vs. *Sheo Pergash*, I. L. R., 12 Cal., 453.

As to the limitation under Act IX of 1871, which differed from the present Act, see *Krishnaji Vithal* vs. *Bhaskur Rangnath*, I. L. R., 4 Bom., 611; *Gend Lall Tewari* vs. *Denonath*, I. L. R., 11 Cal., 673.

Minor.—A minor is not bound by the one year's limitation—*Khoda Box* vs. *Budri Narain*, 8 C. L. R., 306; he may bring a suit under this section within one year of attaining his majority. See Limitation Act, 1877, section 7—*Phoolbas Koonwur* vs. *Jogessur*, I. L. R., 1 Cal., 226; 3 Ind. App., 7.

Other Suits: Limitation.—It has been held that the limitation of one year does not apply to a suit by the judgment-debtor against the intervenor—*Nitta Kolita* vs. *Bishnuram Kolita*, 2 B. L. R., App., 49; *Kedarnath* vs. *Rakhal*, I. L. R., 15 Cal., 674; and see the case of *Shivapa* vs. *Dod Nagaya*, I. L. R., 11 Bom., 114; and as to Madras, see *Melieloon Perengarypprom* vs. *Damodren*, 4 Mad., 472, as explained in *Guruya* vs. *Subbarayudu*, I. L. R., 13 Mad., 366; especially when the judgment-debtor charged that the successful intervenor was his mortgagee in possession—*Cheriyarakel* vs. *Vayaka*, 6 Mad.,

416; nor to a suit by one attaching creditor against another, who, having obtained a decree against an intervenor declaring that the property released was that of the judgment-debtor, executed his decree and bought the property—*Chintamani* vs. *Iswar Chandra*, 3 B. L. R., App., 122; nor to a suit by a person not a party to the execution-proceedings —*Venkata* vs. *Subbamma*, I. L. R., 4 Mad., 178; *Suryana* vs. *Durgi*, I L.R., 7 Mad., 261; or who comes in too late to be made a party to the proceedings under sections 280, 281 or 282—*Roghoonath Doss* vs. *Bydonath*, 14 W. R., 364; nor to a suit between rival claimants —*Doorgaram* vs. *Nuro Singh*, 11 W. R., 134.

Where the suit is not to follow to certain property but its proceeds, one year's limitation does not apply. Thus, where A got a decree against M's widow for wrongful conversion of his timber by M, and attached the property of M's brother, the attachment was disallowed. A then sued to execute against the property. It was held that M's brother having sold the timber and benefited by the same, A could follow the proceeds in his hand, and the limitation was six years from the date defendant received the money—*Gooroo Dass Pyne* vs. *Ram Narain Sahoo*, Ind. App., 59.

Step in Aid of Execution.—A suit to set aside an order in a claim case is not a step in aid of execution—*Raghunandun* vs. *Bhugoo Lal*, I. L. R., 17 Cal., 268.

Power to order property attached to be sold, and proceeds to be paid to person entitled.

284. Any Court may order that any property which has been attached, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Act VIII of 1858, section 246. This section applies to H. C. and also to P. S. C. C., as far as it relates to moveable property.

May.—The word "may" means "shall"; but still when property is sold in execution of a decree, it cannot be sold again at the instance of a decree-holder who attached it before the attachment affected by the decree-holder under whose decree it is sold—*Kashy Nath* vs. *Surbanand*, I. L. R., 12 Cal., 317. See note under section 295, *post*, and "RE-SALE," section 285, *infra*; "SECOND SALE," section 314, *post*.

Appeal.—A judgment-debtor applied to have certain property attached in execution sold in successive shares. The Judge refused the application: *Held*, the debtor could appeal under section 588 (*j*), Act X of 1877—*Chandhari Singh* vs. *Jhumah*, 4 C. L. R., 27.

Property attached in execution of decrees of several courts.

285. Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof, shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

Application of this Section.—This section has no reference to the sections of the Code relating to the sale and delivery of property—*Chunni Lal* vs. *Debi Prasad*, I. L. R., 3 Alla., 356; and it is doubtful whether it refers to immoveable property—*Obhoy Churn* vs. *Golam Ali*, I. L. R., 7 Cal., 410. It does—*Chuni Lall* vs. *Debi Prasad*, I. L. R., Alla., 356; *Muttukaruppan* vs. *Mutturamalinga*, I. L. R., 7 Mad., 47.

Re-Sale.—This section does not render a sale under a second attachment invalid, even if the decree-holder is purchaser—*Obhoy Churn* vs. *Golam Ali*, I. L. R., 7 Cal., 410. But where a house, while under attachment by a Subordinate Judge, was attached and sold by a Munsif, and was subsequently sold by the Subordinate Judge,—it was held that the Munsif's sale was invalid—*Muttukaruppan* vs. *Mutturamalinga*, I. L. R., 7 Mad., 47; and see the cases of *Aghore Nath* vs. *Shama Sundari*, I. L. R., 5 Alla., 615; *Chunni Lal* vs. *Debi Prasad*, I. L. R., 3 Alla., 356; *Badri* vs. *Saran Lal*, I. L. R., 4 Alla., 359; otherwise in Bengal—*Bykant Nath* vs. *Rajendro*, I. L. R., 12 Cal., 333. But where

there are not two or more attachments existing at the same time, this section does not apply—*Stowell* vs. *Ajudhia Nath*, I. L. R., 6 Alla., 255. See "MAY," section 284, *ante*; "SECOND SALE," section 314, *post*.

Any Objection.—The Court referred to in this section has the sole power of deciding objections to the attachment, of determining claims made to the property, of ordering the sale thereof and receiving the sale-proceeds, and of providing for their distribution under section 295—*Badri* vs. *Saran Lal*, I. L. R., 4 Alla., 359. See note under section 295, *post*. Where by mistake the property has been sold in the Lower Court, the property should not be re-sold, but the Superior Court should adopt the sale and distribute the assets realised—*Bykant Nath* vs. *Rajendro*, I. L. R., 12 Cal., 333.

G.—Of Sale and Delivery of Property.

(*a*) *General Rules.*

Sales by whom conducted and how made.

286. Sales in execution of decrees shall be conducted by an officer of the Court or by any other person whom the Court may appoint, and except as provided in section 296, shall be made by public auction in manner hereinafter mentioned.

Act VIII of 1859, section 248. This section applies to H. C. and P. S. C. C.

Jurisdiction.—Sale under decrees passed without jurisdiction and afterwards set aside on that account are null and void—*Jadu Nath* vs. *Braja Nath*, 6 B. L. R., App., 90; and so are sales under decrees barred by limitation—*Golam Asgar* vs. *Lakshimani Debi*, 5 B. L. R., 68. (But a separate suit to prove the decree was barred at the time of sale will not lie—*Nojabut Ali* vs. *Moha Busseeroolah*, 11 B. L. R., 42.) See note under section 297, *post*.

Notice.—When a Court postponed a sale, but information not reaching the Nazir in time he sold the property: *Held*, the sale was void—*Sant Lal* vs. *Umraounnissa*, I. L. R., 12 Alla., 96; and see *Zainulabderi* vs. *Muhammad*, I. L. R., 10 Alla., 171.

Court may Appoint.—The words "whom the Court may appoint" apply not only to the words "any other person," but also to the "officer of the Court;" otherwise any officer might, without any authority, take upon himself to sell property in execution. Thus if, in the absence of a Subordinate Judge, a District Judge were to carry on a sale, it would be set aside without proof of substantial injury—*Judoonath Roy* vs. *Ram Baksh*, 12 W. R., 238; but where a Munsif, absent through illness, empowered his peshkar to carry on a sale, the sale was upheld; there was no proof of substantial injury—*Omur Chunder Dass* vs. *Soor Mooniar Khatoon*, W. R., 1864, p. 44.

The fact that a creditor and his attorney have directed the Sheriff to seize property does make the latter the creditor's agent for the purpose of selling it—*Dorab Ally Khan* vs. *Khajah Moheeoodden*, I. L. R., 3 Cal., 806; I. L. R., 6 Cal., 356.

A sale under section 296, *post*, is permissive, and not obligatory—*Luchmeeput* vs. *Lekraj Roy*, 8 W. R., 415.

Proclamation of sales by public auction.

287. When any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale, and shall specify as fairly and accurately as possible—

(*a*) the property to be sold;

(*b*) the revenue assessed upon the estate or part of the estate, when the property to be sold is an interest in an estate or a part of an estate paying revenue to Government;

(*c*) any incumbrance to which the property is liable;

(*d*) the amount for the recovery of which the sale is ordered; and

(*e*) every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property.

For the purpose of ascertaining the matters so to be specified, the Court may summon any person whom it thinks necessary, and examine him in respect to any such matters, and require him to produce any document in his possession or power relating thereto.

Rules to be made by High Court.

The High Court shall, as soon as may be after this Code comes into force, make rules for the guidance of the Courts in exercise of their duties under this section. The High Court may from time to time alter any rules so made. All such rules shall be published in the local official Gazette and shall thereupon have the force of law. As regards his own Court and the Court of Small Causes at Rangoon, the Recorder of Rangoon shall be deemed to be a "High Court" within the meaning of this paragraph.

Nothing in this section shall apply to cases in which the execution of the decree has been transferred to the Collector.

Act VIII of 1859, section 249. This section applies to H. C. and P. S. C. C.

Void Sales.—The sales contemplated by this section are sales in execution of decrees, and the procedure and the rules laid down regarding them are framed on the assumption that the property to be sold has been already attached—*Denonauth Ruckit* vs. *Mutty Lal Paul*, 1 Hyde, 158; and that property not attached and not proclaimed cannot be sold—*Ram Onoogroho* vs. *Montorum*, 6 W. R., 223; *Fida Husain* vs. *Kutub*, I. L. R., 7 Alla., 38. *contra*—*Kishory Mohun* vs. *Mahomed*, I. L. R., 18 Cal., 188; and where plaintiff attached before judgment, and his suit was dismissed but decreed on appeal: *Held*, a sale without a further attachment was void—*Ram Chand* vs. *Pitam*, I. L. R., 10 Alla., 506. See section 274, *ante*.

Owner: Estoppel.—The real owner, if not a party, is not bound to come forward, and unless he does something which binds him, he is not affected by the sale—*Biswantapa* vs. *Ranu*, I. L. R., 9 Bom., 86, p. 94; and see cases under section 252, *ante*.

Proclamation.—The object of issuing a proclamation is to give notice to intending purchasers, and not to the judgment-debtor—*Laek Ram* vs. *Mohesh*, 12 W. R., 488; to inform them of what is to be sold and the names of the parties whose right, title and interest in it are to be sold, and parties present at the sale are not bound to go behind it, and cannot be fastened with knowledge of the contents of the decree—*Abdool Kureem* vs. *Jaun Ali*, 18 W. R., 56, dissenting from the following pasage in *Ishan Chunder Mitter* vs. *Buksh Ali Soudagur*, Marsh., 614: "If the parties who went to that auction had referred to the decree they would have found that the debt for which the sale was to take place was not the widow's but Juggomohun's, and that the property to be sold under the decree was not the widow's but Juggomohun's, because Juggomohun was really the debtor, and the widow was sued merely in her representative character." But in a later case another Bench refused to follow the decision in 18th volume of the W. R., and declared that the decision in Marshall's reports was good law—*Nuzeerun* vs. *Ameerooddeen*, 24 W. R., 3. And where, on an execution-sale, there is a discrepancy between the conditions of the proclamation of what is to be sold, and the certificate of what has been sold, the High Court at Calcutta has held that the conditions of the proclamation are to be taken of superior authority in dealing with the claims of innocent third parties whose rights are affected by the variation—*Uma Churn Sen* vs. *Gobind Chunder Mozumdar*, 1 C. L. R., 460. See, however, the cases under section 316, *post*.

The declaratory portion of a sale-proclamation is not, by itself, sufficient to override the description of the property in the body of the document—*Dwarka Nath* vs. *Aloke Chunder*, I. L. R., 9 Cal., 641.

The proclamation should be written in the language of the Court from which it issues instead of the current language of the country, as was the case under the old Code—*Mohun Lall* vs. *Sheikh Ali Buksh*, S. D., N. W., 1856, p. 585; and should specify the details given in this section; for an omission may form a ground for cancelling the sale, in case any substantial injury has ensued; otherwise not—*Aruna Chellam* vs. *Aruna Chellam*, I. L. R., 12, Mad., 19. Thus the omission of the jumma and the name of the decree-holder in the proclamation does not vitiate a sale unless the debtor has suffered loss —*Bhood Singh* vs. *Gouree Mull*, S. D., N. W., 1860, p. 533. Where, on the application of the same decree-holders in five separate cases, the entire right of all the sharers in common property was sold, and the proclamation did not specify the rights of each judgment-debtor or his liability in each case, but no injury ensued, the sale was upheld—*Thakoor Dass* vs. *Hurdeo*, S. D., N. W., 1862, p. 15; and so where two lots were sold as one lot, though the proclamation treated them as separate—*Nundseput* vs. *Urquhart*, 13 W. R., 209; and where the proclamation did not specify the numbers, values, &c., of promissory notes sold, the sale would not be set aside except on proof of substantial injury—*Luchmeeput* vs. *Lekraj Roy*, 8 W. R., 415.

Where the holder of two decrees attaches property in execution of one of the decrees, he has a right to state in the sale-proclamation that he also claims the same property as liable to sale in satisfaction of his second decree—*Bolakee Lall* vs. *Khuruckdharee*, 12 W. R., 79. Where a mortgagee gets separate decrees for instalments on the same the mortgage property should not be sold under one decree subject to the other but out and out —*Dosibai* vs. *Ishvardas*, I. L. R., 15 Bom., 222.

Order : Charge.—An order of sale after attachment on a money-decree creates a valid charge on the property *Suraj Bunsi Koer* vs. *Sheo Pershad*, I. L. R., 5 Cal., 148; *Rai Balkishen* vs. *Rai Sita*, I. L. R., 7 Alla., 731; *Madho Parshad* vs. *Mehrban*, I. L. R., 18 Cal., 157; 19 Ind. App., 194; a money-decree on a mortgage-bond does not—*Radha Kant* vs. *Sudafut Mahomed*, 21 W. R., 86. See note under section 276, *ante*.

Construction.—The sale of a decree for possession of land does not carry the mesne profits due to the debtor—*Gunesh Lal Tewari*, I. L. R., 6 Cal., 213; and the sale of a decree partly executed only enables the purchaser to execute what remains to be carried out—*Grishchunder* vs. *Jibaneswari*, I. L. R., 6 Cal., 243.

Error in Sale. If a Court directs the sale of property not warranted by the decree, the person aggrieved may follow his property in a regular suit *Issamathen Bibee* vs. *Roy Luchmeeput*, I. L. R., 4 Cal., 142; *Dorab Ally Khan* vs. *The Executors of Khajah Moheeooddeen*, I. L. R., 3 Cal., 806. And if the sale-proclamation asserts an interest in the judgment-debtor which does not exist, the purchaser can follow the money into the hands of the Sheriff, or even the execution-creditor if the money has been paid to him—*Framji Besanji* vs. *Hormasji*, I. L. R., 2 Bom., 258.

If the property of which sale is sought is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence or otherwise of the debt, and, if it comes to the conclusion that no debt exists, should abstain from proceeding to a sale—*Harilal* vs. *Abhesang*, I. L. R., 4 Bom., 323; but it cannot call upon the debtor to show cause why the debt should not be paid into Court —*Siriah* vs. *Muckanachary*, I. L. R., 10 Mad., 194.

Representative.—It is only in cases where it is manifest that the judgment-debtor must have been sued as a representative that the Court has allowed a sale, in terms of the interests of the judgment-debtor, to convey the interests of others apparently not parties to the suit; except where the person contesting the sale was bound to pay the debt for which the decree was passed —*Lokinahton* vs. *Ajaib Lal*, 4 C. L. R. 465, and cases there cited.

Revenue Assessed.—Not stating the revenue is an irregularity, but this objection should be taken in the first Court when seeking to set aside a sale—*Macnaghten* vs. *Mahabir Pershad*, I. L. R., 9 Cal., 656.

Any Incumbrance.—In the case of a mortgage the amount of the mortgage debt unpaid should be stated—*Megh Lall* vs. *Shib Pershad*, I. L. R., 7 Cal., 41. As to the effect of stating in the sale notice a larger sum than is due on a mortgage, see *Seth Gokul Dass* vs. *Murli*, I. L. R., 3 Cal., 602.

Part of an Estate.—The "part of an estate" means the "aliquot part of an estate"—*Kally Prosunno Bose* vs. *Dinonath Mullick*, 11 B. L. R., 56.

Time and Place of Sale.—The proclamation should fix a day for the sale which is not a fixed holiday, or a day in which the Courts are closed by order of the High Court, for on these days a sale is illegal—*Haro Jemadar* vs. *Jadub Chunder Halder*, 3 W. R., Mis., 24; and no sale can take place before that date—*Jhoomuck Chowdhry* vs. *Radha Pershad*, 25 W. R., 328; or before the hour fixed—*Basharutulla* vs. *Umacharn*, I. L. R., 16 Cal., 794. If a portion of the property is released to a third party after

proclamation—*Shib Prokash* vs. *Sardar Doyal*, I. L. R., 3 Cal., 544, or if the sale does not occur on the fixed day and a postponement is necessary, then the general rule is that a new proclamation should issue, for *prima facie*, a sale without being duly proclaimed is injurious to the debtor—*Sanwul Singh* vs. *Mankun Panday*, 2 Alla., 143; but see "SUBSTANTIAL INJURY," section 311, *post*. If the postponement has been an indefinite postponement—*Okhoy Chunder* vs. *Erskine & Co.*, 3 W. R., Mis., 11; or if the sale should take place on the day originally fixed, after the order of postponement has passed—*Tekait Jai* vs. *Mirza Bendeh*, S. D., N.-W., 1856, p. 322; or on any day before the date to which it is postponed—*Jhoomuck Chowdhry* vs. *Radha Pershad*, 25 W. R., 328; and the debtor has not by his conduct or agreement stopped himself from objecting to the irregularity—*Noorul Hossein* vs. *Omatool Fatima*, 25 W. R., 34; *Hurdeo Narain* vs. *Girdharee*, 19 W. R., 227, a new proclamation must issue; and an agreement to postpone for one month will not justify a sale several weeks after, without a new proclamation—*Shoshee Mookhee* vs. *Dwarkanath*, 6 W. R., Mis., 84. See, however, *Bishen Dyal Singh* vs. *Khudeemun*, W. R., 1864, p. 359. But if the postponement is only for one day and made in open Court—*Roy Gowree Nath* vs. *Fakeer Chand*, 18 W. R., 347, the sale will be upheld, though no proclamation has issued, unless the debtor proves that he has suffered injury—*Asumtoonnissa* vs. *Khudemoonissa*, 17 W. R., 278. See, however, *Harbuns Sahai* vs. *Bhairo Pershad*, I. L. R., 5 Cal., 259.

Ascertaining the Matters so Specified.—An objection raised in the course of an inquiry under this section is not within the scope of section 278, *ante*—*Bhiku Pal* vs. *Khem Chand*, I. L. R., 14 Bom., 369.

Limitation.—An application to issue a proclamation of sale is a step in aid of execution—*Ambica Pershad* vs. *Surdhari Lal*, I. L. R., 10 Cal., 851; *Paroosh Ram* vs. *Kali Puddo*, I. L. R., 17 Cal., 53; *Lalraddi* vs. *Kala Chand*, I. L. R., 15 Cal., 363; even if it is verbal—*Maneklal* vs. *Nasia*, I. L. R., 15 Bom., 405.

Indemnity of Judges, &c.

288. No Judge or other public officer shall be answerable for any error, misstatement or omission in any proclamation under section 287, unless the same has been committed or made dishonestly.

This section applies to H. C. and P. S. C. C.

Mode of making proclamation.

289. The proclamation shall be made, in manner prescribed by section 274, and a copy thereof shall then be fixed up in the Court-house, and, in the case of land paying revenue to Government, also in the Collector's office.

If the Court so direct, such proclamation shall also be published in the local official Gazette and in some local newspaper, and the costs of such publication shall be deemed to be costs of the sale.

Act VIII of 1859, section 249. This section applies to H. C. and P. S. C. C.

This section removes the difficulty pointed out in the case of *Kisto Kishore* vs. *Soorjonath*, 10 W. R., 354.

On the Spot where the Property is Attached.—These words have been repealed by Act VII of 1888, section 29. It had been held that where several separate properties were attached, there must be a separate proclamation for each property—*Tripura Sundari* vs. *Durga Churn*, I. L. R., 11 Cal., 74; but not if it is one property consisting of several parcels—*Pedro* vs. *Jalbhoy*, I. L. R., 12 Bom., 368.

Shall then be Fixed Up.—This shows that the proclamation and copy fixed up in the Court-house must be made and attached subsequently to that made under section 274, as decided in the case of *Mohunt Meyh Lall* vs. *Shib Pershad*, I. L. R., 7 Cal., 31.

Irregularity.—Omission to carry out the provisions of this section is only an irregularity—*Nana Kumar* vs. *Golam Chunder*, I. L. R., 18 Cal., 422.

290. Except in the case of property mentioned in the proviso to section 269, no sale under this chapter shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been fixed up in the Court-house of the Judge ordering the sale.

Time of sale.

This section applies to H. C. and P. S. C. C.

Any infringement of this section is more than a material irregularity and voids the sale—*Bakshi Nund* vs. *Malak Chand*, I. L. R., 7 Alla., 289; *Sadhusaran* vs. *Panch Dev*, I. L. R., 14 Cal., 1 (see, however, the case of *Rewa Nahton* vs. *Ram Kishen*, 13 Ind. App., 106), at least it must have caused substantial injury and the sale should not be confirmed—*Jasoda* vs. *Mathura*, I. L. R., 9 Alla., 511.

Thirty Days.—It is a material irregularity for the proclamation to be published less than thirty days prior to the sale—*Abdul Nossia* vs. *Dulel Doss*, 11 C. L. R., 303; *Megh Lall Porrea* vs. *Mohamed Date*, I. L. R., 7 Cal., 39; only an irregularity—*Venkata* vs. *Sama*, I. L. R., 14 Mad., 228; *Bagalchunder* vs. *Rameshur*, I. L. R., 18 Cal., 496; *Rahchandar* vs. *Kamta*, I. L. R., 4 Alla., 300; the sale is void—*Ganga Persad* vs. *Jag Lal*, I. L. R, 11 Alla., 333; *Sant Lal* vs. *Umraounnissa*, I. L. R., 12 Alla., 96.

Consent.—An application made on the day of sale by the judgment-debtor that a part only of his property should be sold instead of the entirety, is not a consent under this section—*Harbuns Sahai* vs. *Bhairo Pershad*, I. L. R., 5 Cal., 259.

An order under this section may be set aside under section 622, *post*—*Bhekraj Koeri* vs. *Gendh Lal*, I. L. R., 5 Cal., 878.

291. The Court may in its discretion adjourn any sale under this chapter (other than a sale by the Collector) to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment: Provided that when the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court. Whenever a sale is adjourned under this section for a longer period than seven days, a fresh proclamation under section 289 shall be made, unless the judgment-debtor consents to waive it. Every such sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to such officer, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale.

Power to adjourn sale.

Stoppage of sale on tender of debts and cost, or on proof of payment.

Act VIII of 1859, section 249. This section applies to H. C. and P. S. C. C.

Knocked Down.—A bid may be withdrawn until the lot is knocked down—*Agra Bank* vs. *Hamlin*, I. L. R., 14 Mad., 238.

Fresh Proclamation.—The omission to issue a fresh proclamation when the sale is adjourned is only an irregularity—*Bagalchunder* vs. *Rameshur*, I. L. R., 18 Cal., 496.

Not an Adjournment.—Under the rules of the High Court in Bengal all properties for sale are to be placed on a list, and the sales commence on the day fixed and must go on from day to day till the list is cleared. *Held*, where the sale commenced on the 6th, but the property was not sold till the 10th, that there was not an adjournment—*Lal Mohun* vs. *Nunu Mahomed*, I. L. R., 17 Cal., 152.

There is no rule of law compelling the selling officer to close the auction on the first day. It is left to his judgment to do as he thinks best, and much will depend on the nature of the property and the circumstances of the sale. On the other hand, he is not bound to refuse closing the sale, because a person has sent him notice to say that he is ready to make a higher bid—*Govind Hari* vs. *Bank of India*, 4 Bom., 164. See note to section 311, *post*, as to irregularities in conducting a sale.

Jurisdiction.—A District Judge cannot order a Subordinate Judge to postpone a sale in a case pending before the Court of the latter officer—*Jaishee Ram* vs. *Bijai Kooer*, 5 Alla., 177.

Payment.—A payment made to prevent a sale in execution is not a voluntary payment whether made by the debtor or a third party claiming the property—*Omrito Lall* vs. *Ramdhun*, 18 W. R., 503; *Fatima Khatoon* vs. *Mahomed Jan*, 12 Moore, 64; Act IX, 1872, section 69. An assignee after decree in a mortgage-suit is entitled to deposit, and where this was refused and the judgment-creditor bought himself, the sale was set aside in a regular suit—*Behari Lal* vs. *Ganpat Lal*, I. L. R., 10 Alla., 1.

Selling Officer.—A public officer executing the process of a Court cannot, under colour of that process, do at a sale what the process does not authorize him to do for the purpose of carrying out a contract between the execution-creditor and a third party—*Moher* vs. *O'Gready*, 4 L. R., Ir., 54.

Adjournment—A postponement should not be allowed unless there is some reason to believe that it will be beneficial to the judgment-debtor, and the Court is satisfied that by the postponement he will be in a position to satisfy the demand, or the immediate sale is likely to be attended with ruinous or unduly injurious consequences to the judgment-debtor and the postponement will not seriously prejudice the decree-holder—*Janokesnath* vs. *Radha Mohun*, 20 W. R., 130; and the general rule is, that Courts will not interfere by ordering a stay of judicial proceedings unless serious injury will ensue to the party applying in case the stay of proceedings is not granted, and unless the party has come promptly to make the application—*Sidhee Nuzur Ally* vs. *Ojoodhyaram*, 10 Moore, 322, p. 327. Where a debtor prayed that the sale of his property might be stayed, on the ground that the day fixed for the sale was near the last day for the payment of Government revenue, the application was allowed—*Re Ahmed Reza*, 13 W. R., 281; but where a decree-holder on the day of sale presented a petition stating that the judgment-debtor had promised to execute a private sale of the property, but had not, and asked the Court to confirm him in possession, it was held that the Judge was not right in refusing to stop the sale—*Venkata* vs. *Venkatakristnia*, 5 Mad., 410. As to whether a new proclamation should issue, see note under section 287, *ante*.

Officers concerned in execution-sales not to bid for or buy property sold.

292. No officer having any duty to perform in connection with any sale under this chapter shall either directly or indirectly bid for, acquire or attempt to acquire any interest in any property sold at such sale.

This section is new. It applies to H C. and P. S. C. C.

In the North-West pleaders who have any duty to perform in connection with a sale are by circular order prohibited from purchasing property sold in execution of decrees, though not from purchasing the decree itself from their client—*Goshain Jug Roop* vs. *Chinqun*, 2 Alla., 46; but he is not an officer within this section—*Alagirisami* vs. *Ramanathan*, I. L. R., 10 Mad., 111. See also *Nunduput Mahta* vs. *Urquhart*, 13 W. R., 209.

As to the incapacity of judges, pleaders, moktars, clerks, bailiffs or other Court officers to bid at the sale of actionable claims, see section 136 of the Transfer of Property Act and *Rathnasami* vs. *Subramanya*, I. L. R., 11 Mad., 56; *Singarcharlu* vs. *Sivabai*, I. L. R., 11 Mad., 498; *Subbarayadu* vs. *Kotayya*, I. L. R., 15 Mad., 389.

Defaulting purchaser answerable for loss by re sale.

293. The deficiency of price (if any) which may happen on a re-sale under this Code by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court by the officer holding the sale,

and shall, at the instance of either the judgment-creditor or the judgment-debtor, be recoverable from the defaulter under the rules contained in this chapter for the execution of a decree for money.

Act VIII of 1859, section 254. This section applies to H. C. and P. S. C. C. in part.

Application of the Section.—This section extends to all sales, whether of moveable or immoveable property, and also to re-sales made under the Code, whether made in consequence of default of payment of deposit under section 306, or of the purchase-money under sections 307 and 308, *post*—*Jarherbhai* vs. *Haribhai*, I. L. R., 5 Bom., 575; *Vallabhan* vs. *Pangunni*, I. L. R., 12 Mad., 454; *Ramdhani Sahai* vs. *Rajrani Kooer*, I. L. R., 7 Cal., 337.

A purchased at a sale in execution of a decree obtained by B. Next day the property was sold in execution of a decree obtained by C, who had a lien prior to that of B. A refused to carry out the sale. It was held that he was liable under this section—*Sooruj Buksh* vs. *Sreekishen Doss*, 6 W. R., Mis., 126. But where A purchased, made default, and a re-sale was ordered, and before the sale took place the property was sold by another judgment creditor at a lower price, it was held that the second sale was not a re-sale within the Act, and the first purchaser was not liable to pay the difference—*Bisoka Moyee* vs. *Sonatun Doss*, 16 W. R., 14.

Where a decree-holder was alleged to have purchased through his agent, but afterwards repudiated the bid and the property was re-sold, and the debtor applied to recover the loss by resale: *Held*, that the question was one arising between the parties to the suit and an appeal lay—*Vallabhan* vs. *Pangunni*, I. L. R., 12 Mad., 454.

Re-Sale.—The sale contemplated here is a sale of the property first sold and under the same description—*Baijnath Sahai* vs. *Moheep Narain*, I. L. R., 16 Cal., 535.

Deficiency of Price.—The purchaser is liable for the deficiency of price and the expenses of the re-sale, and no more—*Sree Narain* vs. *Mahtab Chunder*, 3 W. R., 3; he is not bound to pay interest—*Soorj Buksh* vs. *Sreekishen*, 9 W. R., 500. The person liable is the principal, and not the agent. Thus, where a purchaser was allowed to sign the sale sheet as "Mokhtear purchased for Mussamut Deoranee Kooer," it was held that Mussamut Deoranee Kooer, and not the Mokhtear was responsible; and that if she repudiated the position of principal, then, although the Mokhtear might be liable in a civil suit for misrepresentation or breach of contract, he was not subject to the summary process under the Code—*Hares Ram* vs. *Hur Pershad*, 20 W. R., 80; *id.*, 397. So, where A purchased as "mother and guardian of her infant son," the minor was the real purchaser—*Hemangineee Dossee* vs. *Jogendro Narain*, 12 W. R., 236.

Who may proceed against the Defaulter.—Either the judgment-creditor or the judgment-debtor may proceed against the defaulter, but the judgment-creditor is not bound to do so, and may elect to proceed against any other property of his debtor, leaving him his remedy—*Khiroda Moyee* vs. *Golam Somdanee*, 21 W. R., 149; *Gour Chunder* vs. *Chunder Coomar*, 10 C. L. R., 236; I. L. R., 8 Cal., 291; nor in such a case can the amount bid at the first sale be deducted from the debt—*Anandrav* vs. *Sheikh Baba*, I. L. R., 2 Bom., 562; *Gour Chunder* vs. *Chunder Coomar*, I. L. R., 8 Cal., 291; unless the creditor is the defaulting purchaser—*Joobrag Singh* vs. *Gour Buksh*, 7 W. R., 110. The re-sale should only cover the same property—*Joy Chunder* vs. *Kali Kishore*, 8 C. L. R., 41.

The debtor is not bound to proceed against the bidder, and he may still have the second sale set aside for irregularity—*Bepin Chunder* vs. *Modhoo Soodun*, 12 C. L. R., 316.

Appeal.—An appeal lies from an order under this section, if the decree-holder-purchaser repudiates—*Vallabhan* vs. *Pangunni*, I. L. R., 12 Mad., 454; and even if the purchaser is not a party to the suit—*Baijnath Sahai* vs. *Moheep Narain*, I. L. R., 16 Cal., 535; *contra*—*Ilahi Baksh* vs. *Baij Nath*, I. L. R., 13 Alla., 569; *Deoki Nandan* vs. *Tapesu*, I. L. R., 14 Alla., 201.

Decree-holder not to bid for or buy property without permission.

294. No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

When a decree-holder purchases with such permission the purchase-money and the amount due on the decree may, if he so desires, be set-off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

If decree-holder purchase, amount of decree may be taken as payment.

When a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale, and all expenses attending it, shall be paid by the decree-holder.

This section applies to H. C. and P. S. C. C. See note under section 312, *post*.

Rights and Liabilities.—The purchaser under this section must make the deposit in cash required by section 306, but the sale should not be set aside for default, where all the parties interested waive their right to have the deposit made—*Gopal Singh* vs. *Roy Bunwaree*, 5 C. L. R., 181. He takes subject to the rule in section 295—*Shrinivas* vs. *Radhabai*, I. L. R., 6 Bom., 570; *Taponidi* vs. *Muthura*, I. L. R., 12 Cal., 499; *Viraragava* vs. *Varada*, I. L. R., 5 Mad., 123, and may be compelled to refund by process in execution—*Madden* vs. *Chappani*, I. L. R., 11 Mad., 356.

In the mofussil, the decree-holder when purchaser gives a receipt for the purchase-money, and petitions that satisfaction may be entered up for the amount. See *Khelat Chunder* vs. *Keshub Chunder*, 16 W. R., 46 In regard to the sale he is bound to exercise the utmost fairness, and if he or his agent dissuade others from buying—*Woopendro Nath Sirkar* vs. *Brojendro Nath Mundul*, I. L. R., 7 Cal., 346, or openly depreciates the property—*Rukhinis Bullubh* vs. *Brojonath*, I. L. R., 5 Cal, 308, the sale will probably be set aside; otherwise if the purchaser is not the creditor - *Lal Mohun* vs. *Nunu Mahomed*, I. L. R., 17 Cal., 152; *Gunga Narain* vs. *Annunda*, 12 C. L. R., 404.

A purchase by the decree holder without permission is not *ipso facto* void; but is valid until set aside under this section—*Sabherbhai* vs. *Haribhai*, I. L. R., 5 Bom., 575; *Chintamanrav* vs. *Vithabhai*, I. L. R., 11 Bom., 588; *Parmesira* vs. *Krishna*, I. L. R., 14 Mad., 498. In determining whether it should be set aside the Court should take into consideration whether the property has been sold at an adequate or inadequate price—*Mathura* vs. *Nathuni*, I. L. R., 11 Cal., 731.

A purchase by the son of a decree-holder, who is joint with his father, with moneys not proved to be separate, is a purchase by the decree-holder himself—*Narain* vs. *Anaji*, I. L. R., 5 Bom., 130.

Amount due on the Decree.—Rather that portion of the assets which is coming to this decree-holder; for where more than one decree holder has applied for execution, this section must be taken subject to the provision of section 295—*Shrinivas* vs. *Radhabhai*, I. L. R., 6 Bom., 570 *Viraragava* vs. *Varada*, I. L. R., 5 Mad., 123.

Fiduciary Relation—A mortgagee purchaser who has obtained lease to bid does not stand in a fiduciary relation to his mortgagor—*Sheonath Doss* vs. *Janki Prasad*, I. L. R., 16 Cal., 132, and see *Mahabir Pershad* vs. *Macnaghten*, 16 Ind. App., 107, p. 114; and is only bound to give credit to the mortgagor for the actual bid—*Gunga Pershad* vs. *Jawahir*, I. L. R., 19 Cal., 4; but if the decree is reversed, the sale falls through—*Zainulabdin* vs. *Ashgar Ali*, 15 Ind. App., 12.

If the decree-holder purchases and without sanction the dispute falls within section 244, *ante*—I. L. R., 12 Mad., 454, and the judgment-debtor cannot bring a regular suit to set aside a sale because the decree-holder purchased—*Viraragava* vs. *Venkata Charyar*, I. L. R., 5 Mad., 217; even on the ground of fraud—*Sukharam* vs. *Damodhar*, I. L. R., 9 Bom., 469; *Mohendro* vs. *Gopal*, I. L. R., 17 Cal., 769.

Appeal.—No appeal lies from an order refusing to give a decree-holder permission to purchase, but an appeal lies from an order confirming, setting aside, or refusing to set aside a sale of immoveable property—*Judoonath* vs. *Brojo Mohun*, I. L. R., 1 Cal., 174; or refusing to put the creditor in possession—*Muttie* vs. *Appasami*, I. L. R., 13 Mad., 504.

Step in Aid of Executors.—An application for lease to bid is a step in aid of execution —*Bansi* vs. *Sikree*, I. L. R., 13 Alla., 211.

Proceeds of execution-sale to be divided rateably among decree-holders.

295. Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons :

Provided as follows :—

Proviso where property is sold subject to mortgage.

(*a*) when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale :

(*b*) when any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold :

Proviso.

(*c*) when immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale ;

secondly, in discharging the interest and principal-money due on the incumbrance ;

thirdly, in discharging the interest and principal-moneys due on subsequent incumbrances (if any) ; and

fourthly, rateably among the holders of decrees for money against the judgment-debtor who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees and have not obtained satisfaction thereof.

If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

Nothing in this section affects any right of the Government.

Act VIII of 1859, section 270. This section applies to H. C. and P. S. C. C. See note under section 285, *ante*.

Interest—Rent taken in lieu of interest by a mortgagee is not within the section—*Sivarama* vs. *Subramania*, I. L. R., 9 Mad., 57.

Incumbrance.—See *Mathu Lal* vs. *Kishan Lal*, I. L. R., 12 Alla., 547.

Effect of Order.—This section is but a rule of procedure, and does not affect the civil rights of the parties, and a regular suit will lie to determine their equitable rights—

Janoky Bullubh vs. *Johiruddin*, I. L. R., 10 Cal., 576; *Shahi Ram* vs. *Shib Lall*, I. L. R., 7 Alla., 378; on the other hand, failure to participate does not prevent a creditor executing his decree in any other manner—*Nadir Hossein* vs. *Pearee Thovildarinee*, 19 W. R., 255.

An order under this section does not amount to an attachment—*Gunga Din* vs. *Kushali*, I. L. R., 7 Alla., 702; *Durga Churn* vs. *Monmohini*, I. L. R., 15 Cal., 771; but if a debt is attached no equitable assignment of it is valid against another creditor who subsequently gets an order under this section—*Sorabji* vs. *Govind*, I. L. R., 16 Bom., 91.

Regular Suit.—*Cause of action.*—The cause of action does not arise until the money is paid—*Hart* vs. *Tara Prasanna*, I. L. R., 11 Cal., 718.

Jurisdiction.—A Small Cause Court cannot try a case for refund of assets paid under this section—*Shahi Ram* vs. *Shib Lal*, I. L. R., 7 Alla., 378; it can—*Harihara* vs. *Subramanya*, I. L. R., 9 Mad., 250.

Limitation.—If the Court making the distribution possesses jurisdiction, the regular suit must be brought within one year from the date of the order—*Gouri Prosad* vs. *Ram Ratan*, I. L. R., 13 Cal., 159; see, however, *Taponidi* vs. *Mathura Lal*, I. L. R., 12 Cal., 499; not so in Madras—*Sivarama* vs. *Subramanya*, I. L. R., 9 Mad., 57; or in Bombay—*Vishnu* vs. *Achut*, I. L. R., 15 Bom., 438. Otherwise if the Court has not jurisdiction—*Ram Kishna* vs. *Bhawani*, I. L. R., 1 Alla., 333.

Parties.—All the parties to the distribution should be made parties to the suit—*Gouri Prasad* vs. *Ram Ratan*, I. L. R., 13 Cal., 159; *Brojo Kanth* vs. *Bunee*, 23 W. R., 434.

The same Judgment-Debtor.—Where there is one decree against A and another against A and B, and the decree-holders apply for execution against A, this section applies—*Shumbhoo Nath* vs. *Luckynath*, I. L. R., 9 Cal., 921; and the same rule applies if a money-decree against B, P and H, and D holds a money decree against B and for enforcement of a hypothecation by sale of property against P, B and S, and execution is taken out against B—*The Delhi and London Bank* vs. *The Uncovenanted Service Bank*, I. L. R., 10 Alla., 35; but otherwise if a creditor has a decree against A and B, and executes it by sale of the joint property, while C holds a decree against A alone—*Deboki Nundun* vs. *Hart*, I. L. R., 12 Cal., 294. A decree against A and B personally and another against A personally and B as representative fall within the section—*Hart* vs. *Tara Prasanna*, I. L. R., 718, p. 728.

Decrees for Money.—Every decree by virtue of which money is payable is to that extent a decree for money even though other relief may be granted by the decree—*Hart* vs. *Tara Prasanna*, I. L. R., 11 Cal., 718; and a decree against A and B which so far as B is concerned is a decree to enforce a hypothecation by sale of their property but does not direct the sale of specific property of A is as regards him a money-decree—*The Delhi and London Bank* vs. *The Uncovenanted Service Bank*, I. L. R., 10 Alla., 35; and see *Gur Sahai* vs. *Ram Dial*, 7 Alla., 91; *Jagat Narain* vs. *Dhundhey*, I. L. R., 5 Alla., 566. A judgment under section 86 of the Insolvent Act is a money-decree—*In re Bhugwandas*, I. L. R., 8 Bom., 511.

Where a mortgagee obtains a decree declaring the debt may be realized by sale of the mortgaged property, he may waive his lien and proceed under this section—*Fakeer Buksh* vs. *Chutturdharee*, 14 W. R., 209; *Radha Kant* vs. *Mirza Sudafut*, 21 W. R., 86; and he is not compelled to proceed first against the mortgaged property—*Hart* vs. *Tara Prasanna*, 1. L. R., 11 Cal., 718; *Kalee Prasad* vs. *Raye Kishore*, 19 W. R., 281. But see *The Delhi and London Bank* vs. *The Uncovenanted Service Bank*, I. L. R., 10 Alla., 35.

Good faith.—The Court should exclude persons not *bonâ fide* decree-holders—*In re Sunder Dass*, I. L. R., 11 Cal., 43; *Chhaganlal* vs. *Fazarali*, I. L. R., 13 Bom., 154.

Realised in Execution.—These words mean that the assets are available for distribution and do not apply to the twenty-five per cent. deposited by the purchaser of the judgment-debtor's property under section 301 *post*—*Hafez Mahomed* vs. *Damodar*, I. L. R., 18 Cal., 242; nor to money paid into Court after attachment but before sale, on account of one of the judgment-creditors—*Gopal Dai* vs. *Chunni*, I. L. R., 8 Alla., 67, or their representative—*Said Bux* vs. *Shib Chunder*, I. L. R., 13 Cal., 225; nor to money paid by a judgment-debtor under arrest—*Purshotam Dass* vs. *Mahant Suraj*, I. L. R., 6 Bom., 588; and compare *Westacott* vs. *Bevan*, 1 Q. B. (1891), 774; but a debt attached, under section 268, *ante*, and paid into the hands of the Sheriff, is within this section—*Sorabji* vs. *Govind*, I. L. R., 16 Bom., 91, and so are sums paid into Court as purchase-money before the sale is confirmed—*Vishvanath* vs. *Vir Chand*, I. L. R., 6 Bom., 16; compare *Bishen Chunder* vs. *Mun Mohinee*, 8 W. R., 501.

Attachment before Judgment.—Section 490 does not empower a decree-holder to share in the distribution of property he has attached. There is no necessity to re-attach; but an application under section 235 for execution is imperative—*Pallonji* vs. *Jordan*, I. L. R., 12 Bom., 400.

Enforceable under the Attachment.—After attachment of a debt before judgment the debtor gave an equitable assignment of it subject to the attachment:

Held, this assignment was not good against other creditors who applied for execution under this section before the date of payment to the Sheriff of the debt—*Sorabji* vs. *Govind*, I. L. R., 16 Bom., 91. Insolvency after attachment has no effect—*Viraraghava* vs. *Parasurama*, I. L. R., 15 Mad., 372.

Application of the Section.—This section only applies where the decree-holders holding decrees against the judgment-debtor have succeeded in getting their cases transferred to the higher Court—*Muttalagiri* vs. *Muttayyars*, I. L. R., 6 Mad., 357; and have all applied to the same Court for execution of their decrees against him—*Gopee Nath* vs. *Aehcha Bibee*, 9 C. L. R., 395; I. L. R., 7 Cal., 553; *Shumbhoo* vs. *Lucky Nath*, I. L. R., 9 Cal., 920; *Krishna Sankar* vs. *Chundra*, I. L. R., 5 Bom., 198 (the Court of a Judge of Small Causes and that of a Subordinate Judge are not the same, though the Judge is—*Him. Bank* vs. *Hurst*, I. L. R., 3 Alla., 710; they are in Bombay—*Malhari* vs. *Narso Krishna*, I. L. R., 9 Bom., 174, and Madras—*Kalu* vs. *Vikrisha*, I. L. R., 15 Mad., 345; but see *Pitamber* vs. *Dhondu*, I. L. R., 12 Bom., 486), though they may not have all attached—*Megh Lall* vs. *Shib Pershad*, I. L. R., 7 Cal., 34; and where some applications are pending prior to realization—*Tiruchitambala* vs. *Seshayyangar*, I. L. R., 4 Mad., 383; *Vishvanath* vs. *Virchand*, I. L. R., 6 Bom., 16; and assets have been realized—*Bishen Chunder* vs. *Mun Mohinee*, 8 W. R., 501, under a judicial order—*Anund Lall* vs. *Jullodhur Shaw*, 17 W. R., 313; either by sale or otherwise in execution and are actually in Court—or have been set off under section 294—*Taponidi* vs. *Mathura Lall*, I. L. R., 12; *Madden* vs. *Chappani*, I. L. R., 11 Mad., 356; note on section 294, *ante*; although the sale may not have been made absolute—*Vishvanath* vs. *Virchand*, I. L. R., 6 Bom., 16; and prior to the realization there were other persons taking out execution in the same Court—*Krishnasankar* vs. *Chundrasankar*, I. L. R. 5 Bom., 198; and it is not shown that their decrees are barred—*Radha Gobind* vs. *Oozeer*, 15 W. R., 219, or that they are not pending in execution—*Binda Bibee* vs. *Lalla*, 21 W. R., 66; then there will be no second sale under any other attachment which will fall to the ground—*Kashy Nath* vs. *Surbanand*, I. L. R., 12 Cal., 317; see 15 Mad., 372.

Particular Cases.—A and B held a decree against C, and D held another decree against C and E, jointly and severally. C and E each possessed immoveable property separately as well as other immoveable property; C's immoveable property was put up to sale in execution of the first decree, and realised sufficient to satisfy both decrees: *Held*, this same property could not be sold a second time, but action should be taken under this section—*Rati Ram* vs. *Chiranj Lal*, I. L. R., 3 Alla., 579.

Certain moveable property was attached in execution of decrees of the Small Cause Court at Ahmedabad. After the attachment, but before the sale of the attached property, other creditors of the same judgment-debtor obtained decrees against him in the Court of the Subordinate Judge at the same place and applied to it for the attachment of the same property in execution of their decrees. The Subordinate Judge accordingly attached it by prohibitory orders issued to the Judge of the Small Cause Court. After the sale, the holders of the decrees obtained in the Judge's Courts claimed a rateable share in the assets realized by the Small Cause Court under section 295 of Act X, 1877: *Held*, that they were not entitled to any share in the assets realized by the Small Cause Court until after satisfaction of the decrees of the Small Cause Court—*Jetha Madhavji* vs. *Najerali Abhramji*, I. L. R., 4 Bom., 472; followed in *Krishnasankar* vs. *Chundrasankar*, I. L. R., 5 Bom., 198.

The holder of a decree for unascertained mesne profits who has applied for execution is entitled to share—*Viraragava* vs. *Varada*, I. L. R., 5 Mad., 123; but see *Binda Bibee* vs. *Lalla*, 21 W. R., 66.

Legal Representative.—The legal representative of a deceased judgment-debtor is eligible if he has bought the decree against his predecessor—*Munmohan* vs. *Vizbai*, I. L. R., 13 Bom., 171.

Rateably.—And all will share equally in the surplus after deducting the costs of realization: there is no priority, except perhaps in the case of the crown debts—*In re Henly & Co.*, 9 C. D., 469; *Secretary of State for India* vs. *The Bombay Landing Co.*, 5 Bom., 53; or of rent realised by the sale of the house or building for which it was due —*Maniklall* vs. *Lakha*, I. L. R., 4 Bom , 429. See also *Soobul Chunder* vs *Russick*, I. L. R., 15 Cal., 202, and section 276, *ante*.

Sold subject to Mortgage.—The provisions of the first paragraph, clauses (*a*) and (*b*), have reference only to sales under simple money-decrees and prohibit a mortgagee as such to any share of the surplus-proceeds when the property is sold subject to his mortgage; otherwise if he consents to sell the property free of lien. And if the property be sold under a mortgage-decree a prior incumbrance is not taken into account—*Jagal Narain* vs. *Dhundhey*, I. L. R., 5 Alla., 566. This section refers to cases in which the property is sold subject to a mortgage and not to cases where property, subject to an undisclosed mortgage, is sold in execution—*Joychunder Ghose* vs. *Ram Narain Poddar*, 21 W. R., 43; *Fakeer Buksh* vs. *Chutturdhuree*, 14 W. R., 209; *Cha Nagindas* vs. *Halal Kore*, I. L. R., 5 Bom., 477; *Taponidi* vs. *Mathura Lall*, I. L. R., 12 Cal., 449.

The Court has jurisdiction to inquire into the merits of the alleged mortgage—*Purshotam* vs. *Dhondu*, I. L. R., 6 Bom., 582; *Vishnu Dikshit* vs. *Narsing Rav*, I. L. R., 6 Bom., 584.

An estate was mortgaged in 1863, and again in 1867, to the same person in substitution of the mortgage of 1863 and in continuation of the security given by it; the securities obtained in 1863 were given up. In 1864, the property was mortgaged to a different person. It was held that the first mortgagee was entitled to priority for the amount outstanding from the first mortgage of 1863, and revived in the mortgage of 1867, then the second mortgagee for the amount of his mortgage, and the residue to the first mortgagee—*Wosseun* vs. *Byjnath Singh*, 25 W. R., 171; where a creditor got a decree declaring the debt leviable on certain property mortgaged for the debt as well as other landed property that might be found in the possession of the debtor, and the mortgaged property was sold under another decree subject to his lien, it was held that he could not get any part of the sale-proceeds unless it were shown that the mortgaged land had not produced enough to satisfy his claim—*Kalee Dass* vs. *Lall Mohun*, 16 W. R., 306; but where A and B were sued on bill-of-exchange by B, and A mortgaged certain property of B as security for the payment, which was afterwards sold subject to B's mortgage in execution of a decree held by a third party; B got one decree on bill-of-exchange, and another declaring that he had a good mortgage of A's interest in the property and for an account and sale in default of payment. Subsequently B got an order in his bill-of-exchange suit for payment from surplus sale-proceeds in the third party's suit. On appeal from an order ordering B to repay the amount, on the ground that he was not entitled to share in the surplus, the order was allowed to stand on B, undertaking to pay into Court the mortgage-money with interest, if that sum should be received by him in the mortgage suit—*Bank of Bengal* vs. *Nundolall Dass*, 12 B. L.R., 509. Where even different properties belonging to the same proprietor had been mortgaged to three different persons, and all of them sued upon their bonds, and obtained decrees followed by simultaneous sales in execution, the mortgagees were satisfied out of the entire sale-proceeds in the order in which their liens had been created—*Gopee Singh* vs. *Kisha Lall*, 25 W. R., 187.

Estoppel.—When property is sold subject to a mortgage, the mortgagee is not entitled to participate, and it is doubtful whether any allowance should be made to a purchaser who pays off a mortgage—*Taponidi* vs. *Muthura Lall*, I. L. R., 4 Cal., 499; but if the decree-holder, knowing of a mortgage, suppresses all mention of it in the notification, and causes the property to be sold as unencumbered and receives the full value of it as if it were free from mortgage, the mortgagee would probably have a good action against him for repayment—*Douglas* vs. *Collector of Benares*, 5 Moore, 296; and where, in execution of a decree, the right, title, and interest of the judgment-debtor in certain property were sold by the decree-holder, but without notice of a mortgage held on it by him, it was held that the absolute right passed as against the decree-holder to the purchaser, that neither he nor his assignee of the decree on the mortgage-bond could realise the latter debt by sale of the same property, because the vendor had suppressed the fact of the charge and thereby induced the first purchaser to buy—*Doollub Sircar* vs. *Kristo Coomar*, 12 W. R., 303; 3 B. L. R., 407. Where a mortgagee had got separate decrees for instalments under one bond, their Lordships of the Privy Council seemed to think that the property should not be sold under one decree subject to the mortgage lien of the other—*Dosibai* vs. *Ishvardas*, I. L. R., 15 Bom., 222; and see *Ballam Das* vs. *Amir*, I. L. R., 12 Alla., 537.

Receiver.—A manager may be appointed under this section without the consent of the decree-holder, with directions to pay the judgment-creditors rateably; but he cannot be directed to satisfy the claims of persons other than decree-holders—*Thakoor Chunder*, Petitioner, Marsh., 261.

Jurisdiction to Sell.—The Nazir of the District Judge held and conducted a sale in execution of a decree passed by a Subordinate Judge: *Held*, that in reference to the sale, the District Judge had no jurisdiction to pass any orders under section 270, Act VIII of 1859, or any order respecting the re-sale of the property—*Nobo Kishore* vs. *Protab Chunder*, 1 C. L. R., 534.

Sale-Proceeds.—The Court may allow a decree-holder to take out the purchase-money before confirmation of sale—*Vishvanath* vs. *Virchand*, I. L. R., 6 Bom., 16 *Jogendro Nath* vs. *Gobind*, I. L. R., 12 Cal., 252. See, however, *Mahomed* vs. *Damodar*, I. L. R., 18 Cal., 242.

Surplus Sale-Proceeds.—When surplus sale-proceeds are deposited in Court, the Judge should only pay out the money to the party in whose name it stands or his agent—*In the matter of Puddabutty Dossia*, 12 W. R., 352.

Appeal.—No appeal lies from an order under this section—*Kashi Ram* vs. *Mani*, I. L. R., 14 Alla., 210.

Revision.—An order under this section is open to revision—*Tiruchilambala* vs. *Seshayyangar*, I. L. R., 4 Mad., 383; *Sew Bux* vs. *Shib Chunder*, I. L. R., 13 Cal., 225, but in the case of *Venkataraman* vs. *Mahalingayyan*, I. L. R., 9 Mad., 508, the Court did not interfere; otherwise in *Viraraghava* vs. *Parasurama*, I. L. R., 15 Mad., 372.

(*b.*)—*Rules as to Moveable Property.*

Rules as to negotiable instruments and shares in public Companies.

296. If the property to be sold be a negotiable instrument or a share in any public Company or Corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker at the market-rate of the day.

Act VIII of 1859, section 248. This section applies to H. C. and P. S. C. C.

The Court is not bound to authorize the sale by a broker; it can exercise a discretion to do so or not. Where promissory-notes were sold by auction, and the sale-proclamation did not, as it ought, give the numbers and amounts of the different notes, and the notes were not brought into Court before sale, but were left in the possession of the Collector, the sale, though considered irregular, was not set aside, as no injury was shown to have ensued from the irregularities—*Luchmiput* vs. *Lekraj Roy*, 8 W. R., 415.

Moveables.—Under the code it is intended that moveables should ordinarily be sold within the jurisdiction of the Court ordering the sale—*Lakhsmibai* vs. *Santappa*, I. L. R., 13 Bom., 22.

Payment for other moveable property sold.

297. In the case of other moveable property, the price of each lot shall be paid for at the time of sale, or as soon after as the officer holding the sale directs, and, in default of payment, the property shall forthwith be again put up and sold.

On payment of the purchase-money, the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute.

Act VIII of 1859, section 251. This section applies to H. C. and P. S. C. C.

Moveable Property.—Huts are not moveable property—*Raj Chunder* vs. *Dharma Chandra*, 2 B. L. R., 77; 10 W. R., 416; and since a Small Cause Court has no jurisdiction to deal with immoveable property, a purchaser of huts in execution of such a decree acquires no title by the purchase—*Natloo Meah* vs. *Nund Ranee*, 17 W. R., 309. A stone sugar mill is moveable property—*Hurmungal* vs. *Athul*, 4 Alla., 15; see *Miller* vs. *Brindabun*, I. L. R., 4 Cal., 946.

Sale Absolute.—On payment of the purchase-money the sale of moveables becomes absolute, and no irregularity will vitiate it, though a suit will lie to set it aside if there is a warranty of title—*Framji* vs. *Hormasji*, I. L. R., 2 Bom., 258, 266. If the moveable property of A is sold in execution of a decree against B, A can follow the property in the hands of the purchaser, or sue him for damages equal in amount to the value of the property; for the latter only purchased the right, title and interest of B—*Mahanund Haldar* vs. *Akial*, 9 W. R., 118.

Practice.—The officer conducting the sale can allow the purchaser a reasonable time to pay the purchase money—*Shah Fareed* vs. *Seo Charn*, 4 Alla., 37.

The provisions of section 293, *ante*, making a defaulting purchaser liable for any deficiency, apply to re-sales under this section—*Ramdhoni Sahai* vs. *Rajrani Koer*, I. L. R., 7 Cal., 337.

Arms.—Sale of arms by a Nazir is excluded from the operation of the Indian Arms Act—*Waled Hiraji* vs. *Hera Patel*, I. L. R., 9 Bom., 518.

Irregularity not to vitiate sale of moveable property, but any person injured may sue.

298. No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit

against him for compensation, or if such other person be the purchaser for the recovery of the specific property and for compensation in default of such recovery.

Act VIII of 1859, section 252. This section applies to H. C. and P. S. C. C.

Irregularity.—No irregularity in the sale of moveable property will vitiate the sale, but the person injured may sue to set aside the sale if the sale-proclamation warrants any title—*Framji* vs. *Hormasji*, I. L. R., 2 Bom., 258, 266, or for compensation, in all cases; and where the person causing the injury is also purchaser, the suit may be for the specific property, or compensation in default of recovery. The introduction into the Code of the substantive law contained in the latter portion of the section is stated to have been made on account of the case of *Mahanund Haldar* vs. *Akial*, 9 W. R., 118, which decided that, if the property of A be sold in execution of a decree against B, the sale is not an irregularity within this section, and A can follow the purchaser for the property or its value as damages, or in other words, the right, title and interest of the judgment-debtor in the property may be challenged and contested within the period of limitation without suing to set aside the sale—*Sharafatunissa* vs. *Lachmi Narain*, 7 Alla., 288. Nor is his remedy confined to suing the purchaser; he may obtain damages from the judgment-creditor—*Kanaye Pershad* vs. *Hur Chand*, 14 W. R., 120.

Not an Irregularity.—Omission to state the value of the property sold in the sale-proclamation or the amount of the decree at the time of sale—*Kasse Nauth* vs. *Hullodhur*, 2 W. R., 60; or to serve the notification of sale on the judgment-debtor in person, or in the village in which he lives—*Romesh Chundra* vs. *Jadub Chunder*, 6 W. R., 14; or overstating the balance due, is not an irregularity within this section—*Chatter Sing* vs. *Dhurrum Coonwur*, 1 Alla., 61. See note under section 312, *post*.

Delivery of moveable property actually seized.

299. When the property sold is a negotiable instrument or other moveable property, of which actual seizure has been made, the property shall be delivered to the purchaser.

This section applies to H. C. and P. S. C. C.

Delivery of moveable property to which judgment-debtor entitled subject to lien.

300. When the property sold is any moveable property to which the judgment-debtor is entitled subject to the possession of some other person, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

This section applies to H. C. and P. S. C. C.

Delivery of debts and of shares in public Companies.

301. When the property sold is a debt not secured by a negotiable instrument, or is a share in any public Company, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the

manager, secretary or other proper officer of the Company from permitting any such transfer or making any such payment to any person except the purchaser.

This section applies to H. C. and P. S. C. C.

Presumption of Order being Served; see *Debendra Kumar* vs. *Rup Lall*, I. L. R., 12 Cal., 546.

Transfer of negotiable instruments and shares.

302. If the endorsement or conveyance of the party in whose name a negotiable instrument or a share in any public Company is standing is required to transfer such instrument or share, the Judge may endorse the instrument or the certificate of the share, or may execute such other document as may be necessary.

The endorsement or execution shall be in the following form or to the like effect :—" *A. B.*, by *C. D.*, Judge of the Court of (*or as the case may be*) ; in a suit by *E. F.* against *A. B.*"

Until the transfer of such instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon, and to sign a receipt for the same ; and any endorsement made, or document executed, or receipt signed as aforesaid, shall be as valid and effectual for all purposes as if the same had been made or executed or signed by the party himself.

Act VIII of 1859, section 267. This section applies to H. C. and P. S. C. C. See note under section 262, *ante*.

Vesting order in case of other property.

303. In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct ; and such property shall vest accordingly.

This section applies to H. C. and P. S. C. C.

(*c.*)—*Rules as to Immoveable Property.*

What Courts may order sales of land.

304. Sales of immoveable property in execution of a decree may be ordered by any Court other than a Court of Small Causes.

This section applies to H. C.

Mortgage.—The provisions of the Code for the sale of immoveable property govern the sale of a decree declaring a charge upon land—*Mussamut Bhuwani Kuar* vs. *Golab Rai*, I. L. R., 1 Alla., 348; *Sami Ayyar* vs. *Krishnasami*, I. L. R., 10 Mad., 169; not so—*Naigar* vs. *Bhaskar*, I. L. R., 10 Bom., 444; *Debendra Kumar* vs. *Rup Lall*, I. L. R., 12 All., 547; and compare *Rai Balkrishna* vs. *Musuma*, 9 Ind. App., 182, p. 197; I. L. R., 5 Alla., 142, p. 157.

The purchaser at a sale of immoveable property under a Small Cause Court decree acquires no title in the property—*Natto Meah* vs. *Nund Ranee*, 17 W. R., 309; nor can an ordinary Civil Court (save under section 19 *ante*) sell immoveable property wholly outside its jurisdiction—*Nowab Ali* vs. *Shaikh Uzir*, 23 W. R., 233; it should follow the procedure laid down in section 223, *ante*.

Small Cause Court.—A Small Cause Court could sell the undivided right, title and interest of a deceased debtor to which the defendant succeeded, in moveable property, in satisfaction of a decree obtained against the defendants, without infringing section 6 of Act II of 1865—*Ahobalasoo Chetty* vs. *Venkatakristnamma*, 5 Mad., 275; but not a mortgage-bond of immoveable property—*Buddoo Mull* vs. *Maharoop*, 6 Alla., 129.

Where a decree declares a lien on specific property it may be executed in the usual way, although there is no declaration in it that the decree-holder can sell—*Nuddyabashee* vs. *Reza*, 15 W. R., 337.

Postponement of sale of land to enable defendant to raise amount of decree.

305. When an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may on his application postpone the sale of property comprised in the order for sale, for such period as it thinks proper, to enable him to raise the amount.

Certificate to judgment-debtor.

In such case the Court shall grant a certificate to the judgment-debtor authorizing him, within a period to be mentioned therein, and notwithstanding anything contained in section 276, to make the proposed mortgage, lease or sale:

Provided that all moneys payable under such mortgage, lease or sale, shall be paid into Court and not to the judgment-debtor:

Provided also that no mortgage, lease or sale under this section shall become absolute until it has been confirmed by the Court.

Act VIII of 1859, section 243. This section applies to H. C.

Postponement.—Postponement is a matter of discretion—*Bishenmun Singh* vs. *Land Mortgage Bank*, 12 Ind. App., 7, p. 10. The Courts should exercise a reasonable discretion, and should not postpone the sale unless the judgment-debtor can make out a fair case—*Kishen Coomaree* vs. *Golab*, 15 W. R., 477, and the creditor will not suffer—*Ram Rutton* vs. *Land Mortgage Bank*, 17 W. R., 193; and show the debt can be paid within a reasonable time by mortgage or the appointment of a receiver—*Mohinee Mohun* vs. *Ram Kant*, 15 W. R., 322; a year is unreasonable—*Fyzooddeen* vs. *Giraulh Singh*, 2 Alla., 1; *Ram Ruttun*, *supra*, and then the postponement should be only for a reasonable period—*Kednum Achutaramayya* vs. *Khaja Mahomed Amin Akhan*, 5 Mad., 272; *Suhuj Narain* vs. *Ram Pershad*, 21 W. R., 146. The Court cannot lease or mortgage the property itself—*Luchmeeput Doogar* vs. *Maharaja Juggut Indur Tewaree*, W. R., 1864, Mis., 5; and once property has been put up for sale and bids have been made *bonâ fide*, it has no power to postpone the sale or decline to conclude it, and order another auction on the mere representation of the debtor that he can obtain a higher price by private sale; at any rate not without proof that the amount of the debt could be so raised—*Luchmee Narain* vs. *Bhyroo Pershad*, 2 Agra, Mis., 11.

Mortgage Sale.—This section does not apply to a decree founded on a mortgage, when that decree declares that certain property is to be sold in satisfaction of the mortgage-debt—*Oomda Kahnum* vs. *Raj Roop*, 1 C. L. R., 295.

Appeal.—An appeal lay from an order under Act VIII of 1859, section 243—*Hanooman Pershad* vs. *Ajoodhia Pershad*, 10 W. R., (F. B.), 5 ; 1 B. L. R., 7. See now section 244, *ante*, and section 588, *post*.

Deposit by purchaser of immoveable property.

306. On every sale of immoveable property under this chapter, the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per centum on the amount of his purchase-money to the officer conducting the sale, and, in default of such deposit, the property shall forthwith be put up again and sold.

Practice—Act VIII of 1859, section 253. This section applies to H. C.

An officer conducting a second sale under this section is not bound to commence from the next highest bid below that made by the defaulter ; he may do so if the next highest bidder is willing to abide by his bid, otherwise he should commence the sale *de novo*—*Gour Mookh* vs. *Lalla Gour*, 1 W. R., Mis., 11.

The officer conducting the sale cannot insist upon a deposit being made before acceptance of a bidding ; but if it appear that persons without means have been put forward to make sham biddings and fraudulently frustrate the sale, he would be justified in inquiring into the trustworthiness of the bidder before accepting his bid—*Muhesh Narain* vs. *Kishanund*, 9 Moore, 328 ; and the sham bidder would be liable under section 228 of the Penal Code for obstructing the sale—*Mohesh Chunder*, Appellant, W. R., 1864, Mis., 3.

Section 293—It has been decided that section 293, *ante*, applies to re-sales under this section, and that the first purchaser can be compelled to pay the difference between the first and second sales—*Ramdhani* vs. *Rajrani*, I. L. R., 7 Cal., 337 ; *Vallabhan* vs. *Pangunni*, I. L. R., 12 Mad., 454. See, however, *Bhim* vs. *Sarwan*, I. L R., 16 Cal., 33.

Decree-Holder.—The decree-holder to whom a lot is knocked down, is bound to make the usual deposit—*Chulkoo Dutt* vs. *Leelanund Singh*, W. R., 1864, Mis., 30, unless all the parties interested in the amount to be deposited waive their right to a cash deposit—*Gopal Singh* vs. *Roy Bunwaree*, 5 C. L. R., 181 ; and if there is any dispute as to whether the deposit was offered or not, it must be decided by the Judge before commencing a second sale—*Kuppayyan* vs. *Ramasami*, I. L. R., 6 Mad., 197.

No Sale.—It has been decided that if the deposit is not made immediately there is no sale—*Intizam Ali* vs. *Narain Singh*, I. L. R., 5 Alla., 316 (see reference to this case in *Bhim* vs. *Sarwan*, I. L. R., 16 Cal., 33 ; *Vallabhan* vs. *Pangunni*, I. L. R., 12 Mad., 454) ; *contra*—*Venkata* vs. *Sama*, I. L. R., 14 Mad , 227. See, however, *Beepun Chunder* vs. *Purreshnath*, I. L. R., 9 Cal., 98.

Effect of this Section.—Non-compliance with the provisions of this section voids the sale—*Intizam Ali* vs. *Narain Singh*, I. L. R., 5 Alla., 316 ; is a material irregularity—*Bhim* vs. *Sarwan*, I. L. R., 16 Cal., 33 ; a mere irregularity—*Venkata* vs. *Sama*, I. L. R., 14 Mad., 227.

Notification.—No fresh notification is necessary for a re-sale under this section—*Vallabhan* vs. *Pangunni*, I. L. R., 12 Mad., 454.

Forthwith.—This word shows that proceedings under this section are a continuation of the original sale and an adjournment is not allowable—*Bhim* vs. *Sarwan*, I. L. R., 16 Cal., 33, p. 38 ; *contra*—*Vallabhan* vs. *Pangunni*, I. L. R., 12 Mad., 454.

Time for payment in full.

307. The full amount of purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day ; or if the fifteenth day be a Sunday or other holiday, then on the first office-day after the fifteenth day.

This section applies to H. C.

In computing the fifteen days the day of sale should be excluded—*Amanee Begum* vs. *Koorban Ali*, 3 Agra, 240.

Section 293, *ante*, applies to defaulting purchasers—*Javherbhai* vs. *Haribhai*, I. L. R., 5 Bom., 575; *Ramdhani* vs. *Rajrani Koer*, I. L. R., 7 Cal., 337. See also *Vallabhan* vs. *Pangunni*, I. L. R., 12 Mad., 454; also 10 Cal., 758; 14 Mad., 498.

Procedure in default of payment.

308. In default of payment within the period mentioned in the last preceding section, the deposit, after defraying the expenses of the sale, shall be forfeited to Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

Act VIII of 1859, section 254. This section applies to H. C.

Under Act VIII of 1859, section 254, the defaulting purchaser and decree-holder were considered in Bengal as parties to the suit, and an appeal lay from a decision under section 254—*Ram Dial* vs. *Ram Dass*, I. L. R., 1 Alla., 181, and does now—*Baijnath Sahai* vs. *Mohesp*, I. L. R., 16 Cal., 335; *contra*—*Rahim Baksh* vs. *Dhuri*, I. L. R., 12 Alla., 397. See note under section 293, *ante*.

Court.—Under the rule of the High Court, Madras, payment into a Government Treasury is sufficient for the purpose of this section—*Srinivasa Mellayacha*, I. L. R., Mad., 211.

Notification on re-sale of immoveable property.

309. Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh notification in the manner and for the period hereinbefore prescribed for the sale.

Act VIII of 1859, section 255. This section applies to H. C.

In Default of Payment.—A notification is only prescribed in cases where the re-sale is in default of payment of the purchase-money within time, namely, within the fifteen days allowed by section 307, *ante*—*Vallabhan* vs. *Pangunni*, I. L. R., 12 Mad., 454.

Co-sharer of share of undivided estate sold in execution to have preference in bidding.

310. When the property sold in execution of a decree is a share of undivided immoveable property, and two or more persons of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer.

Act XXIII of 1861, section 14. This section applies to H. C.

Advance the Sum.—This section contemplates a distinct bid by the co sharer in the ordinary way. It is not sufficient that he prefers his right of pre-emption and offers to pay a sum equal to that bid by the highest bidder—*Hira* vs. *Unas ilt Khan*, I. L. R., 3 Alla., 827; *Tej Singh* vs. *Gobind*, I. L. R., 2 Alla., 850.

Co-Sharer.—This section gives a person who is a co-sharer at the time of sale—*Dwarka Parshad* vs. *Ram Autar*, 7 Alla., 281, and having a right of pre-emption in any undivided immoveable property (see *Ram Auter* vs. *Sheo Dutt*, 6 Alla., 243) held jointly by him and the judgment-debtor, not merely a right which must be enforced in a regular suit, but a right to have the sale perfected with him in execution—*Tasuduk Ali* vs. *Muksud*, 6 Alla., 272; followed in *Baij Nath* vs. *Sital Singh*, I. L. R., 13 Alla., 224. See, however, *Abdool Jaleel* vs. *Kalee Koomar*, 6 W. R., Mis., 3.

Scope of the Section.—Except as laid down in the section, there is no pre-emption in property sold in execution of decree—*Abdool Jaleel* vs. *Khellat Chunder*,

10 W. R., 165; *Sheikh Nuzmoodeen* vs. *Kanye Jha*, Marsh., 555; and it does not apply when the property sold is not a share of undivided immoveable property, but only the interest of a mortgagee in such a share—*Jatram Dass* vs. *Beni*, I. L. R., 3 Alla., 15; or the claim of a purchaser before confirmation of the sale—*Dwarka Parshad, supra.*

The buyer should take care to buy in the name of a co-sharer. In a case in which a co-sharer bought not in his own name but in the name of B, not a co-sharer, it was held no pre-emption accrued—*Gunga Ram* vs. *Moola*, 2 Alla., 200.

Appeal —A co-sharer not a party to the suit cannot appeal from an order confirming the sale in favour of another bidder—*Munirudden Khan* vs. *Abdul Rahim*, I. L. R., 3 All., 674. See, however, the case of *Bisesbur Koer* vs. *Hari Singh*, I. L. R., 5 Alla., 42.

Application to set aside sale of land on ground of irregularity.

311. The decree-holder, or any person whose immoveable property has been sold under this chapter, may apply tothe Court to set aside the sale on the ground of a material irregularity in publishing or conducting it;

but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.

Act VIII of 1859, section 256. This section applies to H. C.

Application of the Section.—Section 234, *ante*.

Time to Apply —No application can be made under this section by a purchaser not a party after the sale has been confirmed under section 312, *infra*, even on the ground of fraud—*Gobind Chundra* vs. *Uma Churn*, I. L. R., 14 Cal., 679; his only remedy is a regular suit—*Luchmeeput Singh* vs. *Adoyto Churn*, 24 W. R., 452, and see note under section 318, *post*. As to when a party is purchaser, see *Mohendro* vs. *Gopal*, I. L. R., 17 Cal., 769, and notes under section 244, *ante*.

Where to Apply.—If the sale is held by the Collector under section 320, *post*, application must be made to him—*Keshabdeo* vs. *Radhe*, I. L. R., 11 Alla., 94.

Who may Apply.—The applicant must be either the decree-holder and in this is included any decree-holder who is entitled to a share under section 295, *ante*—*Lukshmi* vs. *Kuttuni*, I. L. R., 10 Mad., 57; *Sorabji* vs. *Govind*, I. L. R., 16 Bom., 91, p. 101; or the person whose immoveable property has been sold, whether he is judgment-debtor or not—*Man Kuar* vs. *Tara Sing*, I. L. R., 7 Alla., 583; *Abdul Haq* vs. *Mohini Mohun*, I. L. R., 14 Cal., 240; *Birj Mohun* vs. *Umanath*, P. C., June 23rd, 1892; and this includes a person whose tenure has been sold under the Rent Law—*Panye Chunder* vs. *Hurchunder*, I. L. R., 10 Cal., 496, the legal representative of the judgment-debtor not on the record - *Sheo Prasad* vs. *Hira Lal*, I. L. R., 12 Alla., 441, and a mortgagee—*Rakhal Chunder* vs. *Dwarkanath*, I. L. R., 13 Cal., 346; but not a person who claims by title paramount to the judgment-debtor—*Asmutunnissa* vs. *Ashruff*, I. L. R., 15 Cal., 488, overruling—*Abdul Haq* vs. *Mohini Mohun*, I. L. R., 14 Cal., 240. See, however, *Sheo Prasad* vs. *Hira Lal*, I. L. R., 12 Alla., 440. An auction-purchaser under a decree cannot apply before his purchase has been confirmed—*Bhagabutti Churn* vs. *Bisheshwar*, I. L. R., 8 Cal., 367. Probably, the old law that where the creditor purchased, the debtor could object to the sale, although his right, title and interest had been sold under a previous execution, is still true on the ground that the judgment-creditor having purchased he would be stopped from denying the debtor had not interest in the property sold—*Reet Bhunjun Singh* vs. *Meeturjeet*, 6 W. R., Mis., 31.

Void Sale.—A sale of "ancestral" property within the meaning of the Government Notification No. 671, August 1880, North-West, is void, as the decree should have been transferred to the Collector, and the sale should not be confirmed—*Suddeo Rai* vs. *Sheo Golam*, I. L. R., 4 Alla., 382; and a sale by the Court officer after the Court has postponed the sale is void—*Sant Lal* vs. *Umraonnissa*, I. L. R., 12 Alla., 96; *Maljha* vs. *Jhow* 6 Alla., 354, and an order passed by the High Court postponing the sale has the same effect—*Nonidh* vs. *Sohun Koer*, 4 Alla., 135; and where under Act VIIIof 1859 a Judge withdrew execution-proceedings from a Subordinate Judge and sold himself, the sale was held to be void — *Abdool Hye* vs. *Macrae*, 23 W. R., 1. So a sale of property attached under section 295, *ante*, by the inferior Court is void, and will be set aside on revision by the High Court—*Badri Prosad* vs. *Sarun Lal*, I. L. R., 4 Alla., 359;

Agore Nath vs. *Shama Sundaree*, I. L. R., 5 Alla., 615. So also if property is sold contrary to the provisions of section 99 of the Transfer of Property Act—*Sathuvayyun* vs. *Muthusami*, I. L. R., 12 Alla., 325; or without having been attached—*Fida Husain* vs. *Kutub*, I. L. R., 7 Alla., 38; *Ramchand* vs. *Petam*, I. L. R., 10 Alla., 506; *contra*—*Kishore Mohun* vs. *Mahomed*, I. L. R., 18 Cal., 188, and see *Macnaghten* vs. *Mahabir*, I. L. R., 9 Cal., 660; or if notice under section 248, *ante*, has not issued—*Ramessuri Dassee* vs. *Doorgadas*, I. L. R., 6 Cal., 103; or if the sale is conducted at a time and place other than those properly notified—*Chedami Lal* vs. *Amir*, I. L. R., 7 Alla., 676; but see *Balkishen* vs. *Sita Ram*, I. L. R., 7 Alla., 731; or if the rule laid down in section 290, *ante*, is infringed—*Bakshi Nand* vs. *Malak Chand*, I. L. R., 7 Alla., 289; *Ganga Prasad* vs. *Jag Lal*, I. L. R., 11 Alla., 333; (and see *Nana Kumar* vs. *Golam*, I. L. R., 18 Cal., 422) the sale is void, *contra*—*Venkata* vs. *Sama*, I. L. R., 14 Mad., 227. Looking, however, to the case of *Rewa Mahton* vs. *Ram Kissen*, 13 Ind. App.; I. L. R., 14 Cal., 18; *Bal Krishna* vs. *Masuma Bibi*, I. L. R., 5 Alla., 143; some of these cases will probably be reconsidered. See note under section 295, *ante*.

Irregularity.—This section is confined to cases in which some irregularity has been committed, and does not apply when the sale is sought to be set aside on some other ground than mere irregularity, such as fraud—*Umbika Churn* vs. *Dwarkanath Ghose*, 8 W. R., 506; *Subbaji* vs. *Srinivasa*, I. L. R., 2 Mad., 264; *Birj Mohun* vs. *Umanath*, P. C., June 23rd, 1892; or that the purchaser fraudulently induced the decree-holder to make false returns—*Nund Lall* vs. *Delawar*, 11 W. R., 244; or that the Nazir, in collusion with the purchasers, fraudulently sold the property for a small sum—*Virsingappa* vs. *Sadashivappa*, 7 Bom., 74; or that the decree was without jurisdiction—*Lall Goondur Lall* vs. *Hubeeboonnissa*, 15 W. R., 311; or that the party whose property was sold, was not the judgment-debtor—*Ramchaibar* vs. *Bechu*, I. L. R., 7 Alla., 641, or, if the property of his representative, that the latter had inherited nothing from him—*Chowdhry Shaikh Wahid* vs. *Mussamut Jumaya*, 6 W. R., Mis., 116. Such objections do not fall within this section. The irregularity must have been committed in publishing or conducting the sale, which refers only to acts done down to the conclusion of the sale when the lot is knocked down to the highest bidder. One debtor satisfied the judgment, and taking an assignment of the decree was allowed wrongfully to sue out execution, and sold the property of his co-debtor. It was held that the person obtaining the execution should not be allowed to retain possession of the sale-proceeds; but, as the irregularity had arisen in granting execution, and not in publishing or conducting the sale, that the sale could not be set aside summarily—*In the matter of the Petition of Digumburee Dabee*, B. L. R. (F. B.), 945.

And so where a Judge received payment after the fifteenth day from the date of sale, the irregularity was held not to fall within this section—*Brinda Debee* vs. *Gopee Soonduree*, 6 W. R., Mis., 82.

Publishing or Conducting it.—*Quære*, whether irregularity in publishing the notice of attachment falls within these words?—*Macnaghten* vs. *Mahabir Pershad*, I. L. R., 9 Cal., 656, p. 660. Selling on a close holiday is not such an irregularity—*Bisram* vs. *Sahibunnissa*, I. L. R., 3 Alla., 333; but see *Haro Jemadar Jadub*, 3 W. R., Mis., 24; nor is selling a portion of an estate as within jurisdiction, although the greater part falls in another district—*Shib Narain Singh* vs. *Gobind Doss Bhukut*, 23 W. R., 154, though there may have been property to satisfy the decree in the district in which it was passed—*Kallee Prosunno Bose* vs. *Dinonath Bose*, 19 W. R., 434. After sale the judgment-debtor cannot object on the ground that execution was barred—*Gangadhara* vs. *Rethavai*, I. L. R., 6 Mad., 237. So it has been held that where the property of a surety was attached and sold, he could not urge that the provisions of section 253, *ante*, did not apply—*Hub Lal* vs. *Kania Lal*, I. L. R., 7 Alla., 365. And it is not irregular to sell property attached during the lifetime of the judgment-debtor, after his death without making his representative a party—*Sheo Prasad* vs. *Hira Lal*, I. L. R., 12 Cal., 440.

Not Material—Irregularity.—Issuing notice of sale after the death of the original decree-holder and before any person has applied to be substituted for him—*Govind Chunder* vs. *Bamun Doss*, 22 W. R., 481; issuing notices of attachment and sale together—*Huro Soondurее* vs. *Brojo Gobind*, 4 W. R., Mis., 12; overstating the balance due at the time of sale—*Chuttor Singh* vs. *Dhurrum Koonwur*, 1 Alla., 61; entering the wrong pergunnah in the proclamation, if it be served in the right village—*Nooral Hossein* vs. *Ram Coomar*, 25 W. R., 326; publishing the notification of sale at an inferior cutcherry, the chief cutcherry being beyond jurisdiction—*Hubeebool Hossein* vs. *Allenuler*, 14 W. R., 44; not beating a drum at time of sale in Bombay—*Trimbak Ranji* vs. *Nana*, I. L. R., 10 Bom., 504; selling property for a demand for which it was only in part liable—*Ragubar Dayal* vs. *Ilahi Baksh*, I. L. R., 7 Alla., 450; *Kanji Mal* vs. *Sailo*, I. L. R., 8 Alla., 116; publicly postponing a sale for more than 7 days without a fresh proclamation—*Harbuns Sahai* vs. *Bhairo Pershad*, 4 C. L. R., 23; *Venkata* vs. *Sama*, I. L. R., 14 Mad., 227; (see "Void Sale," *supra*,) notifying that the sale of land in A would begin in A or B and be completed at B—*Gobind Hari* vs. *Bank of India*, 4 Bom., 164; selling property in lots, though attached and proclaimed in its entirety—*Abdool Hye* vs. *Macrae*, 23 W. R., 1; or for a low price—*Lakemi* vs. *Krishnabhat*, I. L. R., 5 Bom., 424; omitting to mention the numbers and values of promissory-notes sold—*Luckmeeput* vs. *Lekraj Roy*,

8 W. R., 415; or postponing a sale fixed for the 25th on the 23rd to the 26th—*Asmutoonnissa* vs. *Khudemoonnissa*, 17 W. R., 278; or selling after the judgment-creditor had asked the officer to stay the sale—*Kaminee Dassee* vs. *Gourmoney Dassee*, 1 Ind. Jur., N. S., 359, is not a material irregularity, though the sale of one-half after the whole was proclaimed has been set aside as *ultra vires*—*Panch Lall* vs. *Sri Ram Banerjee*, 1 Shome, 10.

Material.—But a serious misstatement of the Government revenue in the notification is a material irregularity—*Girdhari Singh* vs. *Hurdeo Narain*, 3 Ind. App., 230; *Mohabir Pershad* vs. *Olpherts*, 9 C. L. R., 134; though omitting to state the rent apparently is not—*Mohendro Coomar* vs. *Heera Mohun*, I. L. R., 7 Cal., 723. Making a [illegible] tion in execution instead of selling the *undivided share*—*Muthuradas* vs. *Fatma*, 5 Bom., 63; or selling before thirty days have expired after service of proclamation under section 290, *ante*—*Abdool Nossia* vs. *Doolal*, 11 C. L. R., 303; or without a fresh proclamation where there has been a postponement—*Gopee Nath* vs. *Luchmeeput*, I. L. R., 3 Cal., 542; or after a portion of the property has been released to a third party—*Shib Prokash* vs. *Sardar*, I. L. R., 3 Cal., 545; or issuing a sale-notification under Circular Order of the 18th of August 1873, without notifying in it that the property will be sold on a day named, or as soon thereafter as it may come up in the list—*Bykunt Nath* vs. *Juggut Mohun*, 24 W. R., 240; or attaching or advertising property of A and B for sale under a mortgage-decree and subsequently previous to sale announcing only the right, title, and interest of A will be sold—*Mohiny Mohun* vs. *Bhoobunjoy*, 6 C. L. R., 237; or selling a mortgage-debt without proclaiming it under both sections 268 and 274—*Sri Nath Dutt* vs. *Gopal Chunder*, I. L. R., 9 Cal., 511; (but see *Sami Ayyar* vs. *Krishnasami*, I. L. R., 10 Mad., 169), is material. Any irregularity brought by about the contrivance of the decree-holder will be closely looked at—*Tekaet Bhao Narain* vs. *The Court of Wards*, 15 W. R., 58; and where he sells subject to his mortgage and does not describe it—*Megh Lall* vs. *Shib Pershad*, I. L. R., 7 Cal., 35; *Jaganatha* v. *Gangi*, I. L. R., 15 Mad., 303, or buys at a sale held without issuing notice under section 248, *ante*—*Romeshhurry Dasi* vs. *Durgadass Chaterjee*, 7 C. L. R., 85; I. L. R., 6 Cal., 103, or after discouraging other bidders—*Woopendronath* vs. *Brojendronath*, 9 C. L. R., 263, the sale will, if possible, be set aside, but disparaging remarks of spectators or purchasers, where the latter are not the decree-holders, do not amount to an irregularity—*Lal Mohan* vs. *Nunu Mahomed*, I. L. R., 17 Cal., 152.

How Cured.—All irregularities are cured by the certificate of sale—*Balkrishna* vs. *Masuma Bibi*, I. L. R., 5 Alla., 142; see *Muhesh Narain* vs. *Kishanand*, 9 Moore, 328, p. 342; and after that no outsider can object that the sale does not pass a good title—*Naiyar* vs. *Bhaskar*, I. L. R., 10 Bom., 444.

Substantial Injury.—The applicant must show that he has sustained substantial injury by *reason* of the irregularity, and if he cannot connect the irregularity with the injury, he must fail—*Asmutunnissa* vs. *Ashruff*, I. L. R., 15 Cal., 488; *Olpherts* vs. *Mahabir Pershad*, 11 C. L. R., 494; 10 Ind. App., 25; *Tripura Sundari* vs. *Shurja Churn*, I. L. R., 11 Cal., 74; *Macnaghten* vs. *Mahabir Pershad*, I. L. R., 9 Cal., 556; *Arunachellam* vs. *Arunachellam*, I. L. R., 12 Mad., 19; 15 Ind. App., 171; *Satish Chunder* vs. *Thomas*, I. L. R., 11 Cal., 658; and this is a pure question of fact—*Fakharuddin* vs. *Official Trustee*, I. L. R., 8 Cal., 178, p. 187.

Where a sale-notification had not been served under section 289, *ante*, and there was no affidavit of search for incumbrances as required by section 287, *ante*, and the sale took place on and not after the thirtieth day from publication, but there was no evidence of injury, the sale was upheld—*Bandy Ally* vs. *Madhub*, I. L. R., 8 Cal., 932. When the sale is held on the day previous to that fixed in the order of postponement—*Jhoomuck* vs. *Radha Pershad*, 25 W. R., 328, or after it—*Shoshee Mookhee* vs. *Dwarkanath Biswas*, 6 W. R., Mis., 84 (especially if the creditor is the purchaser—*Kishen Prosunno* vs. *Nurduma Dossee*, 17 W. R., 339); or at an hour not mentioned in the notification—*Khodeja Bebee* vs. *Johad Roheem*, 14 W R., 320; or after an indefinite postponement without a new proclamation—*Okhoy Chunder* vs. *Erskine*, 3 W. R., Mis. 11; followed in *Megh Lall* vs. *Shib Pershad*, I. L. R., 7 Cal., 35; or if the advertised order in which it should take place is suddenly changed—*Pokraj Singh* vs. *Munraj*, 12 W. R., 281; or property advertised to be sold in lots is sold in a lump—*Sreekunt* vs. *Ramjeebun*, 18 W. R., 342 (see, however, *Urquhart* vs. *Nundeeput*, 12 W. R., 492; 13 W. R., 209); or Kurkuns read out notices of liens and affirm the existence of a mortgage on the property—*Govind Hari* vs. *Bank of India*, 4 Bom., 164; and the property is sold at an inadequate price, the sale will be set aside. And where a District Judge, who had no authority to call up a case from the file of a Subordinate Judge, sold the whole of the property when part would suffice, against the will of the debtor, the sale was set aside—*Abdool Hye* vs. *Macrae*, 23 W. R., 1.

Estoppel.—If injury is proved the sale is set aside unless the applicant has by his conduct equitably estopped himself for pleading the irregularity; and a mere petition for postponement is not sufficient to bar him—*Mahtab Deo* vs. *Leelanund Singh*, 9 C. L. R., 399; I. L. R., 7 Cal., 613. If a judgment-debtor petitions that a sale should be postponed for one month, the proclamation and attachment to remain, and the sale takes place at the

end of the month, the debtor cannot plead that a notification should have issued—*Hills* vs. *Osman Biswas*, 25 W. R., 35; *Baboo Hurdeo Narain Sahoo* vs. *Gridharee Singh*, 19 W. R., 227; and where the sale-notification wrongly stated the Government revenue to be Rs. 3,146, instead of Rs. 8,146, and the sale was postponed on an application by the debtor asking, among other things, that the attachment and the notification of the sale should be maintained, it was held that the error was material, but that the debtor had estopped himself from saying there was any error in the notification after he had agreed to the postponement with the notification being maintained—*Girdhari Singh* vs. *Hurdeo Narain*. 3 Ind. App., 230. If a judgment-debtor lies by and knowing of an irregularity allows the sale to proceed without objection he should not be allowed to raise the same point afterwards—*Arunachellam* vs. *Arunachellam*, 15 Ind. App., 171; I. L. R., 12 Mad., 19; 3 Ind. App., 240. On the other hand, if the judgement-creditor is mortgagee and does not say so before sale he cannot enforce his mortgage—*Jaganatha* vs. *Gangi*, I. L. R., 15 Mad., 303.

Onus of Proof.—It lies on the objector, see *Mahesh Narain* vs. *Kishanund*, 9 Moore, 328, p. 342.

Effect of Setting Aside a Sale.—When a sale is set aside, the parties are simply remitted to the position in which they stood immediately before the sale, without prejudice to any other proceedings in execution which have been legally performed. Thus, where a sale was set aside on the ground that all the formalities prescribed by law had not been followed, the attachment was held to have revived—*Gunno Singh* vs. *Muddun Mohun*, W. R., Sp. No. 26; so, where property had been sold four times, and the sales proved unfructuous, because the highest bidders turned out to be only nominal purchasers, and the final sale was impeached on the ground that immediately before it a copy of the decree had not, in accordance with Reg. XX of 1793, been transmitted to the Board of Revenue, the objection was overruled, inasmuch as the terms of the Regulation had been complied with before a previous sale—*Rajah Mohesh Narain Singh* vs. *Kishanand Misser*, 9 Moore, 328. See note under section 290, *ante*.

As to the effect of a fraudulent sale of the rights of third parties, see *Sidhee Nazur Ally* vs. *Ojoodhyaram Khan*, 10 Moore, 540.

Procedure.—Before Act VI of 1892, it was held that Section 647 applied to all proceedings, and that when a petition was preferred under this section, the Judge should fix a day for hearing and receive all the evidence tendered by all the parties as to whether or not any material irregularity had ensued and affected the applicant injuriously—*Brojo Mohun* vs. *Shab Ameeruddin*, 20 W. R., 424; *Sanwal Singh* vs. *Makhun Panday*, 2 Alla., 143; *Rethbhunjun Singh* vs. *Miturjeet*, 4 W. R., Mis., 9; *Khodeja* vs. *Ram Narain*, 12 W. R., 511; and come to a distinct finding on each point—*Parbutty* vs. *Girdharee*, 6 W. R., Mis., 125; but though section 647 does not now apply, the proceedings are proceedings in the suit and the ordinary *lex fori* applies. If an application is made within time, it must be dealt with, and it cannot be summarily rejected on the ground that it should have been made earlier, or that the statements contained in it were in all probability not true —*Nujmooddeen* vs. *Abdool*, 15 W. R., 95, *Kalee Sahoy* vs. *Makoond Lall*, 24 W. R., 216. A Nazir's report is not evidence—*Sookh Raj* vs. *Tuffazool Hossein*, 2 Alla., 142.

Appeal.—After a claim or objection is disposed of, the Court should proceed to pass an order under section 312 post—*Tota Ram* vs. *Khub*, I. L. R., 7 Alla., 253; *Baldeo Singh* vs. *Kishan*, I. L. R., 9 Alla., 411; and no appeal lies by the judgment-debtor from an order rejecting under section 103, *ante*, his application against the purchaser a third party—*Ningappa* vs. *Gangawa*, I. L. R, 10 Bom., 433; nor from an order refusing to restore it—*Raja* vs. *Sirinivasa*, I. L. R., 11 Mad., 319.

Revision.—Where a sale is set aside, though the finding is that no substantnial injury has been sustained, the Judge exercises a jurisdiction not vested in him, and the order may be set aside under section 622, *post*—*Lakshmani* vs. *Najimudin*, I. L. R., 9 Mad., 145.

Step in Aid of Execution.—The appearance of a decree-holder by his pleader to oppose an application made by the judgment-debtor to set aside a sale in execution is not an application under art. 179, Sch. II of the Limitation Act—*Umesh Chunder* vs. *Soondar Narain*, I. L. R., 16 Cal., 747.

Effect of objection being disallowed and

312. If no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser.

If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale.

of its being allowed.

No suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made.

Act VIII of 1859, section 257. This section applies to H. C.

See "*Publishing or Conducting it.*" section 311, *ante*.

The mere act of confirming a sale is not an application in aid of execution within the meaning to cl. (4), art. 179 of Act XV of 1877—*Motendro Chandra* vs. *Mohendro Nath Ghose*, 10 C. L. R., 330.

Objection Disallowed—If the application is disallowed, the Judge must pass an order confirming the sale—*Mahomed Hossein* vs. *Parunder*, I. L. R., 11 Cal., 287; and if he refuses his order is subject to revision—*Birj Mohun* vs. *Rai Uma Nath*, P. C., June 23rd, 1892; but if the application is allowed, the sale must be set aside, and an order passed directing by whom the expenses of the sale should be paid—*Hurdei Bebee* vs. *Surjoo Pershad*, 6 Alla., 309. Where the execution has been set aside for irregularity on the part of the Court officers, it has been held that the judgment-debtor should not be saddled with the costs of the sale—*Hulst* vs. *Luchmun Dass*, 2 Agra, Mis., 1.

The objection cannot be taken for the first time in appeal—*Macnaghten* vs. *Mahabir Pershad*, I. L. R., 9 Cal., 656.

Appeal.—An appeal lies from the first part of this section under section 588, cl. 16, unless in the special case of documents registered and decrees passed under the Registration Act XX of 1860—*Huro Soondures* vs. *Punchoo Ram*, 24 W. R., 225; but not a second appeal—*Nana Kumar* vs. *Golam Chunder*, I. L. R., 18 Cal., 422. No appeal lies from a decision under the second clause—*Sakharam* vs. *Bhiku*, I. L. R., 11 Bom., 603.

In a case before the Privy Council, it appeared that the Judges of the High Court in their judgment said :—"We reverse the order of the Subordinate Judge, dated the 9th of November 1872, and confirm the sale," but the order merely directed that the order of the Lower Court be reversed and the sale confirmed. Their Lordships interpreted the order as meaning that the sale should be confirmed by the Judge of the Lower Court who had, on disallowing objections, neglected to pass an order confirming the sale, and had afterwards refused to do so—*Girdhari Singh* vs. *Hurdeo Narain*, 3 Ind. App., 230. A judgment-debtor preferred various objections to stay a sale, but the Subordinate Judge rejected them and ordered the sale. The judgment-debtor preferred an appeal against the Judge's order rejecting his petition of objections: *Held*, it might be dealt with as an appeal against confirmation of the sale—*Sonamonee Dassia* vs. *Motee Singh*, 14 W. R., 385. And where a minor applied through his mother on the 11th of January and the application was rejected on the ground that his mother was not his proper guardian, again applied through a guardian, but after confirmation of the sale it was held that the order was under the first portion of this section—*Baldeo* vs. *Kishen*, I. L. R., 9 Alla., 411.

Parties.—If the auction-purchaser is made a party to the proceedings, he can appeal if the sale is set aside—*Gopal Singh* vs. *Dular*, I. L. R., 2 Alla., 352; *Kanthi Ram* vs. *Bankey Lal*, I. L. R., 2 Alla., 396; if he is not, the sale cannot be set aside—*Gangadhara Radhabai*, I. L. R., 6 Mad., 237. See also "WHO MAY APPLY," section 311, *ante*, "PARTIES," p. 363, *post*.

Limitation.—Applications under this section should be made within thirty days, but the Court may admit them after the period has expired, if sufficient cause be shown —*Raj Coomar* vs. *Lalljee*, 18 W. R., 333; provided the sale has not been confirmed—*Poulson* vs. *Dunn*, 18 W. R., 11.

Minor.—A minor gets the benefit of section 7 of the Limitation Act—*Baldeo* vs. *Kishen Lal*, I. L. R., 9 Alla., 411.

A suit to set aside an execution-sale must be brought within one year from the date of confirmation—Act XV of 1877, sched. II, cl. 12, *Mahomed Hossein* vs. *Purundur*, I. L. R., 11 Cal., 287; *Mahomed Sayad* vs. Roji, I.L.R., 10 Bom., 214; unless the plaintiff in the second suit was a party to the execution-proceedings in a different *character* from that in which he sues—*Kali Mohun* vs. *Anandmoni*, 9 C. L. R., 18; or only the right, title and interest of the defendant is sold, and he does not sue; or the sale is *ultra vires* and passes nothing—*Sadagopa* vs. *Jumuna*, I. L. R., 5 Mad., 54; or he was not a party to and not bound by the decree and proceedings under which the defendant claimed—*Venkati Naraish* vs. *Subbama*, I. L. R., 4 Mad., 178; *Nilakandan* vs. *Thandamma*, I. L. R., 9 Mad., 460; though apparently if instead of selling the right, title and interest of A in land

the tenure itself is sold, a stranger must sue within 12 months—*Saryand* vs. *Durgi*, I. L. R., 7 Mad., 258; *Haji* vs. *Atharam*, I. L. R., 7 Mad., 512.

Suit to Set Aside an Order.—No regular suit lies to set aside an order under this section by a person who is a party in the cause—*Viraraghiva* vs. *Venkatacharyar*, I. L. R., 5 Mad., 217: if an irregularity occurs in the course of the execution-proceedings, it must be raised by a party in execution, and not by regular suit—*Modun Mohun* vs. *Boroda Sondori*, 8 C. L. R., 261; *Mohendro Narain* vs. *Gopal*, I. L. R., 17 Cal., 769; and this code applies—*Prangour* vs. *Himanta*, I. L. R., 12 Cal., unless the person has been a party to the suit in a different capacity—*Kali Mohun* vs. *Anandamoni*, 9C. L. R., 18; *The Collector of Monghyr* vs. *Hurdai Narain*, I. L. R., 5 Cal., 435 (see, however, note under section 234, *post*). If an order has been passed on grounds not warranted by the section, such as refusing to confirm a sale, because a re-sale would be advantageous to all the parties, it may be contested in a regular suit by the bidder whose rights have been injuriously affected—*Amrit Misser* vs. *Gurda Pardan*, 7 Alla., 183; and a suit will lie by the auction-purchaser if the sale is not confirmed for insufficient reasons—*Sukhai* vs. *Daryai*, I. L. R., 1 Alla., 375; *Bandi Bibi* vs. *Kalka*, I. L. R., 9 Alla., 602; *Azimudden* vs. *Baldeo*, I. L. R., 3 Alla., 554; or where any person other than the decree-holder, or the person whose property has been sold, has been allowed to object—*Man Kuar* vs. *Tara Singh*, I. L R., 7 Alla., 583; see note under section 244, *ante*.

Rent Law.—No suit lies to set aside a sale under section 174 of the Bengal Rent Act—*Kabilaso Koer* vs. *Raghu Nath*, I. L. R., 18 Cal., 481.

Suit to Set Aside Sale—A regular suit will lie to set aside a sale, that is to say, the whole sale—*Hormusji* vs. *Cowasji*, I. L. R., 13 Bom., 297, although confirmed by the Court, for any other cause than that it has been irregularly conducted—*Jammal Ali* vs. *Tirbhee*, 12 W. R., 41: see also *Balkrishna* vs. *Masuma*, I. L. R., 5 Alla., 142, p. 157; such as that the property sold is outside the jurisdiction of the Court—*Nowab Ali* vs. *Uzir Mahomed*, 23 W. R., 233; *Kodoo Mundul* vs. *Shushee Shikhur Sircar*, 16 W. R., 227; *Prem Chand* vs. *Mokhoda*, I. L. R., 17 Cal., 699; or that the purchaser has notice that the decree is being executed *benames* by one of the judgment-debtors—*Digamburee Debia* vs. *Eshan Chunder*, 15 W. R., 372; or that the sale has taken place under a decree passed without jurisdiction—*Lulla Goondur* vs. *Hubeeboonissa*, 15 W. R., 311; *Jodu Nath* vs. *Brojo Nath*, 6 B. L R., App., 90; or set aside—*Sabbaya* vs. *Yelamma*, I. L. R., 9 Mad., 130; or the sale was postponed by an order of Court—*Sant Lal* vs. *Umraounissa*, I. L. R., 12 Alla., 96; or, though the decree has been properly made, the property sold is not within the Court's jurisdiction at the time of sale—*Narayanasawmy* vs. *Saravana*, 6 Mad., 58. But where property was sold on account of two items in a decree and it could only be sold for one, this was held to be an irregularity not affecting jurisdiction—*Raghubar* vs. *Ilahi Baksh*, I. L. R., 7 Alla., 450, p. 452; nor is it an objection that the sale took place when the decree was barred—*Saroda Churn* vs. *Mahomed*, I. L. R., 11 Cal, 376; especially if the Court decided in execution that it was not—*Mahomed Hossein* vs. *Purundur*, I. L. R., 11 Cal., 287.

Equity.—And generally a sale will not be supported, if it is in accordance with the principles of justice, equity, and good conscience that it should be set aside against a purchaser without notice—*Abdool Hye* vs. *Nowab Raj*, 9 W. R., 196; *Ganga Pershad* vs. *Gopal Singh*, 11 Ind. App., 234; I. L. R., 11 Cal., 136; but a sale under a decree obtained by fraud will not be set aside—*Jugal Kishore* vs. *Abhaya*, 1 B. L. R., 84, and the cases mentioned in—*Assamatherm* vs. *Lutchmeeput*, I. L. R., 4 Cal., p. 171; unless the purchaser is implicated—*Mohesh Chunder* vs. *Dwarkinath*, 24 W. R., 260; *Gobind Chunder* vs. *Ram Kamul*, 25 W. R., 364; but see *Lalla Bunseedhur* vs. *Koonwur*, 10 Moore, 454, p, 474 (see as to collusion between the creditor's agent and the purchaser—*Roy Nandipal Mahata* vs. *Urquhart*, 4 B. L. R., 181; *Kishore Chunder* vs. *Kally Kinkur Chowdhry*, 20 W. R., 333.)

It is not sufficient to set aside a sale that the decree has subsequently been set aside on appeal—*Beharee Lall* vs. *Rajah*, 6 Alla., 291; *Chunder Kant* vs. *Bissesur*, 7 W. R., 312; or on re-hearing—*Jan Ali* vs. *Jan Ali*, B. L. R., 57; or was *ex-parte*, and passed without summons having been served according to the terms of the Code—*Mackintosh* vs. *Kalee Doss*, 19 W. R., 234; unless it has been set aside before the sale has been confirmed—*Basappa* vs. *Dundaya*, I. L. R., 2 Bom., 540; *Mulchand* vs. *Mukta*, I. L. R., 10 Alla., 83; *In the matter of Mahomed Hossein*, 9 C. L. R., 53; I. L. R., 7 Cal., 91; but if the judgment-creditor is the purchaser, he purchases subject to the result of the litigation—*Sadasivayyar* vs. *Muttu Subapathi*, I. L. R., 5 Mad., 196; *Zainulabdin* vs. *Mahomed*, 15 Ind. App., 12.

Section 244.—And if property is sold in pursuance of an order passed under section 244, *ante*, the order has the force of a decree—*Murari Singh* vs. *Pryag*, I. L. R., 11 Cal., 363; and it is very doubtful if such an order is not appealed against whether it can afterward be impeached on the ground of want of jurisdiction—*Bishenmun Sing* vs. *Land Mortgage Bank*, 12 Ind. App., 7; *Basti Ram* vs. *Fattu*, I. L. R., 8 Alla., 146; and when the contest arises between parties to the suit, section 244, *ante*, prevents any separate

suit on the ground of fraud—*Saroda Churn* vs. *Mahomed*, I. L. R., 11 Cal., 376; *Siva Pershad* vs. *Nundo Lall*, I. L. R., 18 Cal., 139; *Mohendro Narain* vs. *Gopal Mondul*, I. L. R., 17 Cal., 769. See section 244, *ante*.

Section 278.—If, at the time of a sale in execution, a private purchaser makes, and afterwards withdraws, an objection to the sale, he is not prevented from bringing a suit to set it aside. Had he not formally objected, no doubt could be entertained of his right to institute a suit; and the making and afterwards withdrawing the objection can have no greater effect than would have followed the abstaining from making it—*Kumarasamy* vs. *Pana Soona*, 7 Mad., 359.

Purchase by a Stranger.—In the case of *Balkrishna* vs. *Masuma*, I. L. R., 5 Alla., 142; 9 Ind. App., 182, the defendants mortgaged a talook to Biseshar Prasad whose interest was purchased in execution by Narain Das, the father of Balkrishna. In answer it was urged that the requirements of section 249, Act VIII of 1859, had not been complied with; execution having issued in a district other than that in which the mortgaged property was situated and thirty days' notice not having been given, the sale was void. This view prevailed in the District Court as well as in the High Court; but in appeal their Lordships of the Privy Council said: "With respect to the first case, their Lordships think the judgment dismissing the suit on the ground that the plaintiff was not the purchaser of Biseshar's mortgage, on the ground of the sale being irregular and of the Court not having jurisdiction to execute the decree was wrong. *The irregularities referred to if they existed were cured by the certificate of sale*, and though the Court may not have had jurisdiction to attach lands out of its district, it had jurisdiction to sell in execution the right to enforce the bond."

The case *of Rewa Mahton* vs. *Ram Kishen Singh*, 13 Ind. App., 106, is somewhat similar. In it there were cross-decrees and the property was sold in execution of the decree for the smaller amount, contrary to the express provisions of sections 246, *ante*. The High Court held that the execution-proceedings were a nullity and must be set aside. Their Lordships said:—

"The Court, therefore, notwithstanding the finding of the Lower Court, that the defendant—the present appellant—was a *bonâ fide* purchaser at the sale under the execution, and without themselves entering into the question of fraud or no fraud, held that the execution issued by the Moonsif, and all the subsequent proceedings were a nullity and must be set aside. The defendant-appellant purchased *bonâ fide* and for a fair value, property exposed for sale under an execution issued by a Court of competent jurisdiction upon a valid judgment.

"Their Lordships are of opinion that the High Court came to an erroneous decision with regard to the construction of section 246, and that the judgment of the High Court in this respect must be set aside. A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issued has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. *If the Court has jurisdiction* a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues."

Apparently their Lordships of the Privy Council are of opinion that a purchaser not a party to the suit, need only see if there is a valid decree and an order for sale, and his title is not affected by irregularities of procedure which are cured by the certificate of sale. If this be so, this decision seems to diminish the authority of some of the following cases in so far as they decide that sales are not voidable, but void on account of irregular procedure, namely—*Ram Chand* vs. *Pitam Mal*, I. L. R., 10 Alla., 506; *Ramessuri* vs. *Doorgadass*, I. L. R., 6 Cal., 103; *Chedami Lal* vs. *Amir*, I. L. R., 7 Alla., 676; *Palani* vs. *Sivalinga*, I. L. R., 8 Mad., 7.

Purchase by Creditor.—But if the creditor is the purchaser, the same rule does not apply. In the case of *Zain-al-abdin* vs. *Mahomed*, 15 Ind. App., 12, the defendant had sued the plaintiff previously and obtaining a decree, sold his property after appeal filed. At one sale he purchased; at another a stranger. The decree was subsequently modified by the High Court, and then plaintiff sued to set aside both sales on the ground that the decree had been modified. The Courts in India made no distinction between the decree-holders who had purchased and the persons who, not parties, had purchased *bonâ fide*. Their Lordships said:—

"It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bonâ fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties and at the time when that decree was a valid decree and when the order for sale was a valid order."

And where a judgment-creditor sold and bought the property of his judgment-debtor pending appeal, and the decree was reversed, he was compelled to make restitution—*Sadasivayyar* vs. *Muttu Subapathi*, . L. R., 5 Mad., 106.

Notice.—A creditor who purchases, purchases with notice of what has taken place previously in the proceedings between him and the debtor—*Pettachi* vs. *Chinna Tambiar*, I. L. R., 10 Mad., 241, p. 250.

Form of Decree.—Where at the suit of certain members of a tarwad, a sale at which the plaintiff purchased was set aside, though one of the debts in the original suit was binding on the tarwad, the decree gave a charge on the property for that debt—*Kunhi Mannau* vs. *Chali*, I. L. R., 14 Mad., 494.

Minor.—A sale is not binding if made under a decree against a minor based on a mortgage by his guardian, who exceeded his authority in mortgaging, did not defend the suit, and the purchaser had notice of the same—*Dabee Dutt* vs. *Subodra*, 25 W. R., 449; *Junges Lall* vs. *Sham Lall*, 20 W. R., 120; but where the guardian acted fraudulently and confessed judgment, the purchaser, not having notice, was allowed a lien for the advances made—*Lalla Bunseedhur* vs. *Koonwur*, 10 Moore, 454; but see *Ram Jewun* vs. *Sham Lall*, 20 W. R., 123.

Limitation.—Where a minor is bound by the decree, he must sue to set aside the sale within three years from attaining majority—*Raghubar Dyal* vs. *Bhikya*, I. L. R., 12 Cal., 69.

Practice.—Sales made without jurisdiction may also be set aside on revision, and in appeal from the order of sale by a party to the suit—*Bishennun Singh* vs. *Land Mortgage Bank*, L. R., 12 Ind. App., 7, p. 10; but where the Judge has jurisdiction and sets aside a sale after finding material irregularity and substantial injury there is no power to interfere under the Charter—*Sookoomlu Singh* vs. *Kashu* 13 W. R., 250. See note under section 244, *supra*.

Stamp.—In a suit to set aside an auction-sale, the plaint must be stamped as if the suit were for the recovery of the property—*Drapu* vs. *Ishan Chunder*, 9 C. L. R., 231.

Application to set aside sale on ground of judgment-debtor having no saleable interest.

313. The purchaser at any such sale may apply to the Court to set aside the sale, on the ground that the person whose property purported to be sold had no saleable interest therein, and the Court may make such order as it thinks fit:

Provided that no order to set aside a sale shall be made unless the judgment-debtor and the decree-holder have had opportunity of being heard against such order.

This section applies to H. C. See 5 Bom., 83.

Purchaser.—The power of the Civil Court to set aside a sale summarily is limited to irregularities in the proceeding or in the sale, and to the case of the debtor possessing no saleable interest in the property sold; whereas, the power of a Court in a regular suit is limited only by the principles of justice and equity—*Abdul Hye* vs. *Nawab Raj*, (F. B.) B. L. R., 911; *Durga Sundari* vs. *Govinda*, I. L. R., 10 Cal., 368. The judgment-debtor cannot initiate proceedings under this section—*Ramchaibar* vs. *Bechu*, I. L. R., 7 Alla., 641; which only enables the Court to relieve the purchaser in a summary way, not on the ground of fraud or misrepresentation—*Durga Sundari* vs. *Govinda*, I. L. R., 10 Cal., 368; but when it appears that the whole of the consideration has failed—*Durga Sundari* vs. *Govinda*, I. L. R., 10 Cal., 368; *Ram Coomar Dey* vs. *Shushee Bhoosun*, I. L. R., 9 Cal., 626; *Protab Chunder* vs. *Panioty*, I. L. R., 9 Cal., 506; but the purchaser may also sue and even follow his money in the hands of a person who has got it under section 295, *ante*—*Kishun Lal* vs. *Muhammad*, I. L. R., 13 Alla., 383. And where a purchaser who before payment of the purchase-money applied and failed under this section, but was afterwards declared to have no interest in the property in a suit to which the judgment-creditor was a party, he was allowed to sue for the purchase-money—*Pacnayappan* vs. *Narayana*, I. L. R., 11 Mad., 269. Formerly he would have lost his purchase-money and be liable to a civil suit by the real owner of the property for the property or its value—*Mohanund Haldar* vs. *Akial Mahaldar*, 9 W. R., 118; *Sham Sundur Doss* vs. *Raheem Buksh*, 6 Alla., 252; *Hira Lal* vs. *Karimunnissa*, I. L. R., 2 Alla., 780; unless there is a contrary equity or guarantee—*Ram Narain* vs. *Mahtab*, I. L. R., 2 Alla., 828; *Framji* vs. *Hormasji*, I. L. R., 2 Bom., 258; *Dorab Ally* vs. *Abdool Azeez*, 5 Ind. App., at p. 128. The decree-holder is liable for damages on account of the wrongful execution—*Kalee* vs. *Damodur*, 9 Bom., 92; *Kanaye Bose* vs. *Hur Chand*, 14. W. R., 120.

To the Court.—The application must be made to the Court even when execution has been transferred to a Collector under section 320, *post*—*Nathur Mal* vs. *Lachmi Narayan*, I. L. R., 9 Alla., 43. But see section 320 as amended.

No Saleable Interest.—This includes the case of a person having an interest whic cannot be sold,—that is, where he has nothing to sell—*Munna Singh* vs. *Gajadhar*, I. L. R., 5 Alla., 577. After a vesting order the debtor has no interest—*Ram Soondur* vs. *Shoshi Mohun*, 11 C. L. R., 389; I. L. R., 9 Cal., 217; but see "EFFECT OF ATTACHMENT," section 483, *post*. A saleable interest in a portion of the property is sufficient—*Ram Coomar* vs. *Shoshee*, I. L. R., 9 Cal., 626.

Ordinarily, a first sale under a second attachment governed by Act VIII of 1859 passed all the interest of the judgment-debtor—*Chutka Panda* vs. *Goburdhone*, 6 C. L. R., 85; *Obhoy Charan* vs. *Golam Ali*, I. L. R., 7 Cal., 410; but where a mortgagee, in a suit to enforce his lien, obtained a decree for sale prior to attachment of the property included in the mortgage under a rent-decree, it was held that the debtor had no saleable interest in the property to pass in execution of the rent-decree, and the purchase-money should be refunded—*Naharmul Marwari* vs. *Sadut Ali*, 8 C. L. R., 468. See as to this—*Durga Sundari* vs. *Govinda*, I. L. R., 10 Cal., 368, p. 373. And the interest of a mortgagor is saleable, although the mortgagee may have got a decree against him—*Protab Chunder* vs. *Panioty*, 12 C. L. R., 488; I. L. R., 9 Cal., 506; or the mortgage-debt may exceed the value of the property—*Sant Lal* vs. *Ramji*, I. L. R., 9 Alla., 167. If the purchaser knew that the debtor had no saleable interest in the property, the sale should not be set aside—*Mahabir Prasad* vs. *Dhumand*, I. L. R., 3 Alla., 527. See also *Dorab Ally* vs. *Abdool Azeez*, 5 Ind. App., at p. 129; note under section 295. "SALEABLE INTEREST," section 266, *ante*. "SECOND SALE," section 314, *post*.

A sale in execution of a decree by a Mofussil Court of property, within its jurisdiction will pass a good title to the purchaser, notwithstanding that, at the time of such sale, the Sheriff was in possession of the property under a writ of *fieri facias* issued subsequently to 1865—*Grish Chunder Das* vs. *Brojo Jibun Bose*, 8 C. L. R., 4.

Practice.—Application must be on notice to the judgment-debtor or, if dead, on notice to his representative—*Bala Kadar* vs. *Gulam Mohidin*, I. L. R., 7 Bom., 424.

Small Cause Court.—A suit for the purchase-money does not lie in a Small Cause Court—*Pachayappan* vs. *Narayana*, I. L. R., 11 Mad., 269.

Confirmation of sale.

314. No sale of immoveable property in execution of a decree shall become absolute until it has been confirmed by the Court.

Act VIII of 1859, section 256. This section applies to H. C.

A Judge cannot set aside a sale which has been properly completed, where there has been no irregularity, nor any default of the purchaser—*Adurmonee Dossee* vs. *Kaminee*, 3 W. R., Act X, 145.

Second Sale.—When property is sold in execution of decree, all previous attachments fall to the ground and it cannot be sold again—*Kashy Nath* vs. *Surbanand*, I. L. R., 12 Cal., 317. A lunatic's wife and manager of his estate purchased, and the sale was confirmed; but the Judge refused to give her possession until she furnished security to protect the lunatic, and subsequently resold the property. The Privy Council held that no second sale should have been allowed after the first had been confirmed—*Saroda Prosad* vs. *Luchmeput Singh*, 17 W. R., 289.

Confirmed.—Certain representative judgment-debtors objected to the sale of certain property and claimed it as their own. Their objections were disallowed, and they appealed to the High Court; but before the appeal came on for hearing, the sale was confirmed as regards a portion of the property, and it was held that the sale having been confirmed for a long time could not be set aside, but that the petitioner's title to the unsold portion should be tried — *Pootee Begum* vs. *Indurjeet, Kooer*, 12 W. R., 201. See also *Mahomed Hossein* vs. *Kokil Singh*, I. L. R., 7 Cal., 91. But where a sale of certain immoveable property took place after an order postponing the sale had been passed, but before it reached the officer conducting the sale, and it was confirmed, it was held that the Court would, on application of the decree-holder, review the order and set aside the sale—*Mian Jaun* vs. *Man Singh*, I. L. R., 2 Alla., 686.

Where a decree directs the sale of A's property first and then of B's, if the decree-holder is unable, from opposition, to sell A's property and proceeds against B's, but cannot realise his decree therefrom, he has not lost his right to re-attach and re-sell A's property—*Stephenson* vs. *Unnoda Dossee*, 6 W. R., Miss., 18.

Public Demands Act.—A certificate issued before the expiration of 60 days required by Act XI of 1859 is not duly issued so as to cure defects in the service of notice or in the proclamation of sale—*Monindra Nath* vs. *Saraswati*, I. L. R., 18 Cal., 125.

If sale set aside, price to be returned to purchaser.

315. When a sale of immoveable property is set aside under section 312 or 313,

or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it,

See *Dorab Ally* vs. *Abdool Azeez*, L. R., 5 Ind. App., at p. 128.

the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid.

The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money.

Act VIII of 1859, section 258. This section applies to H. C.

It is Found.—See *Sivaram* vs. *Rama*, I. L. R., 8 Mad., 99.

"Is Deprived of It."—See *Sivaram* vs. *Rama*, I. L. R., 8 Mad., 99.

A purchaser may, under section 313, resist confirmation of the sale; while under this section he may apply after confirmation for a refund of the purchase-money on the ground that nothing passed by the sale—*Sivaram* vs. *Rama*, I. L. R., 8 Mad., 99. And when it was found in a regular suit, to which the decree-holder was a party, that the property did not belong to the judgment-debtor, the application of this section was allowed—*Benode Behari* vs. *Mohesh*, 12 C. L. R., 331; *Kunhi Moidin* vs. *Tarayil*, I. L. R., 8 Mad., 101.

Where plaintiff, a purchaser under Act VIII of 1859, who, on proceeding to take possession, was opposed by defendant, who claimed the property as his own, brought a suit for a refund of the purchase-money under this section, the sale still remaining uncancelled, it was held that no such suit would lie—*Bisseswar Panday* vs. *Bhagwan Dasi*, 3 B. L. R., 301.

Any Person to whom the Money had been Paid.—This supposes that the purchase-money may be paid out before confirmation of sale—*Jogendro Nath* vs. *Govind Chunder*, I. L. R., 12 Cal., 252. It includes the case of a person getting the money under section 295, *ante*—*Kishun Lal* vs. *Muhammad Safdar*, I. L. R., 13 Alla., 383.

The purchaser is entitled to receive back his purchase-money with or without interest as the case may require—*Kunhi Moidin* vs. *Tarayil*, I. L. R., 8 Mad., 101; generally, interest at 6 per cent. is allowed—*Abdool Hye* vs. *Macrae*, 23 W. R., 1; unless he claims more than he is entitled to —*Kishun Lal* vs. *Muhammad Safdar*, I. L. R., 13 Alla., 383. He should not be charged with the expenses of the sale—*Hurdi Beebee* vs. *Surjoo Persad*, 6 Alla., 309; he should be allowed the money laid out by him for the benefit of the property, but he must account for the rents and profits—*Morgan* vs. *Abdool Hye*, 23 W. R., 393; *Mitterjeet* vs. *The Heirs of the widow Juswant*, 3 Moore, 42.

The compensation should usually be paid by the person directing the sale—*Ishuree Persad* vs. *Lall Chutterput*, 3 Moore, 100.

Parties.—The purchaser should make the judgment-debtor a party to his application—*Kuppayyan* vs. *Ramasami*, I. L. R., 6 Mad., 197; or his legal representative—*Bala Kadar* vs. *Golam Mohiden*, I. L. R., 7 Bom., 424; see p. 359.

Regular Suit.—A purchaser can also sue for a declaration—*Virasami* vs. *Athi*, I. L. R., 7 Mad., 505, and on obtaining it apply to the proper Court for his purchase-money—*Kunhi Moidin* vs. *Tarayil*, I. L. R., 8 Mad., 101; *Benode* vs. *Mohesh*, 12 C. L. R., 331; or to recover the money on the ground of a total failure of consideration—*Munna Singh* vs. *Gajadhur Singh*, I. L. R., 5 Alla., 577; *Kishun Lal* vs. *Muhammad, Safdar*, I. L. R., 13 Alla., 383; and where the purchase-money was returned, but without nterest, a suit for interest was allowed—*Rugubar* vs. *The Bank of India*, I. L. R., 5 Alla., 364; but such a suit cannot be brought in a Small Cause Court—*Pachayappan* vs. *Narayana*, I. L. R., 11 Mad., 269.

It was held under Act VIII that if the Court reversing the sale omitted to order repayment of the purchase-money, the purchaser could sue to recover it in a regular suit—

Greesh Chunder vs. *Lookoda Moye*, 1 W. R., 55; even though he put the property up for sale, unless guilty of fraud—*Brojendur Roy* vs. *Jugurnath*, 6 W. R., 147.

If there is not a total failure of consideration, or the purchaser bought with a knowledge of a defect in the jurisdiction of the officer carrying out the sale, it is possible he might not succeed in recovering his purchase-money in a regular suit; see *Dorab Ally* vs. *Abdool Azeez*, L. R., 5 Ind. App., at p. 128.

Limitation.—The limitation to an application under this section is provided by Art. 178 of the Limitation Act—*Girdhari* vs. *Sital Prasad*, I. L. R., 11 Alla., 372.

Revision.—If the judgment-debtor has any saleable interest in the property, the Court has no jurisdiction to order a refund, and the order directing a refund can be set aside under section 622, *post*—*Kunhamed* vs. *Chathu*, I. L. R., 9 Mad., 437.

Certificate to purchaser of immoveable property.

316. When a sale of immoveable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before:

Provided that the decree under which the sale took place was still subsisting at that date.

Act VIII of 1859, section 259. This section applies to H. C.

Decree Still Subsisting.—These words refer to a decree which has not been reversed and is in full force—*Mahomed* vs. *Kokil*, I. L. R., 7 Cal., 91, and a sale-certificate operates as a valid transfer, although the sale actually took place when execution was barred by limitation—*Saroda Churn* vs. *Mahomed Isuf*, I. L. R., 11 Cal., 376. If the decree has been reversed before confirmation, the sale cannot be confirmed—*Mul Chand* vs. *Mukla*, I. L. R., 10 Alla., 83. See "EXISTING DECREE," section 244, *ante*.

Application. An application for a certificate need not be in writing and requires no stamp—*Hira* vs. *Tek Chand*, I. L. R., 13 Bom., 670.

Sale-Certificate—See "CERTIFIED PURCHASER," section 317, *post*.

Section 259, Act VIII of 1859, required the Court to grant a certificate to the purchaser and directed that it should be taken and deemed to be a valid transfer of the debtor's right and interest; but their Lordships of the Privy Council held that the section did no more than create statutory evidence of the transfer in place of the old mode of transfer by Bill of Sale—*Buhuns Kowur* vs. *Lalla*, 14 Moore, 496, p. 523. It was held in Bombay that in suits against a third party for possession by a purchaser under Act VIII of 1859 a sale-certificate was a condition precedent—*Harkisandas* vs. *Bai Icha*, I. L. R., 4 Bom., 155; *Khusal* vs. *Bhimabai*, I. L. R., 12 Bom., 589. But still the uncertified purchaser had an equitable interest in the property which when perfected by the certificate was superior to that of any subsequent purchaser at a private sale—*Yeshvant* vs. *Govind*, 10 Bom., 453, or in execution of decree—*Chintamanrav* vs. *Vithabai*, I. L. R., 11 Bom., 588, unless the first purchaser was guilty of negligence and perfected his title after the second purchaser had been put in possession—*Nanjudepa* vs. *Hemapa*, I. L. R., 9 Bom., 10. Further, in equitable suits, the purchaser could file his certificate and make a complete title any time before decree—*Krishnaji* vs. *Ganesh*, I. L. R., 6 Bom., 139. And the same result ensued when he was put in possession—*Sheoram* vs. *Ravji*, I. L. R., 7 Bom., 235. Under Act X of 1877, the rights of a purchaser without a certificate were greater than under Act VIII of 1859. His title became complete on payment of the purchase-money and confirmation—*Naigar* vs. *Bhaskar*, I. L. R., 10 Bom., 444. Under the present Code, which has gone back to, if not beyond, Act VIII of 1859, it has been decided, that where the question is between a party to a suit in execution or his representative and the auction-purchaser, the former cannot dispute the latter's title after confirmation, and the case of *Sheoram* vs. *Ravji* has been approved—*Khusal* vs. *Bhimabai*, I. L. R., 12 Bom., 589. See the remarks of Sargent, C. J., in *Yeshvant* vs. *Govind*, I. L. R., 10 Bom., 453.

In Calcutta the equitable interest of a purchaser under Act VIII of 1859 after the date of sale was allowed, and while proceedings regarding the validity of the sale were pending, and if the sale was set aside he recovered all sums spent in protecting it—*Hossein Buksh* vs. *Roy Dhunput*, 18 W. R., 289; and in accordance with the case decided by their Lordships of the Privy Council, it was held that the order confirming the sale gave a good title—*Doorga Narain* vs. *Baney Madhub*, I. L. R., 7 Cal., 199, p. 207, followed in *Tara Prasad* vs. *Nund Kishore*, I. L. R., 9 Cal., 842; *Benodi Lal* vs. *Tamizuddin*, 7 C. L. R., 115, and the estate vested on the date of sale—*Bhyrub Chunder* vs. *Soudamini*, I. L. R., 2 Cal., 141. The same position was allowed to a purchaser under Act X of 1877, before the Amending Act of 1879—*Chatraput Singh* vs. *Grindra*, I. L. R., 6 Cal., 389; but since that time the property vests in the purchaser from the date of the certificate, *i.e.*, the date of confirmation and does not relate back—*Prem Chand* vs. *Purnima*, I. L. R., 15 Cal., 546. In regard to the question of *lis pendens* raised in this case, see *Umesh Chunder* vs. *Zahur*, I. L. R., 18 Cal., p. 178.

In Madras the Courts considered that the certificate under Act VIII of 1859 was the instrument by which title was transferred—*Srinivasa* vs. *Seshayyangar*, I. L. R., 3 Mad., 37; yet if a sale is completed and possession given a certificate is not necessary—*Velan* vs. *Kumarasami*, I. L. R., 11 Mad., 296.

In Allahabad, the decisions were similar to those in Calcutta—*Jagan* vs. *Baldeo*, I. L. R., 5 Alla., 305; *Muzaffar Hossain* vs. *Ali*, I. L. R., 297.

Pleading.—If in a suit the sale is admitted, no certificate is necessary—*Doorga Narain* vs. *Baney Madhub*, I. L. R., 7 Cal., 199, p. 207; and this is also the practice in Madras—*Sreman Jadagopa* vs. *Jamane Bhar*, I. L. R., 5 Mad., 54; *Velan* vs. *Kumarasami*, I. L. R., 11 Mad., 296; and in the North-West Provinces—*Jagan* vs. *Baldeo*, I. L. R., 5 Alla., 305; and in Bombay—*Naigar* vs. *Bhaskar*, I. L. R., 10 Bom., 444.

Estoppel.—The acceptance of a sale-certificate by the purchaser of a mortgagor's interest in land, is not an admission of the mortgagor's title within section 19 of Act XV of 1877—*Ambala Vavert* vs. *Naduvaka*, I. L. R., 6 Mad., 325.

Effect of.—All irregularities previous to sale are cured by the issue of a certificate and no regular suit will lie to set aside the sale on account of them—*Balkrishna* vs. *Masuma*, I. L. R., 5 Alla., 142, p. 157; 9 Ind. App., 181; nor can a third party contest its validity—*Naigar* vs. *Bhaskar*, I. L. R., 10 Bom., 444. See also *Balkishan* vs. *Sita Ram*, I. L. R., 7 Alla., 731.

When a tenure has been sold and sale-certificate granted, the presumption is that the purchase-money has been paid—*Fyzooddeen* vs. *Shamsunnissa*, 12 W. R., 508.

Amendment.—A sale-certificate should not be amended *ex-parte*—*Rughoo Nundun* vs. *Wilson*, 23 W. R., 301.

Duplicate.—As to when a duplicate certificate should issue, see *Lakshman*, Applicant, I. L. R., 9 Bom., 472; *Nandram* vs. *Kacha*, I. L. R., 9 Bom., 526. See note to section 317, *post*.

Registration.—See sections 17 and 50 of the Registration Act as amended by section 65 of Act VII of 1888. As to the previous law, see I. L. R., 7 Mad., 248 and 419; I. L. R., 6 Bom., 495; I. L. R., 9 Bom., 472; I. L. R., 5 Alla., 568; I. L. R., 9 Cal., 82.

Stamp.—The purchaser must procure the stamp. Claims admitted by the parties should be taken into account in ascertaining the stamp-duty, and they should be entered in the certificate—*In re Ramkrishna*, I. L. R., 9 Bom., 47. As to the duty see *Reference*, I. L. R., 7 Mad., 421; *Reference*, I. L. R., 10 Cal., 92; and compare *Meer Kaisur* vs. *Ebrahim*, I. L. R., 15 Bom., 532; *Vishnu Keshav*, I. L. R., 10 Bom., 58.

Construction.—See "REPRESENTATIVE CAPACITY," *post*.

Section 259, Act VIII of 1859, declared that the "certificate shall be taken and deemed to be a valid transfer" of the right, title and interest of the judgment-debtor. It was held, in connection with this section, that the certificate should be construed without reference to external evidence—*Mookhya* vs. *Ram Lall*, 14 W. R., 435; *Lalla Bissessur* vs. *Doolar Chand*, 22 W. R., 181; *Shaikh Kuleemooddeen* vs. *Ashruf*, 19 W. R., 276 (disapproving of *Manson* vs. *Golam*, 15 W. R., 490); unless it is necessary to enquire what is the meaning of the words used in the certificate—*Manager of Durbungah* vs. *Ramaput Singh*, 17 W. R., 459; or there has been a description in it which is partly correct and partly incorrect—*Maleebun* vs. *Raseeda*, 25 W. R., 401; *Ram Gopal* vs. *Shib Pershad*, 12 W. R., 483. In *Baluk Doss* vs. *Nimaye*, 17 W. R., 511, oral evidence was admitted to contradict the sale-certificate. The present rule is that in case of doubt the whole execution-preceedings should be looked at—*Mahabir Pershad* vs. *Markunda*, 17 Ind. App., 11, p. 14.

Limitation.—The provisions of the Limitation Act do not apply to an application for a sale-certificate—*Kylasa Goundon* vs. *Rama Sami*, I. L. R., 4 Mad., 172; *Vithal Janardas* vs. *Vithojirav*, I. L. R., 6 Bom., 586; and if granted after three years from confirmation of sale by one Judge, his successor cannot interfere with the order—*Vittal Janawan* vs. *Vithojirar*, I. L. R., 5 Bom., 586; *Devidas* vs. *Pirjada*, I. L. R., 8 Bom., 377.

Immoveable Property.—The words "immoveable property" have not been defined in the Act; in questions concerning the rights of Hindus, they will probably be taken to include whatever the Hindu law classes as immoveables, such as a "*hak*" in Bombay—*Fatesangji* vs. *Desai Kallianrayai*, 10 Bom., 281. A decree for the sale of mortgaged property was attached and sold: *Held*, the purchaser should get a certificate, as he bought not merely the paper but the interest in the immoveable property recoverable under the degree, and that such interest must be regarded as immoveable property within this section—*Hari Govind* vs. *Ramchandra*, 9 Bom., 64.

Silence of Creditor: Fraud.—Except in cases falling within section 312 or 313, or where the judgment-debtor has no saleable interest—*Shib Lall* vs. *Lochun Singh*, 3 Agra, 7; *Doolhin Hurnath* vs. *Baijhoo Oojha*, 2 Agra, 50; *Bank of Hindustan* vs. *Premchand*, 5 Bom., O. C., 83, and the sale has been set aside—*Krishnapa* vs. *Panchapa*, 6 Bom., 258, the purchaser cannot recover any portion of his purchase-money, unless the decree-holder asserts a title in the debtor in a way which amounts to a warranty—*Mahomed Sayad* vs. *Navroji*, I. L. R., 10 Bom., 214; or there has been fraud *Huronath Roy* vs. *Mothooranath*, 7 W. R., 4; *Dhondu* vs. *Ramji*, 4 Bom., 114, or possibly, if the decree-holder, knowing of a charge on the property, sells it without any mention of the charge, and the purchaser is compelled to pay it off—*Douglas* vs. *The Collector of Benares*, 5 Moore, 271; and if a mortgagee sells under two mortgage degrees, and purchases in the second, he cannot set up his sale against the first purchaser—*Chooramun Singh* vs. *Mahomed*, 9 Ind. App., 21. See also *Bashvantappa* vs. *Banu*, I. L. R., 9 Bom., 86. And if the decree-holder has a lien on the property, and standing by allows it to be sold as unencumbered, he loses his lien against the purchaser—*Doollub Sircar* vs. *Kristo Coomar*, 12 W. R., 303; 4 B. L. R., 407; *Bhuggobutty* vs. *Shamachurn*, I. L. R., 1 Cal., 353; *Dolee Chund* vs. *Oomda*, 24 W. R., 263; without notice — *Nursing* vs. *Roghoobar*, I. L. R., 10 Cal., 609; especially if, when asked, he does not give full information—*McConnell* vs. *Mayer*, 2 Alla., 315 As to evidence of fraud, see *Gheran* vs. *Kunj Behari*, I. L. R., 9 Alla., 413; *Banwari Das* vs. *Muhammud*, I. L. R., 9 Alla., 690. As to other cases, see "RIGHTS AND LIABILITIES," *infra*.

Purchaser under Money-Decree on Mortgage-Bond.—By section 99 of Act IV of 1882, which came into force on the 1st of July 1882, the mortgagor is prohibited from selling the mortgaged property under a money-decree unless by suit under section 67 of the same Act—*Kaveri* vs. *Ananthayya*, I. L. R., 10 Mad., 129; *Durgayya* vs. *Anantha*, I. L. R., 14 Mad., 74.

Silence of Debtor.—There is no duty on the judgment-debtors to come forward—*Vasanji* vs. *Lallu*, I. L. R., 9 Bom., p. 288; and if sued as representatives then unless they induce bidders to suppose that they claim no personal interest in the property or mislead them by their silence, they can claim their share—*Curupadapa* vs. *Irapa*, I. L. R., 14 Mad., 558.

Bona-fide Purchaser for Value.—An auction-purchaser is not—*Bikaji* vs. *Yashvantrav*, I. L. R., 8 Bom., 489; *Sobhag Chand* vs. *Bhai Chand*, I. L. R., 6 Bom., 193; *Yeshvant* vs. *Govind*, I. L. R., 10 Bom., 453, he is even though he be the judgment-creditor—*Brojendro Coomar* vs. *Dacca Muny*, 20 W. R., 223, and see *Rewa Mahton* vs. *Ram Kishen Singh*, 13 Ind. App., 196. See on the question as to who is a *bonâ-fide* purchaser within the Limitation Act—*Yesu* vs. *Balkrishna*, I. L. R., 15 Bom., 583.

No Title Guaranteed.—No title is guaranteed to the purchaser at an execution-sale beyond that he shall have the rights and interests in the property which belong to the judgment-debtor; or, in other words, that the judgment-debtor shall not recover back the lands—*Sowdamini Chowdhrain* vs *Krishna, Kishor*, 4 B. L. R., 11; and that if the judgment-debtor, or his heirs, recover the property, they cannot hold against him —*Deonarain Singh* vs. *Tokhun Singh*, 5 W. R., 30; unless they can claim adverse possession for more than twelve years; nor can any other person bound by the decree—*Umesh Chunder* vs. *Zahur*, I. L. R., 18 Cal., 164, p. 178. The suit of a first mortgagee was compromised and decree passed. At a sale on a second mortgage the mortgagor purchased. *Held*, he could not keep possession against a purchaser on the first mortgage decree—*Lutfali* vs. *Futteh Bahadur*, I. L. R., 17 Cal., 23. The intending purchaser is bound to satisfy himself of the value and quality of the property as if he was purchasing from a private person—*Jummal Ali* vs. *Tirbhee Lall*, 12 W. R., 41; *Mahomed Basirulla* vs. *Abdulla*, 4 B. L. R., App., 35.

What Passes.—If the property sold does not belong to the judgment-debtor, nothing passes by the sale—*Kishen Chunder* vs. *Ashooran*, Marsh., 647; if he has any interest in it, the purchaser gets it,—not as it stood at the moment of sale, but as attached and notified for sale—*Ram Onoogroho* vs. *Montorun*, 6 W. R., 223. It has been held that what the debtor possessed on the date of the sale-notification passes—*Soojaut Ali Khan* vs. *Koosal Chand*, S. D., N.-W., 1864, 561, unless the interest of the right is expressly described, and then only to that extent—*Azadee* vs. *Azmere Koonwar*, 1 Agra, 282; and that where there is a difference between the notification of sale and the sale-certificate, the conditions of the notification are taken as of superior authority—*Um*

Churn vs. *Gobind Chunder*, 1 C. L. R., 460; but another contention is, that where there is any difference between the order of sale and the certificate, the latter will prevail, unless the purchaser has notice of the difference—*Gouree Komul* vs. *Surat Chunder*, 22 W. R., 408. The right of the purchaser is confined to the right, title and interest of the debtor which were seized and sold with all its defects—*Dorab Ally* vs. *Abdool Azeez*, 5 Ind. App., 125; *Deendyal* vs. *Jagdeep Narain*, 1 C. L. R., 49; *Assamathem* vs. *Roy Lutchmeput*, I. L. R., 4 Cal., 142; *Dorabally Khan* vs. *The Executors of Mohesooddeen*, I. L. R., 3 Cal., 806; *Ram Tuhul Singh* vs. *Bisseswar Lall Sahoo*, 2 Ind. App., 131. See, however, as to the amount of share—*Rangasamy* vs. *Krishnayyan*, I. L. R., 14 Mad., 418; and compare *Madho Parshad* vs. *Maherbun*, 17 Ind. App., 194, p. 196; and though a tenure may be sold for its own arrears, yet if only the right, title and interest of the debtor is seized and sold, the purchaser obtains no more—*Doolar Chand* vs. *Lalla Chand*, 3 C. L. R., 561; 6 Ind. App., 47.

Increment.—If between the time of attachment and time of sale, the interest of the judgment-debtor is accelerated or enlarged, the increment passes—*Umesh Chunder* vs. *Zahur*, I. L. R., 18 Cal., 164; 17 Ind. App., 201.

Rights and Liabilities—See "LIS PENDENS," section 203, *ante*.

The purchaser cannot seek to recover what the debtor could not—*Zalim* vs. *Choonee Lal*, 4 Agra, 194; is subject to limitation against him—*Shridhar Vinayak* vs. *Bapaji*, 6 Bom., 220; and can add his possession to that of the debtor for the purpose of pleading limitation—*Ali Saheb* vs. *Kaji*, I. L. R., 16 Bom., 197. He buys subject to all liens, mortgages and leases existing—*Oojagur Roy* vs. *Ram Khelawan*, 10 W. R., 384; *Bapuji* vs. *Satyabhamabai*, I. L. R., 6 Bom., 490; *Kishan* vs. *Ganga*, I. L. R., 13 Alla., 28; *Sobhagchand* vs. *Bhaichand*, I. L. R., 6 Bom., 193; *Enayet Hossein* vs. *Girdhari Lal*, I. L. R., 12 Moore, 366; *Kishen Lal* vs. *Ganga Ram*, I. L. R., 13 Alla., 108; and equities affecting the judgment-debtor—*Ram Lochun* vs. *Ramnarian*, 1 C. L. R., 296; but not to a custom binding on private purchasers only—*Kalian* vs. *Bhagirathi*, I. L. R., 6 Alla., 47; nor by a notice of foreclosure issued after his purchase on his predecessor—*Mohun Lall* vs. *Goluck Chunder*, 10 Moore, 1; *Rameshwar* vs. *Mewar*, I. L. R., 11 Cal., 341. Nor is he a party or the representative of a party under section 244, *ante*, so as to be bound by proceedings under sections 278—283, *supra*—*Vishvanath* vs. *Subraya*, I. L. R., 15 Bom., 290; nor bound by his estoppel—*Lala Parbhu* vs. *Mylne*, I. L. R., 14 Cal., 401. He is liable for rent—*Okkoy Chunder* vs. *Nilambar Mookerjee*, W. R., 1864, 72; *Sheikh Khoda Buksh* vs. *Digamboree*, W. R., 1864, p. 207, and revenue—*Chatraput* vs. *Grindra Chunder*, I. L. R., 6 Cal., 389; see, however, *Prem Chand* vs. *Purnima*, I. L. R., 15 Cal., 546; but if he has notice of a charge, and does not pay it, he will be held liable for all the costs incurred in enforcing the security—*The Land Mortgage Bank* vs. *Ram Rutten*, 21 W. R., 270. He is entitled to the crops, unless there is a custom to the contrary—*Afatoolla Sirdar* vs. *Dwarka Nath*, I. L. R., 4 Cal., 814; 4 C. L. R., 95; *The Land Mortgage Bank* vs. *Bishnu*, I. L. R., 2 Bom., 670; *Ramalinga* vs. *Samiappa*, I. L. R., 13 Mad., 15; to the trees unsevered—*Faqueer Soonar* vs. *Mussannut*, 2 Alla., 251; but see *Nilambar Biswas* vs. *Joy Durga*, 2 Sev., 58; *Chuttar Bhuj* vs. *Villayat Ali*, W. R., 1864, p. 223; *Shaik Abdool* vs. *Dataram*, W. R., 1864, p. 367; to buildings, unless excluded—*Abu Hasan* vs. *Ramzan Ali*, I. L. R., 4 Alla., 381; and to a right of easement against the debtor as if he had voluntarily sold—*Huree Madhub* vs. *Hem Chunder*, 22 W. R., 522. But where a decree-holder, who had attached certain land and a house upon it, caused the land to be sold in execution, and purchased it, and then caused the house to be sold to a third party, it was held that he had purchased the land on which the house stood subject to the right of the person who bought the house to have it continued there—*Mookta Soonduree* vs. *Mothooranath*, 22 W. R., 209.

Estoppel.—If a person sells property covered by a mortgage, and, suppressing the fact, obtains the full value of the property as unencumbered, he cannot afterwards say that the purchaser took it subject to the lien—*Douglas* vs. *The Collector of Benares*, 5 Moore, 271; see also *Salamat Ali* vs. *Budh Singh*, I. L. R., 1 Alla., 303; and see *Abdulla* vs. *Abdulla*, I. L. R., 5 Bom., 8; *Hari* vs. *Lakshman*, I. L. R., 5 Bom., 614, p. 618; so where, in execution of a money-decree, the decree-holder sold certain property which had been mortgaged to him by a registered bond, without notice of the existing lien, and afterwards obtained a decree on the mortgage bond which he transferred to a third party: *Held*, that neither the mortgagee, nor his transferree, could follow the property previously sold—*Dullub Sirkar* vs. *Krishna Kumar*, 3 B. L. R., 407; and the general rule is not that the lien of a seller passes, but that any person who consents to the sale, donation, or other alienation of property, or suffers it, or ratifies it, has no longer any lien on the property, unless he reserves it, on the ground of fraud on the purchaser—*Domat*, B. III, H. 1, section 7, cl. 12; *Donald* vs. *Sukling*, L. R., 1 Q. B. D., 587; it is extinguished, N. Y. Civ. Code, 1604. As to other cases of estoppel, see "Fraud," *ante*.

An auction-purchaser is not estopped from putting up a title independent of that based on his purchase—*Pandit Hunuman Dat* vs. *Mufti Assadullah* 7 Alla., 145; and he differs in many important points from that of a private purchaser—*Dinendronath* vs. *Ram Koomar*, 8 Ind. App., 65; *Alukmonee Debee* vs. *Banee Madhub*, I. L. R., 4 Cal., 677; *Kali Das* vs. *Kanlya*, 11 Ind. App., 218, p. 229. It has been held that without notice,

he is not bound by an agreement to mortgage made by the judgment-debtor—*Bhuggobutty* vs. *Shamachurn*, I. L. R., 1 Cal., 337; nor indeed by a statement made by the judgment-debtor on a previous occasion in a mortgage-deed to which the auction-purchaser was himself a party—*Mussamut Imrit Kooer* vs. *Lalla Debee Pershad Singh*, 18 W. R., 200; nor generally for any mere personal objections against the debtor, such as an estoppel, unless he is a mortgagee purchasing under his own decree—*Lalee Parbhu* vs. *Mylne*, I. L. R., 14 Cal., 401; *Poreshnath Mookerjee* vs. *Anathnath*, I. L. R., 9 Cal., 265; *Kishory Mohun* vs. *Mahomed*, I. L. R., 18 Cal., 188. Thus, where A, as surety of B for a loan, sued C as the purchaser, at a sale in execution, of the rights and interest of B in a bond pledged for the debt, on the ground that he had purchased the bond with all its liabilities, and amongst them was the amount due to A by B: *Held*, C not being a party to the loan transaction was not personally liable—*Shibjoy Thakur* vs. *Pogose*, S. D., 22nd Aug., 1860.

Alienation by Debtor.—He is entitled to question the fraudulent acts and alienations of the judgment-debtor in fraud of the decree—*Shaikh Baichoo* vs. *Howard*, 3 Agra, 15; but see *Burjorji* vs. *Dhunbai*, I. L. R., 16 Bom., 1; and in some cases in the North-West has been elevated to a position very analogous to that of a creditor—*Oomrao Singh* vs. *Shimboo Nath*, 2 Alla., 38; *Alfatum* vs. *Rao Karan Singh*, 7 Alla., 362; but the distinction is well marked in Bengal—*Lalla Ram* vs. *Lokebas Kooer*, 18 W. R., 39. He can claim a partition, if the debtor was a member of an undivided family governed by Mitakshara law—*Deendyal* vs. *Jagdeep Narain*, 1 C. L. R., 49; but he cannot claim the benefit of the law that an unregistered mortgage without possession is not valid against a subsequent purchaser in possession—*Ganpat Bajashet* vs. *Khandu Chaugshet*, 4 Bom., 69; *Mathuradas Ranchoddas* vs. *Kalila Khushal*, 7 Bom., 240.

Limitation.—After twelve years' possession, the purchaser in execution-sale was, under the old law of limitation, free from all claims by a mortgagee—*Anundo Moyee Dossee* vs. *Dhonendro Chunder Mookerjee*, 14 Moore, 111; 16 W. R., 19; *Manly* vs. *Patterson*, I. L. R., 7 Cal., 394. See *Kali Das* vs. *Kanhya*, 11 Ind. App., 218, p. 229.

Hindu Widow.—As to the right of a Hindu widow to reside in the family dwelling house against a purchaser, see *Ramanadan* vs. *Rangammal*, I. L. R., 12 Mad., 260.

Purchaser under Mortgage Sale.—In such cases the purchaser obtains the right, title, and interest which the mortgagor had at the time of executing the mortgage free from all subsequent incumbrances—*Abdulla* vs. *Abdulla*, I. L. R., 5 Bom., 8; *Trimbak* vs. *Naravan*, I. L. R., 8 Bom., 481, p. 486; *Gangulu* vs. *Ancha*, I. L. R., 4 Mad., 73, p. 86; *Ponappa Pellai* vs. *Pappuvayyangar*, I. L. R., 4 Mad., 1, pp. 65, 67; and subsequent incumbrancer not a party must give up possession, though with power to redeem within six months—*Mohun* vs. *Togu*, I. L. R., 10 Bom., 224.

A purchaser at a sale under a decree recovered by a mortgagee is not bound by leases made by the mortgagor, unless he has recognised the lessees as his tenants—*Koomeeroonnissa* vs. *Hunooman Dass*, Marsh., 122; but see *Banee Pershad* vs. *Reet Bhunjun*, 10 W. R., 325.

Formerly if there was no third party interested in the property, it became vested absolutely in the purchaser—as it stood when he was making the mortgage, and not as it stood at the time of sale—*Abdulla* vs. *Abdulla*, I. L. R., 5 Bom., 8; and if the mortgaged property was sold subject to the mortgage execution could issue against it—*Debee Doss* vs. *Grish*, 23 W. R., 196; but the puisne mortgagee could redeem and can now—*Gajadhar* vs. *Mulchand*, I. L. R., 10 Alla., 520; *Nandar* vs. *Karam*, I. L. R., 13 Alla., 315; *Umesh Chunder* vs. *Zahoor*, 17 Ind. App., 201; but if the property had been alienated after the mortgage, voluntarily or by law, the mortgagee might bring a suit against the alienees to have his lien declared and to sell the property—*Emam Montazuddeen* vs. *Raj Coomar*, 23 W. R., 187; 14 B. L. R., 409; *Bijnath Singh* vs. *Goburdhon Lall*, 24 W. R., 210; though if he took a money-decree waiving his lien, the purchaser had no lien on the property—*Ramanath* vs. *Boloram*, I. L. R., 7 Cal., 677. But where a mortgagee elected to take a money-decree, sold property mortgaged as unencumbered, and purchased it, he could not enforce his lien against a *bonâ fide* purchaser for valuable consideration in possession, either in a regular suit or in execution—*Gopinath Singh* vs. *Sheo Sahay*, B. L. R., F. B., 72. And see *Lutf Ali* vs. *Futteh Bahadoor*, 16 Ind. App., 129.

Purchaser under Hindu Law.—The general rule is that the right, title, and interest of the judgment-debtor may either mean the share he would obtain on partition, or the amount which he might have sold to satisfy the debt, and in each case it is a mixed question of law and fact to determine what the Court intended to sell, and what the purchaser expected to buy—*Appaji* vs. *Keshav*, I. L. R., 15 Bom., 13; *Gnanammal* vs. *Muthusami*, I. L. R., 13 Mad., 47; *Pettachi* vs. *Sangili*, I. L. R. 10 Mad., 241; 14 Ind. App., 84; and in deciding it the execution-proceedings are the best evidence—*Mahabir Persad* vs. *Markunda Nath*, 17 Ind. App., 11, p. 17, I. L. R., 17 Cal., 584, p. 589; *Natesayyan* vs. *Narasimmayyar*, I. L. R., 13 Mad., 410, p. 483. The purchaser only gets what he has reason to think he is buying, and the purchase of a whole family estate is not supported by a certificate purporting to convey only the right and interest of the father—*Simbhunath* vs. *Golab Singh*, 14 Ind. App., 77; I. L. R., 14 Cal., 572; *Ram Sahai* vs. *Kewal Singh*, I. L. R., 9 Alla., 672; *Rasa Mal* vs. *Maharaj Sing*, I. L. R., 9 Alla., 205;

Sivagana vs. *Lakho Manna*, I. L. R., 9 Mad., 188; *Rettachi* vs. *Sangalo*, I. L. R., 10; Mad., 241; but where in proceedings against a Hindu his son objected under section 278, *ante*, that this interest should be excluded, and failed: *Held* the whole estate was sold —*Meenakshi* vs. *Immudi*, 16 Ind. App., 1. The purchaser of an undivided interest not under a mortgage-decree against the father—*Bhikaji* vs. *Yashvantrao*, I. L. R., 8 Bom., 489; *Parsioh Naraian*, 11 C. L. R., 263; *Trimbak* vs. *Narayan*, I. L. R., 8 Bom., 481; *Hurdey Narain* vs. *Pundit*, 11 Ind. App., 26; I. L. R., 10 Cal., 626, and against him only—*Kesansing* vs. *Moreshwar*, I. L. R., 7 Bom., 91; *Chockalinga* vs. *Jubbaraya*, I. L. R., 5 Mad., 132, but see 4 Ind. App., 254; I. L. R., 4 Mad., 181; during the lifetime of the debtor, obtains the debtor's interest—*Hurdey Narain* vs. *Pandit* 11 Ind. App., p. 29, and can now sue for a partition throughout India—*Deendyal Lall* vs. *Jagdeep Narain*, 1 C. L. R., 49; *Baboo Lall Jha* vs. *Shetkh Jumah Buksh*, 22 W. R., 116; *Dorasamee* vs. *Atiratra*, I. L. R., 7 Mad., 136; *Jumoona* vs. *Dig Narain*, I. L. other R., 10 Cal., 1; 13 C. L. R., 74; and in Bengal he can also claim to hold jointly with the members—*Komar Bijoy Keshab Roy* vs. *Shamasundari*, B. L. R., (F. B.,) 172; *Eshan Chunder* vs. *Nund Coomar*, 8 W. R., 239.

Father's Debts.—At a sale under a decree against the sons for the debts of their father, according to the Mitakshara law, the purchaser sometimes gets the father's estate—*Girdharee Lall*, vs. *Kantoo Lall*, 22 W. R., 56; 1 Ind. App., 321; *Sham Soonder Koer* vs. *Jumna* 15 W. R., 148; *id.*, 311; *id.*, 203; *Pundit Hait Ram* vs. *Mussamut Mulu*, 7 Alla., 110; *Meenkshi* vs. *Immudi*, 16 Ind. App., 1; I. L. R., 12 Mad., 143; for the right and interest of the sons in the zemindary is assets in their hands liable for the father's debts —*Muttayan* vs. *Sangili*, I. L. R., 6 Mad., 1; 11 Ind. App., 128; *Bhagbut Pershad* vs. *Girja Koer*, 15 Ind. App., 99, p. 104, but not because they are members of the joint family —*Muttusami* vs. *Rama Krishna*, I. L. R., 12 Mad., 293; and even if the decree has been passed in the father's lifetime, yet if the purchaser gets the entire estate in possession, or it is not shown he has not—*Srinivasa* vs. *Yelaya*, I. L. R., 5 Mad., 251; *Subbayan* vs. *Ruppa*, I. L. R., 6 Mad., 155; *Pem Singh* vs. *Partab*, I. L. R., 14 All., 179; *Naryanras*, vs. *Javhervahu*, I. L. R., 12 Bom., 431; they cannot recover the property, unless they show that the debts in question—*Chintamanrao* vs. *Kashinath*, I. L. R., 14 Bom., 320, were contracted for immoral purposes, and that the purchaser had notice that they were so contracted; and if the purchasers are strangers to the suit and have not had notice that the debts were so contracted, they are not bound to make enquiry beyond what appears on the face of the proceedings—*Meenakshi* vs. *Immudi*, 16 Ind. App., 1, p. 5; *Bhagbut Pershad* vs. *Girja Koer*, 15 Ind. App., 99; *Suraj Bunsi* vs. *Sheo Persad*, 6 Ind. App., 88; *Velliyammal* vs. *Katha Chetti*, I. L. R., 5 Mad., 61; *Nanomi* vs. *Madan Mohun*, 13 Ind. App., 1; *Kunhali Keshava*, I. L. R., 11 Mad., 64; see also *Beni Mahdo* vs. *Basdeo*, I. L. R, 12 Alla., 99; but ordinarily, unless the property has been attached and ordered to be sold, a right to a share in joint ancestral property dies with the sharer, and his previous share is no longer subject to execution in a mere money-decree, even though he may have died after the decree—*Suraj Bunsi* vs. *Sheo Pershad*, 6 Ind. App., 88; *Luchmee Dai* vs. *Asman Singh*, 25 W. R., 421.

Representative Capacity.—In other cases, it is only where it is manifest that the father of a joint family has mortgaged the family property for a debt, and a decree has been obtained for realization of the debt by means of a sale of the mortgaged property—*Pemraj* vs. *Savalya*, I. L. R., 294; *Bhagbut* vs. *Girja Koer*, 15 Ind. App., 99; *Hurdey Narain* vs. *Pundit*, 11 Ind. App., 26; *Maruti* vs. *Babaji*, I. L. R., 15 Bom., 87; *Bhikaya* vs. *Ramchunder*, I. L. R., 8 Bom., 489, *Ponnappa* vs. *Pappu Vanyangar*, I. L. R., 9 Mad., 343; *Trimbak* vs. *Narayan*, I. L. R., 8 Bom., 481, or that the judgment-debtor has been sued in a representative capacity—*Sathuvayyan* vs. *Muthasami*, I. L. R., 12 Mad., 325; *Hari Vithal* vs. *Jairam*, I. L. R., 14 Bom., 597, that the Court will allow a sale in terms of the interests of the judgment-debtor to convey the interests of others—*Loki Mahton* vs. *Ajaib Lal*, 4 C. L. R., 465; *Deendyal* vs. *Jagdeep Narain*, 4 Ind. App., 247; *Doolar Chand* vs. *Lall Chand*, 3 C. L. R., 561; *Nugender Chunder Ghose* vs. *Sreemutty Kamini Dossee*, 11 Moore, 241; *Jumoona* vs. *Sligh Narain*, I. L. R., 10 Cal., 1; 13 C. L. R., 74; *Phulchand* vs. *Lachmichand*, I. L. R., 4 Alla., 486. Thus the purchaser gets the estate under a decree against the widow for the debt of her husband—*Ishan Chunder* vs. *Ruksh Ali*, Marsh., 614; *Phoolbas Koonwar* vs. *Lalla Jogeshur*, 25 W. R., 285; even if she has an adopted son not on the record—*Sotish Chunder* vs. *Nil Comul*, I. L. R., 11 Cal., 451 (compare I. L. R., 11 Mad., 408); if this fact appears in the plaint—*Mahabir Prasad* vs. *Basdeo Singh*, 6 Alla., p. 234, or in the judgment—*Jugal Keshore* vs. *Maharajah Jotendro Mohen*, I. R., 1 Ind. App., 66, or decree—*Alakmoune Debia* vs *Bani Madhub*, I. L. R., 4 Cal., 677; or the decree is for rent due in his lifetime, and she is sued as guardian of her minor son—*Manager of Raj Durbhangha* vs. *Maharajah Coomar Ramaput Singh*, 10 B. L. R., 295; or the decree is for costs in a suit in which she seeks to recover family property—*Ramkishore* vs. *Kally Kanto*, I. L. R., 6 Cal., 479; and where the property is sold in satisfaction of several claims against her, some of which bind the estate, though she has a power to adopt and afterwards exercise it, the purchaser gets the full estate—*Debendro Narain* vs. *Coomar Chundernath* 20 W. R., 30; but in other cases as one member of a joint family is not bound to pay the debts of another unless he is his father, a sale under a decree against one for his debt, whatever be its nature, merely passes his property—*Dorasami* vs. *Atiratra*, I. L. R., 7 Mad., 136; *Abelak Roy*

vs. *Rutty Roy*, I. L. R., 11 Cal., 293; *Patal Hari* vs. *Hakim*, I. L. R., 10 Bom., 363; *Lakshman* vs. *Kashinath*, I. L. R., 11 Bom., 700. See "*Legal Representative*," section 206, *ante*.

Widow: Representative.—If the decree is for debts incurred in her life, a purchaser under a money-decree only gets her life-interest—*Baijan Dobbey* vs. *Brij Bhookun Lall Awusti*, 2 Ind. App., 275; 24 W. R., 306. *Ramasami* vs. *Sabbahlammal*, I. L. R., 4 Mad., 373. If the decree declares a charge on the estate, and it is justified by legal necessity—*Kristobehary Sahoy* vs. *Lala Biagnath*, 7 B. L. R., 213, the purchaser gets the estate, unless the widow does not properly defend the suit—*Bramomoyee Dossee* vs. *Krista Mohun*, I. L. R., 2 Cal., 222; or being only possessed of a limited interest in the estate, such as maintenance, she could not possibly represent it—*Ramasami Chetti* vs. *Salurkai Terar*, 8 Mad., 186; and see *Bai Jamna* vs. *Bhaishankar*, I. L. R., 16 Bom., 233. But see the cases against this view, referred to in "LEGAL REPRESENTATIVE" under section 252.

Mahomedan Law.—Where a widow died leaving a son and a daughter and was sued "as represented by her minor son represented by his guardian" for debt, and at the sale the widow's interest was sold: *Held*, it passed the interest of the daughter and she could not recover her share unless she could show the debt was not due—*Kushet Bibi* vs. *Keso*, I. L. R., 12 Bom., 101; *Nuzeerun* vs. *Ameerooddeen*, 24 W. R., 3; and compare *Assamathem* vs. *Lutchmeeput*, 1. L. R., 4 Cal., 142. See also the note under section 252, *ante*.

Decree-Holder—Where a Court by declining to pay to the decree-holder the proceeds of an execution-sale which has been confirmed, obliges him to take proceedings to satisfy the Court that there is no other possible claimant, such proceedings must be considered as proceedings to execute the decree—*Mahomed Hossein* vs. *Lootf Ali*, 18 W. R., 463.

Limitation.—See "LIMITATION," section 312, *ante*. As to the case of a purchaser suing for the property of the judgment-debtor, see *Lakshman* vs. *Bisan Singh*, I. L. R., 15 Bom., 261.

Bar to suit against purchaser buying benami.

317. No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims.

Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser.

Act VIII of 1859, section 260; 11 W. R., 17. This section applies to H. C.

Certified Purchaser.—A certified purchaser at a sale not held under the Code is not within the section—*Fazl Rahman* vs. *Imam Ali*, I. L. R., 14 Cal., 583; nor does it apply when the purchaser agrees to sell after purchase—*Kumara* vs. *Srinivasa*, I. L. R., 11 Mad., 213; nor to a person whose name has been entered in the certificate by fraud or contrary to the wishes of the purchaser—*Koosumba* vs. *Tufuzzul Hossein*, 13 W. R., 85. In the case of *Bodh Sing* vs. *Gunesh Chunder*, 19 W. R., 356, their Lordships of the Privy Council said: "Their Lordships will not enquire whether there is sufficient proof that Ramsoondar, who purchased at an auction-sale held a few days after the Act came into operation, did obtain a certificate under the Act, or of its terms if he did obtain one; because, assuming him to have been a certified purchaser within the meaning of the Act, they are of opinion that the provisions of the section do not apply to such a case as the present." This would seem to assume as essential the fact of a certificate having been given. But in *Bunda Ali* vs. *Bibee Ameerun*, 25 W. R., 493, it was decided that the party to whom the Court has directed a certificate to be granted is entitled to be regarded as the certified purchaser. And where a purchaser who had not obtained a certificate was sued, and afterwards applied and obtained a certificate he was held to be a certified purchaser under this section—*Aldwall* vs. *Ilahi Buksh*, I. L. R., 5 Alla., 478. A certificate may issue after more than three years from the confirmation of purchase—*Kylasa* vs. *Ramasami*, I. L. R., 4 Mad., 172; *Vithal Janardan* vs. *Vithojirav*, I. L. R., 6 Bom., 586; *Lakshman*, I. L. R., 9 Bom., 472; and it should not be rejected if tendered during the hearing of a suit on this account—*Davidas* vs. *Pirjada*, I. L. R., 8 Bom., 377.

Object of the Section.—This section only refers to suits between the benamdar and the beneficial owner—*Sheetanath Ghose* vs. *Madhub*, 1 W. R., 329; and where the

beneficial owner sues the certified benamdar for possession—*Khyrat Ali* vs. *Syfoollah*, 8 W. R., 130. It does not apply to suits brought by the certified purchaser against a party in possession; and if the certified purchaser is a benamdar, or an agent, and the real purchaser obtains possession of the property honestly, the former cannot dispossess the latter—*Buhuns Kowar* vs. *Lalla Bohooree*, 14 Moore, 497; *Karamuddin* vs. *Niamut*, I. L. R., 19 Cal., 199; *Lokhee Narain Roy* vs. *Kalypuddo*, 2 Ind. App., 154; *Muthoora Nath* vs. *Raekomul Dossee*, 24 W. R., 278.

This section was designed to prevent disputes between the purchaser at an execution-sale and a person claiming that the certified purchaser has purchased *benamee* for him. But where the certified purchaser admits that he purchased for another, there is no reason why that person should not set up his title upon the purchase against a person not the certified purchaser, or claiming through him—*Shorosutty Dassee* vs. *Gopeesoondery*, Marsh., 423. In a suit to recover possession of property purchased by plaintiff's benamdar brought against the benamdar (who admitted the claim) and the person in possession, it was held the suit was not barred under this section—*Haji Arjun Mullick* vs. *Sheikh Forutullah*, 9 C. L. R., 295. And so the suit would lie if the benamdar did not appear or contest the claim—*Ramakrishnappa* vs. *Adinarayana*, I. L. R., 8 Mad., 511. It does not affect the rights of members of a joint Hindu family who, by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition however made by a member of the family in his sole name, if made by the use of the family funds—*Bodh Singh* vs. *Guneshchunder*, 19 W. R., P. C., 356; nor does it prevent a suit to declare that the name of the certified purchaser was inserted in the certificate of sale fraudulently and without the consent of the real purchaser—*Gosmiah* vs. *Tafuzzal Hossein*, 4 B. L. R., App. 32; *Natesa Ayyar* vs. *Venkatramayyan*, I. L. R., 6 Mad., 135; nor a suit by a third party not claiming to be real purchaser against the certificate-holder to question the sale on the ground of fraud—*Shama Keshee* vs. *Raj Kissur*, 14 W. R., 179; nor a suit by a judgment-creditor to declare that the property purchased by A belongs to his debtor B—*Sohun Lall* vs. *Lala Gya Pershad*, 6 Alla., 265; nor a suit by a mortgagee to show that the property belonged to and was in possession of his mortgagor and did not belong to the nominal owner—*Kanizak* vs. *Monohur*, I. L. R., 12 Cal., 204. A sued B, and C's widow, on the ground that C had bought the right of B at an auction-sale in certain property, and C's widow pleaded that her husband was the previous certified purchaser of B's rights; it was held that the Courts might enter on the question whether the purchase by C's husband was a *benamee* transaction by B—*Tara Soondaree* vs. *Oojul Monee*, 14 W. R., 111; and where B purchased A's property at an execution-sale *benamee* for A, and subsequently conveyed it to C for A's benefit, A's creditors were not prevented from following the property, though it was doubted if it could be followed in B's hands, on the principle that what A could not follow the creditors could not—*Satapa* vs. *Karbusapa*, 7 Bom., 21; and where plaintiff's property was sold under a decree, and the purchaser agreed in writing the day after the purchase to re-convey it to the plaintiff on payment of the purchase-money, it was held that section 260, Act VIII of 1859, did not apply—*Mor Joshi* vs. *Muhammad*, 10 Bom., 344.

Delivery of immoveable property in occupancy of judgment-debtor.

318. When the property sold is in the occupancy of the judgment-debtor or of some person on his behalf, or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property, and a certificate in respect thereof has been granted under section 316, the Court shall, on application by the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

Act VIII of 1859, section 263. This section applies to H. C.

The application is barred if made more than three years from the date of the certificate of sale—*Hanmantrav* vs. *Pandurang*, I. L. R., 8 Bom., 257.

A purchaser can obtain *khas* possession under this section, although in the first instance he obtained possession under section 319, *post*. The High Court cannot interfere with such an order under the Letters Patent—*Hur Kishore* vs. *Sudoy Chunder*, 17

W. R., 80. But if he has been once put properly in possession, he cannot take out a second execution—*Khatoo Bibi* vs. *Furukh Ali*, 6 W.R., Mis., 108; appproved in *Lakshmana* vs. *Narasimhasami*, I. L. R., 7 Mad., 167; and if he is subsequently dispossessed, his only remedy is a regular suit—*Gopal Das* vs. *Than Singh*, I. L. R., 4 Alla., 184. See "Execution Complete," section 311, *ante*.

Where the right, title, and interest of a party was sold, but possession was not given to the purchaser until fifteen years afterwards, it was held that the former could not recover the property unless he proved twelve years' adverse possession—*Attotram Doss* vs. *Balunkee Doss*, 14 W. R., 357.

If the purchaser does not get physical possession of the property in execution when he is entitled to it, he can bring a suit for it on the ground that he has obtained symbolical possession in Bombay—*Devidas* vs. *Pirjada*, I. L. R., 8 Bom., 377; and in Madras—*Nagireddi* vs. *Rumanna*, I. L. R., 7 Mad., 593; *Sevu* vs. *Muttusami*, I. L. R., 10 Mad., 53; and in Allahabad—*Jagan Nath* vs. *Baldeo*, I. L. R., 5 Alla., 305, and where the assignee of a purchaser was refused possession under this section a regular suit was allowed—*Seru Mohun* vs. *Bhagoban*, I. L. R., 9 Cal., 602. And in Bengal where there is a mere formal proclamation of the purchaser's possession, without any further act of possession, the purchaser is allowed to sue for possession within twelve years from the date of the judgment-debtor's possession *Joggobundhu* vs. *Purnanund*, I. L. R., 16 Cal., 530;—the remedy given under this section is additional and not exclusive—*Kishori Mohun* vs. *Chunder Nath*, I. L. R., 14 Cal., 644.

Limitation.—In case of a perpetual lease by the defendant and in favour of the lessee, see *Gossain Dalmar* vs. *Bepin*, I. L. R., 18 Cal., 520.

Decree-Holder.—If the decree-holder is the purchaser any dispute under this section is governed by section 244, *ante*—*Mutha* vs. *Appasami*, I. L. R., 13 Mad., 504.

Delivery of immoveable property in occupancy of tenant.

319. When the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a certificate in respect thereof has been granted under section 316, the Court shall order delivery thereof to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

Act VIII of 1859, section 264. This section applies to H. C.

This section does not prevent a person from getting possession, if he can, without the aid of the Court—*Obhoya Churn* vs. *Rajendro Coomar*, 22 W. R., 406.

Possession: Regular Suit.—In practice, the Courts of this country do not give possession under a sale in execution by removing a person who is in possession under an apparent *bonâ-fide* title. If the debtor can assert his title to possession by suit only, the purchaser can have no higher claim—*Tarakant Bannerjee* vs. *Puddomoney*, 10 Moore, 483; but the decree and execution in the manner described in this section puts an end altogether to limitation—*Gunga Gobind* vs. *Bhoopal Chunder*, 19 W. R., 101; so far as a party to the proceedings is concerned—*Umbica Churn* vs. *Bholanath*, 4 C. L. R., 55; *Lokessur Koer* vs. *Purgun Roy*, I. L. R., 7 Cal., 418; *Venkatramanna* vs. *Viramma*, I. L. R., 10 Mad., 17; unless in the case of a lessee holding under a perpetual lease from the judgment-debtors—*Gossain Dalmar* vs. *Bepin*, I. L. R., 18 Cal., 520; for a *makarrari* is an estate in land—*Nil Madhab* vs. *Narattam*, I. L. R., 17 Cal., 826.

Remedies.—The purchaser must make his application within three years from the time the sale-certificate issues—*Basapa* vs. *Marya*, I. L. R., 3 Bom., 433.

Limitation.—He may sue for possession within twelve years from the date of possession by the judgment-debtor—*Juggobundhu* vs. *Purnanund*, I. L. R., 16 Cal., 530, and his suit is not the less a suit for the property if he asserts that the title-deeds of the person in possession are fraudulent—*Uma Shankar* vs. *Kalka Prasad*, I. L. R., 6 Alla., 75; and asks to set them aside—*Ikram Singh* vs. *Intizam Ali*, I. L. R., 6 Alla., 260; compare *Janki Kanwar* vs. *Ajit Singh*, I. L. R., 15 Cal., 58, and *Unni* vs. *Kunchi*, I. L. R., 14 Mad., 26. See also note under sections 264 and 335.

Power to prescribe rules for transferring to Collector execution of certain decrees.

320. The Local Government may, with the sanction of the Governor-General in Council, declare, by notification in the official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector, and rescind or modify any such declaration.

Power to prescribe rules as to transmission, execution, and re-transmission of decrees.

The Local Government may also, notwithstanding anything hereinbefore contained, from time to time prescribe rules for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court.

Rules under this section may confer upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector, including the powers of the Court under sections 294 and 312, and may provide for orders passed by the Collector or any gazetted subordinate of the Collector, or orders passed on appeal with respect to such orders, being subject to appeal to and revision by superior revenue-authorities as nearly as may be as the orders passed by the Court, or orders passed on appeal with respect to such orders, would be subject to appeal to and revision by Appellate or Revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

A power conferred by the rules upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exerciseable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

In executing a decree transferred to the Collector under this section, the Collector and his subordinates shall be deemed to be acting judicially within the meaning of Act No. XVIII of 1850 (*an Act for the Protection of Judicial Officers*).

The last three paragraphs of this section have been added by Act VII of 1888, section 30; compare *Lallu* vs. *Bhavla*, I. L. R., 11 Bom., 478. The amendment is not retrospective —*Ganpatram* vs. *Isaac*, I. L. R., 15 Bom., 322. It applies to H. C.

Prescribe Rules.—The Government has power to prescribe rules providing for appeals from the Collector's orders—*Takaddas* vs. *Baldeo Das*, I. L. R., 12 Alla., 564.

Notification.—When such a declaration has been made, the Civil Courts cease to have jurisdiction to execute the decree—*Sukhdeo Rai* vs. *Sheo Ghulam*, I. L. R., 4 Alla., 382. See note under section 321, *post*.

Ancestral.—If a village is ancestral land, so is an accretion to it—*Ram Prasad* vs. *Radha Prasad*, I. L. R., 7 Alla., 402.

Collector's Powers.—The Collector in selling acts as a ministerial officer of the Court and is subject to its revision. In Bombay after confirmation he cannot refuse a certificate—*Lallu* vs. *Bhavla*, I. L. R., 11 Bom., 478; nor can he set aside a sale or extend the time to redeem given in the decree—*Ganpatram* vs. *Isaac*, I. L. R., 15 Bom., 322; *Bai* vs. *Madhab*, I. L. R., 15 Bom., 694.

By the rules in force under the old law in the North-West, the Collector sold property and gave a sale-certificate. The purchaser then asked the Civil Court to be put in possession of more land than was described in the sale-certificate, and this was refused. He then got his certificate amended by the Collector, so as to cover the land, and again applied to to the Civil Court, and failed, as the Judge held only the smaller amount had been sold in execution: *Held*, the Judge had jurisdiction to determine the matter; and as the purchaser could bring a regular suit, the Court should not exercise the power of revision given to it under section 622, *post*—*Sundar Das* vs. *Mansaram*, I. L. R., 7 Alla., 407.

Regular Suit.—A suit lay for confirmation of a sale held in execution by a Collector before the section was amended—*Bandi Bibi* vs. *Kalka*, I. L. R., 9 Alla., 602. See "SUIT TO SET ASIDE AN ORDER," section, 312, *ante*.

Power of Collector when execution of decree is so transferred.

321. When the execution of a decree has been so transferred, the Collector may—

(*a*) proceed as the Court would proceed under section 305; or

(*b*) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or

(*c*) sell the property ordered to be sold or so much thereof as may be necessary.

This section applies to H. C.

In Bombay, it was held that a Judge, could recall a case sent to the Collector—*Mahadji* vs. *Hari*, I. L. R., 7 Bom., 332; not so in Allahabad—*Madho Prasad* vs. *Hansa*, I. L. R., 5 Alla., 314; doubtful—*Hargovan* vs. *Hira*, I. L. R., 8 Bom., 301. See also *Sundar Das* vs. *Mansa Ram*, I. L. R., 7 Alla., 407.

Procedure.—When a decree is transferred in the North-West, the Collector's proceedings are not governed by the Code, but by the rules made by Government and section 244 does not apply as such—*Madho Prasad* vs. *Hansa*, I. L. R., 5 Alla., 314; *Keshabdeo* vs. *Radha Prasad*, I. L. R., 11 Alla., 94.

Sale Set Aside.—An application to set aside a sale for a material irregularity should be made to the Collector—*Madho Prasad* vs. *Hansa*, I. L. R., 5 Alla., 314; but an application under section 313 by the purchaser on the ground that the judgment-debtor had no saleable interest in the property sold, should be made to the Court—*Nathu Mal* vs. *Luchmi Narain*, I. L. R., 9 Alla., 43; *Keshabdeo* vs. *Radha Prasad*, I. L. R., 11 Alla., 94; and see *Takaddas* vs. *Baldeo Das*, I. L. R., 12 Alla., 564, p. 568.

Procedure of Collector when execution of decree is so transferred.

322. When the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector, if

after such enquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.

Notice to be given to decree-holders and to persons having claims on property.

322A. In the case mentioned in section 322, the Collector shall publish a notice calling upon—

(*a*) every person holding a decree for money against the judgment-debtor capable of execution by sale of his immoveable property, and which such decree-holder desires to have so executed, and every holder of a decree for money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder ;

(*b*) every person having any claim on the said property, to submit to the Collector a statement of such claim, and to produce the documents, if any, by which it is evidenced.

Such notice shall be in the language of the district, and shall allow a period of sixty days from the date of its publication for compliance therewith. It shall be published by being posted in the court-house of the Court which made the original order under section 304, and at such other places (if any) as the Collector thinks fit. Where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

Amount of money-decrees to be ascertained, and immoveable property available for their satisfaction.

322B. Upon the expiration of the said period the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any), may desire to make, and for holding such enquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, and may, from time to time, adjourn such hearing and enquiry.

If there be no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount

to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

If any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order under section 304, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof be within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector. The Collector shall then draw up a statement as above provided in accordance with such decision.

Practice.—An appeal from a decision under this section by which a disputed claim is settled is in Madras treated as a miscellaneous appeal, *i.e.*, an appeal from a decree not passed in a regular suit—*Srinivasa* vs. *Peria*, I. L. R., 4 Mad., 420; followed in *Narayan* vs. *Bhagvant*, I. L. R., 10 Bom., 238; otherwise in the North-West Provinces—*Ahmad Khan* vs. *Madho*, I. L. R., 7 Alla., 565.

When District Court may issue notices and hold inquiry.

322C. The Collector may, instead of himself issuing the notices and holding the inquiry required by sections 322A and 322B, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by sections 322A and 322B, and transmit such statement to the Collector.

Under the Bengal, North-West Provinces and Assam Civil Courts Act, 1887, the High Court has power to authorise Subordinate Judges and Munsiffs to take cognizance of references by Collectors under section 322C—Act XII of 1887, section 322 (2), (*e*).

Effect of decision of Court as to dispute arising under section 322B or 322C.

322D. The decision by the Court of any dispute arising under section 322B or section 322C shall, as between the parties thereto, have the force of, and be appealable as, a decree.

This section applies to H. C.

An appeal under this section is a miscellaneous appeal, and is not from a decree passed in a regular suit—*Srinivasa* vs. *Peria*, I. L. R., 4 Mad., 420. See also *Narayan* vs. *Bhagvant*, I. L. R., 10 Bom., 238.

Scheme for liquidation of money-decrees.

323. Whenever the amount to be recovered and the property available have been determined as provided in section 322B or 322C, the Collector may—

(1) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed

to sell such property ; or if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale ;

(2) raise such amount and interest (notwithstanding any order under section 304)—

(*a*) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property ; or

(*b*) by mortgaging the whole or any part of such property ; or

(*c*) by selling part of such property ; or

(*d*) by letting on farm, or managing by himself or another the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale ; or

(*e*) partly by one of such modes, and partly by another or others of such modes.

(3) For the purpose of managing under this section the whole or any part of such property, the Collector may exercise all the powers of its owner.

(4) For the purpose of improving the saleable value of the property available or any part threof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable, or compound the claim of any incumbrancer whether it has become payable or not, and for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this paragraph, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

In proceeding under paragraphs (2), (3) and (4) of this section the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Chief Controlling Revenue-authority.

This section is new. It applies to H. C.

Recovery of balance, if any, after letting or management.

324. If on the expiration of the letting or management under section 323, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks of the date of such notice, he will proceed to sell the whole or a sufficient part of the said property ; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

Collector to render accounts to Civil Court.

324A. The Collector shall, from time to time, render to the Court which made the original order under section 304 an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this Chapter, and shall hold the balance at the disposal of the Court.

Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and (if the Collector so directs) the expenses of witnesses summoned by him.

Application of balance.

Such balance shall be applied by the Court as follows :—

firstly, in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit ; and

secondly, where the Collector has proceeded under section 321, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 295 direct ; or,

thirdly, where the Collector has proceeded under section 322, in keeping down the interest on incumbrances on the property, and (when the judgment-debtor has no other sufficient means of subsistence) in providing for his subsistence to such amount as the Court thinks fit ; and in discharging rateably the claims of the original decree-holder and any other decree-

holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered ;

and no other holder of a decree for money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied,

and the residue, if any, shall be paid to the judgment-debtor or such other person, if any, as the Court directs.

This section is new. It applies to H. C.

Sales how to be conducted.

325. When the Collector sells any property under this Chapter, he shall put it up to public auction, in one or more lots as he thinks fit, and may—

(*a*) fix a reasonable reserved price for each lot ;

(*b*) adjourn the sale for a reasonable time, whenever he deems the adjournment necessary for the purpose of obtaining a fair price for the property, recording his reasons for such adjournment ;

(*c*) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

Restrictions as to alienation by judgment-debtor or his representative and prosecution of remedies by decree-holders.

325A. So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by sections 322 to 325 (both inclusive), the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for money.

During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under section 323.

The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this section in respect of any remedy of which the decree-holder has thereby been temporarily deprived.

Provision where property is in several districts.

325B. When the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by sections 321 to 325 (both inclusive) shall, from time to time, be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

Powers of Collector to compel attendance of parties and witnesses and production of documents.

325C. In exercising the powers conferred on him by sections 322 to 325 (both inclusive), the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

When Court may authorize Collector to stay public sale of land.

326. When, in any local area in which no declaration under section 320 is in force, the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable, and that satisfaction of the decree may be made within a reasonable period by a temporary alienation or management of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him, instead of proceeding to a sale of the land or share. In such case the provisions of sections 320, paragraph two, to 325C (both inclusive) shall apply, as far as they are applicable.

Act VIII of 1859, section 244. This section applies to H. C.

This section does not apply to a decree which directs the sale of land or a share in land in pursuance of a contract specifically directing it—*Bhagwan Prasad* vs. *Sheo*, I. L. R., 2 Alla., 856.

Court may Authorize.—The Court has a discretion, and before passing final orders it should hear any objections raised by the parties—*Huro Prosad* vs. *Kali Prosad*, I. L. R., 9 Cal., 290.

The only indulgence a Court can grant under this section is to allow the judgment-debtor a reasonable time to satisfy the decree by temporary alienation or management of his share: it does not authorize a Court to allow payment by instalments not mentioned in the decree—*Sheo Pershad* vs. *Shiva Ram*, 2 Alla., 59; and the debtor to retain possession of his land, either for self or as guardian of her minor son—*Kashee Lall* vs. *Ameer Jan*, 2 Alla., 347; and where a Collector considered that the lands of a judgment-debtor should be exempted from auction-sale, and the judgment-debtor should be allowed to pay by instalments extending over twelve years, it was held that the arrangement could not be supported—*Muttra Pershad* vs. *Ram Pershad*, 6 Alla., 39; *Huro Prosad* vs. *Kali Prosad*, I. L. R., 9 Cal., 290.

Specific Performance—No decree can be given against the owner to sell land under the management of the Collector.—*Seth Saidayal* vs. *Ram Sahee*, I. L. R., 17 Cal., 432.

Local rules as to sales of land in execution of decrees for money

327. The Local Government may, from time to time, with the sanction of the Governor-General in Council, make special rules for any local area imposing conditions in respect of sale

of any class of interests in land in execution of decrees for money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value :

And if, when this Code comes into operation in any local area, any special rules as to sale of land in execution of decrees are in force therein, the Local Government may continue such rules in force, or may, from time to time, with the sanction of the Governor-General in Council, modify the same.

All rules so made or continued, and all such modifications of the same, shall be published in the local official Gazette, and shall thereupon have the force of law.

This section applies to H. C.

H.—Of Resistance to Execution.

Procedure in case of obstruction to execution of decree.

328. If, in the execution of a decree for the possession of property, the officer charged with the execution of the warrant is resisted or obstructed by any person, the decree-holder may complain to the Court at any time within one month from the time of such resistance or obstruction.

The Court shall fix a day for investigating the complaint, and shall summon the party against whom the complaint is made to answer the same.

Act VIII of 1859, section 226. This section applies to H. C. and P. S. C. C.

This section applies to applications made by the decree-holder—*Mathab Koomaree*, Petitioner, 19 W. R., 62, within one calendar month, excluding the date on which the resistance took place—*Dadu* vs. *Balgouda*, 5 Bom., 39. It is not imperative, and the omission to take action under it does not preclude a decree-holder from bringing a fresh suit to recover possession if he is ousted after his formal institution in possession—*Jugmohun Tewaree* vs. *Baldeo Naick*, 3 Agra, 162 ; or against any party obstructing him—*Balvant* vs. *Babaji*, I. L. R., 8 Bom., 602 : *Trimbak* vs *Narayan*, I. L. R., 8 Bom., 481, and in the latter case he may make a fresh application for delivery of possession—*Muttra* vs. *Appasami*, I. L. R., 13 Mad., 504.

Time of such Resistance or Obstruction—Limitation is thirty days from the date of the obstruction complained of. But where a warrant has been issued and returned, not executed owing to obstruction, and a second then issues and its execution is obstructed, time runs from the date of the second obstruction—*Ramasekara* vs. *Dharmaraya*, I. L. R., 5 Mad., 113.

In the case of *Hunkur Singh* vs. *Madho Lall*, 21 W. R., 147, Phear, J., held in effect that the limitation of one month in Act VIII, section 226, was only important as the limit prescribed within which the judgment-creditor might, by virtue of section 228, bring an action of ejectment against a stranger; and that the judgment-creditor might ask the Court to proceed against the debtor in any matter connected with execution within the ordinary period allowed.

Appeal.—There is apparently no appeal unless one of the parties is purchaser and then the case would fall under section 244, *ante*—*Muttra* vs. *Appasami*, I. L. R., 13 Mad., 504.

329. If the Court is satisfied that the obstruction or resistance was occasioned by the judgment-debtor or by some person at his instigation, the Court shall inquire into the matter of the complaint, and pass such order as it thinks fit.

Procedure in case of obstruction by judgment-debtor or at his instigation.

Act VIII of 1859, section 227. This section applies to H. C. and P. S. C. C.

Purview of this Section—Every obstruction must be caused either by the judgment-debtor, or at his instigation by persons who have no real interest in the property, or by third parties. This section deals with the two first cases, the third is dealt with by section 331, *post*—*Govind Nair* vs. *Kesava*, I. L. R., 3 Mad., 81. Thus, if the decree-holder claims certain lands as having passed under the decree, and the debtor asserts that they were not included in it (and this would be necessary for a valid defence) the case falls within this section—*Prannath Roy* vs. *Preonath*, 8 W. R., 398.

Practice—The Judge should fix a day, hear the evidence adduced on each side, and decide the case—*Shadhoo Shuran* vs. *Bhuggoo*, 12 W. R., 98; and if he directs that the property shall be delivered in whole or in part, he should order that possession be given in one or other of the ways described in the Code—*Brojo Mohun* vs. *Shooda Monee*, 8 W. R., 79.

An order passed between parties under this section is appealable under section 244, *ante*—*Govind Nair* vs. *Kesava*, I. L. R., 3 Mad., 81.

330. If the Court is satisfied that the resistance or obstruction was without any just cause, and that the complainant is still resisted or obstructed in obtaining possession of the property by the judgment-debtor or some other person at his instigation, the Court may, at the instance of the decree-holder and without prejudice to any penalty to which such judgment-debtor or other person may be liable, under the Indian Penal Code or any other law, for such resistance or obstruction, commit the judgment-debtor or such other person to jail for a term which may extend to thirty days, and direct that the decree-holder be put into the possession of the property.

Procedure when obstruction continues.

Act VIII of 1859, section 228. This section applies to H. C. and P. S. C. C.

Judgment-Debtor.—Any dispute between the parties to the suit must be decided under section 244, *ante*—*Sankaravadivam Mal* vs. *Kumarasamya*, I. L. R., 8 Mad., 472.

Party to the Suit.—The term includes formal parties—*Joggessur Mookerjee*, Petitioner, 1st October 1860; but not a person who, though a party to the original suit, was not a party as regards the land in dispute—*Kasheenath Doss* vs. *Bhowanee*, W. R., Mis., 1864, p. 18. See "EFFECT OF A DECREE" under section 206, *ante*.

331. If the resistance or obstruction has been occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the claim small be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant;

Procedure in case of obstruction by claimant in good faith, other than judgment-debtor.

and the Court shall, without prejudice to any proceedings to which the claimant may be liable under the Indian Penal Code or any other law for the punishment of such resistance or obstruction, proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V,

and shall pass such order as it thinks fit for executing or staying execution of the decree.

Every such order shall have the same force as a decree, and shall be subject to the same conditions as to appeal or otherwise.

Act VIII of 1859, section 229. This section applies to H. C. and P. S. C. C.

Resistance or Obstruction.—See *Mahabir Prasad* vs. *Parma*, I. L. R., 14 Alla. 417.

Other than Judgment-Debtor.—If the decree-holder has been obstructed by any person not claiming on behalf of the judgment debor, and has been unable to obtain possession, he can apply under this section—*Buhal Sing* vs. *Beharee*, 10 W. R., 318, *Gunesh Pershad* vs. *Joykishun*, 1 Alla., 218; and should not be referred to a regular suit —*Dhiraj* vs. *Naduroonissa*, 4 W. R., 82, and then the title of the decree-holder will be tried under the procedure adopted in a suit for title—*Cinnasamo Pillia* vs. *Krishna Pillia*, I. L R., 3 Mad., 104; but it is clear that such an application is limited to applications made by the decree-holder—*Buhal Singh* vs. *Beharee*, 1 B. L. R., 206; *Fonindro* vs. *Jugodishwari*, I. L. R., 14 Cal., 234; and see *Mahabir Prasad* vs. *Parma*, I. L. R., 14 Alla., 417.

A, having purchased certain lands as *lakheraj* from B, who refused to register the deed of purchase or give up possession, brought a suit for possession and obtained a decree. Meantime, B surrendered the land as *mal* land to the zemindar, who obstructed A in execution. It was held that A was entitled to possession, leaving the zemindar to bring a suit for resumption—*Taleb Hossein* vs. *Gooroo Pershad*, 20 W. R., 57.

Investigate.—An order rejecting an application as too late does not preclude the losing party from bringing a regular suit—*Bani Pershad* vs. *Lachman*, I. L. R., 4 Alla., 131.

Nature of Investigation.—The Courts in hearing a case under this section are not limited to the question of possession. They can decide any question of title arising between the contending parties in connection with the right of possession—*Mollakhan* vs. *Gorikhan*, I. L. R., 14 Bom., 627; and see *Rakhal Chandar* vs. *Watson and Co.*, I. L. R., 10 Cal., 50.

With like Power.—These words refer to the powers of the Court to enforce the attendance of witnesses and not to the jurisdiction of the Court which is special, enabling it to try a claim of a value below the pecuniary limit of its ordinary jurisdiction—*Sithalakshmi* vs. *Vythilinga*, I. L. R., 8 Mad., 548; *Moulakhan* vs. *Gorikhan*, I. L. R., 14 Bom., 627.

Appeal.—An appeal lies from an order rejecting the application of a judgment-creditor—*Fonindro* vs. *Jugodishwari*, I. L. R., 14 Cal., 234. And the Court to which it lies depends on the value of the claim and not that of the original suit—*Moulakhan* vs. *Gorikhan*, I. L. R., 14 Bom., 627; *Kalima* vs. *Mahomed*, I. L. R., 13 Mad., 520.

Stamp.—Appeals are chargeable with the full stamp of appeals from ordinary decrees—*Mahbuban* vs. *Umrao Begum*, 11 C. L. R., 981; I. L. R., 8 Cal., 729; under article 1, of schedule I of Act VII of 1870—*Narayan* vs. *Bhagrant*, I. L. R., 10 Bom., 238.

Transfer.—A District Judge can transfer a claim case under this section to another Court for trial—*Sithalakshmi* vs. *Vythilinga*, I. L. R., 8 Mad., 548.

Procedure in case of person dispossessed of property, disputing right of decree-holder to be put into possession.

332. If any person other than the judgment-debtor is dispossessed of any property in execution of a decree, and such person disputes the right of the decree-holder to dispossess him of such property under the decree, on the

ground that the property was *bonâ fide* in his possession on his own account or on account of some person other than the judgment-debtor, and that it was not comprised in the decree, or that, if it was comprised in the decree, he was not a party to the suit in which the decree was passed, he may apply to the Court.

If, after examining the applicant, it appears to the Court that there is probable cause for making the application, the Court shall proceed to investigate the matter in dispute ; and, if it finds that the ground mentioned in the first paragraph of this section exists, it shall make an order that the applicant recover possession of the property, and, if it does not find as aforesaid, it shall dismiss the application.

In hearing aplications under this section, the Court shall confine itself to the grounds of dispute above specified.

The party against whom an order is passed under this section may institute a suit to establish the right which he claims to the present possession of the property ; but, subject to the result of such suit, if any, the order shall be final.

Act VIII of 1859. This section applies to H. C. and P. S. C. C.

This section applies to possessory actions—*Brohmo Moyee* vs. *Burkut*, 13 W. R., 264. It is worthy of note that section 9, Act I, 1877, declares that no appeal shall lie from any order or decree passed in any suit instituted under that section, nor shall any review of any such order or dercee be allowed.

Death of Defendant.—Where the order for possession has been obtained before the death of the defendant and possession taken after his death, an objection under this section must be decided in accordance with it, and section 234, *ante*, has no reference it—*Biyyakka* vs. *Fakira*, I. L. R., 12 Mad., 211.

Not the Judgment-Debtor.—If, in execution of decree, a claim made by a third party in possession is rejected, he can either bring a regular suit or wait till he is dispossessed under this section—*Fergusson* vs. *Nil Komul*, 23 W. R., 270 ; and then he may take action under it or bring a regular suit within the ordinary period of limitation—*Toolun* vs. *Shah Shojaut Alum*, S. D. N. W., 1864, p. 409 ; *Kishen Soondur Talookdar* vs. *Fuheerooddin Mahomed*, W. R., 1864, p. 61, or both. As to Bombay, see the case of *Gulabhai* vs. *Jinabhai*, I. L. R., 13 Bom., 213. See note on section 333.

Practice.—When an application has been filed under this section, the Court should examine the applicant in order to determine whether the application should or should not be admitted—*Obhoy Churn* vs. *Rajendro Coomar*, 16 W. R., 288 ; and if it appears that the applicant was a defendant, even though he may not have been so originally, but was made so in the course of trial—*Ram Gopal* vs. *Poorno Chunder*, 12 W. R., 475 ; *Huree Kishore* vs. *Kalee Kishore*, 8 W. R., 114 ; or that he is still in possession—*Kalee Narain* vs. *Protap Chunder*, 12 W. R., 231 ; *Rutton Kooer* vs. *Tussuduck*, 22 W. R., 103 ; the application should be rejected. But if it should appear that the applicant was in manual possession or in possession as landlord—*Bhyrub Sircar* vs. *Sham Manjee*, 15 W. R., 70 ; *Banee Madhub* vs. *Nund Lall*, 22 W. R., 123 ; or as mortgagee ; or as mortgagor through a mortgagee in possession—*Asgur Ali* vs. *Asgur*, 20 W. R., 373 ; or in actual possession as mortgagee of the defendant—*Shafiuddin* vs *Lochan*, I. L. R., 2 Alla., 94, and has been dispossessed under the decree or under color of it, this is sufficient. See also *Hassun* vs. *Naib Ahmed*, 11 W. R., 146. If the parties are agreed that the applicant has been dispossessed by the defendant in execution, the application should not be rejected on the ground that he has not—*Judoo Kapalee* vs. *Issur Chunder*, 17 W. R., 375 ; nor on the ground that the applicant had not originally obtained possession in a strictly legal manner—*Obhoya Churn* vs. *Rajendro*, 22 W R., 406.

Several Applications.—If there are several applications, each application should be tried separately so as to prevent this section from being made a means of disposing of disputes between several claimants—*Sharoda Moyee* vs. *Nobin Chunder*, 11 W.R., 255.

Onus of Proof.—The onus is on the applicant—*Mahomed Yusur* vs. *Prokash Chunder*, 8 W. R., 8; *Woodoy Tara* vs. *Abdool Gunee*, 12 W. R., 16. He should confine himself to proving possession, and leave the decree-holder to prove his right to take possession—*Judoonath Singh* vs. *Kalee*, 14 W. R., 358; *Brindabun Chunder* vs. *Tarachand*, 20 W. R., 114, and probably a decree-holder has no right to take possession under a decree which is barred by limitation, but this has not been decided—*Mohesh Chunder* vs. *Chundra Monee*, 9 W. R., 486. It has been held under Act VIII, 1859, section 230, that a mortgagee whose bond is registered is entitled to recover possession of the mortgaged land, of which he has been dispossessed under a decree obtained against his mortgagor by another mortgagee whose bond has been subsequently registered, on condition that he satisfies the claim of the decree-holder. Otherwise the defendant is entitled to possession on his satisfying the plaintiff's mortgage claim—*Shiroji Bhikaji* vs. *Navji*, 2 Bom., 219; but a mortgagee cannot dispossess a jotedar in execution-proceedings—*Tarakant Banerjee* vs. *Puddomoney Dassee*, 10 Moore, 485.

Limitation.—The application should be filed within thirty days Act XV, 1877, sched. II, art. 165.

Jurisdiction.—If, while a case under this section is pending, the Court is deprived of jurisdiction, through the land which is the subject-matter of the suit being transferred to another district, the case should not be dismissed, but the record ought to be transferred to the other district—*Kalee Doss* vs. *Huronath*, 3 W. R., 5.

Withdrawal.—A claim made under section 230, Act VIII, 1859, was registered, but withdrawn with the permission of the Court to bring a fresh suit: *Held*, that the plaintiff was entitled to bring a fresh suit within the general rules of limitation—*Subbaramien* vs. *Ponnusawmy Chetty*, 5 Mad., 928.

May Institute a Suit.—A regular suit is not barred by art. 11 or art. 13, sched. II of the Limitation Act—*Ayyasami* vs. *Samiya*, I. L. R., 8 Mad., 82; approved in *Narasimma* vs. *Appalacharlu*, I. L. R., 12 Mad., 294; but such a suit will not lie in a *Mamlatdar's* Court in Bombay—*Gulabhai* vs. *Jinabhai*, I. L. R., 13 Bom., 213. As to mis-joinder in such as suit, see *Ram Narain* vs. *Annoda*, I. L. R., 14 Cal., 681.

Transfer of property by judgment-debtor after institution of suit.

333. Nothing in section 331 or 332 applies to a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree is made.

Act VIII of 1859, section 231. This section applies to H. C. and P. S. C. C., so far as it relates to moveable property.

Death of Judgment-Debtor.—If, the order for possession is made before the death of the judgment-debtor, possession given after his death is good—*Biyyakka* vs. *Fakira*, I. L. R., 12 Mad., 211.

Resisting or obstructing purchaser in obtaining possession of immoveable property.

334. If the purchaser of any immoveable property sold in execution of a decree be resisted or obstructed by the judgment-debtor or any one on his behalf in obtaining possession of the property, the provisions of this Chapter relating to resistance or obstruction to a decree-holder in obtaining possession of the property adjudged to him shall be applicable.

Act VIII of 1859, section 268. The section applies to H. C.

This section is solely for the benefit of a purchaser at a sale in execution, and only applies to cases in which he has been resisted or obstructed in taking possession by the judgment-debtor or somebody on his behalf—*Onookool Chunder* vs. *Buroda Kant*, 13 W. R., 467; but he is not bound to make any complaint and may make a fresh application for delivery—*Muttra* vs. *Appasami*, I. L. R., 13 Mad., 504.

Limitation.—The application must be made within thirty days from the date of the resistance—Sched. II, art. 167, Act XV, 1877; but if the complaint is in regard to "obstruction" in its proper sense this period of limitation does not apply—*Muttra* vs. *Appasami*, I. L. R., 13 Mad., 504.

"*This Chapter.*"—See *Muttra* vs. *Appasami*, I. L. R., 13 Mad., 504.

Section 244, Ante.—Where the purchaser is decree-holder, section 244 applies—*Muttra* vs. *Appasami*, I. L. R., 13 Mad., 504.

Obstruction by claimant other than judgment-debtor.

335. If the purchaser of any such property is resisted or obstructed by any person other than the judgment-debtor claiming in good faith a right to the present possession thereof, or if, in delivering possession thereof, any such person is dispossessed, the Court, on the complaint of the purchaser of the person so dispossessed, shall enquire into the matter of the resistance, obstruction or dispossession, as the case may be, and pass such order thereon as it thinks fit.

The party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be final.

Act VIII of 1879, section 269. This section applies to H. C. The amendment to section 269, Act VIII of 1859 by the present Code gets rid of the difficulty referred to in the case of *Harasutollah* vs. *Brojo Nath*, 1 C. L. R., 517 I. L. R., 3 Cal., 729.

Object of this Section.—The object of this section seems to be that there should be a power in the Court to prevent anything which would be an offence against the public peace taking place; and where there is obstruction or resistance on an attempt being made to obtain possession—*Sharoda Pershad* vs. *Roy Dhunpul*, 19 W. R., 219. The Court, in order to prevent future litigation, should enquire into the relative *rights* of the parties—*Fidaye Shikdar* vs. *Ozeoddeen*, 7 W. R., 87; *Huro Pershad Ramessur*, 24 W. R., 461, and pass such an order as may be proper in the circumstances of the case. It is not bound to pass any particular order—*Zuhooran* vs. *Mahomed Wajid*, 18 W. R., 87. The losing party may sue to establish his right to, or to the present possession of, the property within one year from the date of the order—*Zuhooran* vs *Mahomed Wajid*, 18 W. R., 87. Sched. II, art. 11 Act XV, 1877; *Protab Chunder* vs. *Brojolall*, B. L. R., (F. B.,) 638; and the plaintiff is entitled to take advantage of section 5 of the same Act, so that the decision in the case of *Kudomessuree Dassee* vs. *Enam Ali*, 20 W. R., 167, declaring that no deduction should be allowed from the period of limitation, because the Courts were closed, supposing it to have been good law, cannot be considered in force now. It will be noticed that the wording of the article in the Limitation Act referred to above is wider than that of this section, which restrains the suit to a suit to establish a right to present possession; and if the latter is followed, it would seem that where there is a subsisting right, which is contravened by the summary order, as if it declared a mortgage void and possession is obtained under it, such right continues to subsist for twelve months so as to ground a suit for possession by the person dispossessed, failing which he cannot sue afterwards on any portion of such right; but that in other cases, where his right is consistent with the order and the possession, he is not forced to bring an action until some present relief becomes legally claimable—*Rangoo Vithal* vs. *Rikhiradas*, 11 Bom., 174.

A purchaser at a Court's sale of the interest of one member of an undivided Hindu family ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one coparcener only—*Kallapa* vs. *Venkatesh*, I. L. R., 2 Bom., 676 but only in joint possession with the others—*Dugappa* vs. *Venkatramnaya*, I. L. R., 5 Bom., 493; *Patil Hari* vs. *Hakamchand*, I. L. R., 10 Bom., 363; but see *Balaji* vs. *Ganesh*, I. L. R., 5 Bom., 499.

Does not Apply.—It does not apply to the case of a person who has got possession, but cannot collect his rent afterwards—*Zuhooran* vs. *Mahomed Wajid*, 18 W. R., 87, For if the purchaser has been put in possession peaceably, the Court has nothing more to do in execution—*Sevu* vs. *Muttasami*, I. L. R., 10 Mad., 53.

Revision.—An order under this section is liable to revision under section 622, *post*—*Sheoraj Singh* vs. *Banwari*, I. L. R., 6 Alla., 172; but the order should not be set aside if there has been great delay—*Zuhooran* vs. *Mahomed Wajid*, 18 W. R., 87.

Regular Suit.—The party dispossessed may also bring a regular suit within the ordinary period of limitation—*Protab Chunder* vs. *Brojolall* L. R., (F. B.,) 638, *Sevu* vs. *Muttasami*, I. L. R., 10 Mad., 53.

Remedies.—A purchaser who has been obstructed may claim his right under this section and also bring a regular suit—*Madaree* vs. *Bulloo Kooeree*, 2 Alla., 450; *Seru* vs. *Muthusami*, I. L. R., 10 Mad., 53. So it has been held that where a purchaser has merely obtained formal possession he may, under art. 138, sched. II of Act XV of 1887, sue for possession within twelve years from the date of his vendor's possession—*Joggobundhu* vs. *Purnanund*, I. L. R., 16 Cal., 530. And see *Shama Churn* vs. *Madhub*, I. L. R., 11 Cal., 93. See notes under section 264 and 319, *ante*.

If no Suit is Brought.—If a regular suit is not brought within a year, the order has the force of decree—*Achuta* vs. *Mammaru*, I. L. R., 10 Mad., 357; *Krishnaji* vs. *Vithal*, I. L. R., 12 Bom., 625.

Limitation to Apply.—Thirty days from the date of the resistance or obstruction—Act XV of 1877, sched. II, art. 167. See as to the case of a minor—*Vinay Khavamrit* vs. *Sabrao*, I. L. R., 11 Bom., 473. As to the limitation when the order was passed under section 269, Act VIII of 1869, see *Venkatachala* vs. *Appathorai*, I. L. R., 8 Mad., 134.

Stamp.—The stamp on a suit brought under the last clause is only ten rupees, even though possession may be asked for—*Dhodo* vs. *Govind*, I. L. R., 9 Bom., 20.

Against Whom an Order has been Passed.—This section contemplates an order against one party or the other, and if the application is withdrawn, an order allowing the withdrawal is not an order under this section—*Bhilha* vs. *Sakarlal*, I. L. R., 5 Bom., 440.

I.—Of Arrest and Imprisonment.

Place of judgment-debtor's imprisonment.

336. A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the Court, and his imprisonment may be in the civil jail of the district in which the Court ordering the imprisonment is situate, or, when such jail does not afford suitable accommodation, in any other place which the Local Government may appoint for the confinement of persons ordered by the Courts of such district to be imprisoned.

Proviso.

Provided as follows :—

(*a*) for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset of before sunrise, and no outer door of a dwelling-house shall be broken open ; but, when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may unfasten and open the door of any room in which he has reason to believe the judgment-debtor is to be found : provided that, if the room be in the actual occupancy of a woman who is not the judgment-debtor, and who according to the customs of the country does not appear in public, the officer shall give notice to her that she is at liberty to withdraw ; and after allowing a reasonable time for her to withdraw, and giving her every reasonable facility for withdrawing, he may enter such room for the purpose of making the arrest :

(*b*) when the decree in execution of which a judgment-debtor is arrested is a decree for money and the judgment-debtor pays the amount of the decree and the costs of thee arrest to the officer arresting him, such officer shall at once release him.

The Local Government may, by notification published in the official Gazette, direct that whenever a judgment-debtor is arrested in execution of a decree for money and brought before the Court under this section, the Court shall inform him that he may apply under Chapter XX to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of his application and if he places all his property in possession of a receiver appointed by the Court.

If after such publication the judgment-debtor express his intention so to apply, and if he furnish sufficient security that he will appear when called upon, and that he will within one month apply under section 344 to be declared an insolvent, the Court shall release him from arrest:

A Small Cause Court debtor can apply to become an insolvent—*Syed Moidin* vs. *Sandaramurthia*, I. L. R., 2 Mad.

But, if he fails so to apply, the Court may either direct the security to be realised or commit him to jail in execution of the decree.

In the case of a surety such security may be realized in manner provided by section 253.

This section applies to H. C. and P. S. C. C.

Chapter XX.—This chapter does not now apply to Courts within the towns of Calcutta, Bombay or Madras—Section 360A, *infra*.

Shall be Discharged.—A person arrested and brought up before the Court should be discharged on giving security and stating his intention to file a schedule—*Ex-parte Pinsent*, I. L. R., 8 Mad., 276; *In re Hastie*, I. L. R., 11 Cal., 451; see note under section 349, *post*, but if he has been sent to prison, he can only be released under section 341, *post*—*In re Quarme*, I. L. R., 8 Mad., 503. See section 337A, *infra*.

Liability to Arrest.—Persons exempt from personal appearance in Court under sections 640, 641, whether male or female, are subject to section 245A, liable to arrest in execution (section 640)—*Maharani of Burdwan* vs. *Barada Sundari*, 1 B. L. R., (F. B.,) 31. An arrest under civil process of a Mofussil Court on Sunday is legal—4 Mad., xii.

Illegal Arrest.—If a person without jurisdiction is illegally brought within it and arrested, the arrest is illegal, and this extends to all detainers in the Sheriff's hands at the time—*The Queen* vs. *Shearwood*, 2 Tay. and Bell, 71. See also note under section 337, *post*.

As to liability for negligence of the officer arresting the judgment-debtor, see *Kasturchand* vs. *Ranji Sadashiv*, I. L R., 4 Bom., 65; or for not taking a proper surety—*Nago Mahadeo* vs. *Narayan*, I. L. R., 4 Bom., 465. As to when damages may be recovered for arrest in accordance with a decree, see *Raj Chunder* vs. *Shama Soondari*, I. L. R., 4 Cal., 583.

If the officer arrest, when he is not in possession of the warrant, the arrest is illegal —*Empress* vs. *Amarnath*, I. L. R., 5 Alla., 318.

Insolvent—A person who has taken the benefit of the insolvent sections and who is undischarged is not protected from arrest in execution of a decree for an unscheduled debt merely because his property is in the hands of the receiver—*Panna Lall* vs. *Kanhaiya*, I. L. R., 16 Cal., 85.

Security.—If the debtor files a petition of insolvency under section 344, the surety is released—*Koylash Chunder* vs. *Christo Phoridl*, I. L. R., 15 Cal. 171; *Ramzan* vs. *Gerard*, I. L. R., 13 Cal., 100; and so, if the execution-proceedings are allowed to drop and are struck off—*Lalji* vs. *Odoya*, I. L. R., 14, Cal., 757.

Power to Enter —By section 180 of the Criminal Procedure Code, the Police Officer or other person authorized by warrant to arrest a person may break open any outer door or inner door, or window of any house or place, whether that of the person accused or any other person, in order to execute such warrant if after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance: There is no corresponding section in this Code, and it seems as if the officer in charge of the warrant could not in any case break open an outer door or a window, in order to make an arrest; but if he is able to enter the dwelling-house, he may break into any room, including the zenana, in order to effect the arrest—*Kadumbini* vs. *Koylashkaminee*, I. L. R., 7 Cal., 19.

Warrant for arrest to direct judgment-debtor to be brought up.

337. Every warrant for the arrest of the judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs, if any, to which he is liable, be sooner paid.

Act VIII of 1859, section 222. This section applies to H. C. and S. P. C. C.

For Form of Warrant, see sched. IV, No. 154, *post*. The executing officer is only empowered to arrest the defendant and detain him for such a reasonable time as is sufficient to allow of his being brought before the Court, and having an opportunity of applying for his discharge the detention of a defendant after such reasonable time and without further authotity of law is illegal—*In re Shambhoo Chunder Haldar*, Bourke, 59. So where a Sheriff's officer took a prisoner, in custody under a warrant directed to the Superintendent of the Presidency Jail, to the Alipore Jail, and delivered her there, it was held that she was entitled to her discharge—*Shamsonnessa Begum* vs. *Anne Lore*, I. L. R., 11 Cal., 527.

Proceedings on appearance of judgment-debtor in obedience to notice under section 245B, or after arrest in execution of decree for money.

337A. (1) When a judgment-debtor appears before the Court in obedience to a notice issued under section 245B, or is brought before the Court after being arrested in execution of a decree for money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms, if any, as it thinks fit, make an order disallowing the application for his arrest and imprisonment, or directing his release, as the case may be.

(2) Before making an order under sub-section (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely :—

(*a*) the decree being for a sum for which the judgment-debtor was bound as a trustee or as acting in any other fiduciary capacity to account;

(*b*) the transfer, concealment or removal by the judgment-debtor of any part of his property, after the date of the institution of the suit in which the decree was made, or the commission by him after that date of any other act of bad faith

in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree ;

(*c*) any undue or unreasonable preference given by the judgment-debtor to any of his other creditors ;

(*d*) his refusal or neglect to pay the amount of the decree or some part thereof when he has or since the date of the decree has had the means of paying it ;

(*e*) the likelihood of his absconding or leaving the jurisdiction of the Court with the object or effect mentioned in clause (*b*) of this sub-section.

(3) While any of the matters mentioned in sub-section (2) are being considered, the Court may in its discretion order the judgment-debtor to be imprisoned, or leave him in the custody of an officer of the Court, or release him on his furnishing sufficient security for his appearance on the requisition of the Court.

(4) A judgment-debtor released under this section may be re-arrested.

(5) If the Court does not make such an order as is mentioned in sub-section (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to jail.

Act VI of 1888, section 4.

Scales of subsistence-allowances.

338. The Local Government may, from time to time, prescribe scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

This section applies to H. C. and R. S. C. C.

Judgment-debtor's subsistence-money.

339. No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as, having regard to the scales so fixed, the Judge thinks sufficient for the subsistence of the judgment-debtor from his arrest until he can be brought before the Court.

When a judgment-debtor is committed to jail in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the said scales, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

The monthly allowance fixed by the Court shall be supplied by the party on whose application the decree has been executed, by monthly payments in advance before the first day of each month.

The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to jail, and the subsequent payments (if any) shall be made to the officer in charge of the jail.

Act VIII of 1859, section 276. This section applies to H. C. and P. S. C. C.

The first paragraph of this section is new, the remainder runs somewhat similar to section 276, Act VIII, with the exception that the words "or of the jail where the defendant may be in custody" have been struck out, and the minimum rate of four annas a day has been omitted, so as to avoid the points raised in *Aga Ali Khan* vs. *Joydoyal Pershad*, Bourke, 52; *Khan Spyer* vs. *Johan Janssen*, Bourke, 2. The payment of subsistence-money must be in advance—*In re Konoy Lall Doss*, Bourke, 51; otherwise the arrest or commitment is illegal, and it is for the officer of the Court and not the prisoner to see that the money is paid—*In the matter of Julius Thomson*, Bourke, 421.

On the 30th of September the creditor paid subsistence-money for 30 days, and the jailor had then a balance of four annas over from the subsistence-money for September: *Held*, a sufficient compliance with the terms of this section, as the amount paid was sufficient for the whole of October—*Haladhar Dey* vs. *Ambica Churn*, 5 B. L. R., App., 80; but where a prisoner was arrested on the 4th of August, and committed to prison on the evening of the same day, and only 27 days' subsistence-money was paid in, it was held that the provisions of this section had not been complied with, although a sum making the amount sufficient for 28 days, was deposited next day—*Dutt* vs. *Cornelis*, 5 B. L. R., App., 79.

Under the present section an order for subsistence-allowance appears to be necessary —See *Aga Ali Khan* vs. *Joydoyal Pershad*, Bourke, 52; *In re Shambhoo Chunder Haldar*, Bourke, 59. Every judicial officer under whose orders any civil prisoner is detained in jail shall, if the prescribed instalment of monthly allowance has not been deposited on the last day of the month, forthwith transmit an order to the officer in charge of the jail for such prisoner's release—Cal. Civ. O., No. 2, 1878.

Subsistence-money to be costs in suit.

340. Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in jail shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in jail or arrested in account of any sum so disbursed.

Act VIII of 1859, section 279. This section applies to H. C. and P. S. C. C.

Release of judgment-debtor.

341. The judgment-debtor shall be discharged from jail—

(*a*) on the amount mentioned in the warrant of committal being paid to the officer in charge of the jail; or

(*b*) on the decree being otherwise fully satisfied; or

(*c*) at the request of the person on whose application he has been imprisoned; or

(*d*) on such person omitting to pay the allowance as hereinbefore directed; or

(*e* if the judgment-debtor be declared an insolvent as hereinafter provided; or

(*f*) when the term of his imprisonment, as limited by section 342, is fulfilled :

Provided that, in the second, third and fifth cases mentioned in this section, the judgment-debtor shall not be discharged without the order of the Court.

A judgment-debtor discharged under this section is not thereby discharged from his debt ; but he cannot be re-arrested under the decree in execution of which he was imprisoned.

Act VIII of 1859, section 278—*In the matter of Dwarkalall Mitter*, 1 Bourke, 109. This section applies to H. C. and P. S. C. C.

(*c*) See *Appiah Chetty* vs. *Chengadoo*, 4 Mad., 76.

The Code preserves a distinction between arrest and confinement in jail; and immunity from further process is only obtained by actual confinement—*Chengalraya Chetti* vs. *Subbiah*, 6 Mad., 84 ; *In the matter of Dwarkalall Mitter*, 1 Bourke, 109 ; *Subba* vs. *Venkata*, I. L. R., 8 Mad., 21 ; or if the discharge takes place after the warrant of committal has been made out—*Timapa* vs. *Maneshvar*, I. L. R., 9 Bom., 181 ; see also section 337A, *ante* ; but it is not within the power of a Judge to re-arrest a defendant without any petition or motion on behalf of the judgment-creditors to that effect—*Shib Ram* vs. *Ruhumutoollah*, 15 W. R., 68.

The judgment-debtor was arrested in execution of decree and committed to prison. He entered into a compromise with the decree-holder for the adjustment of the decree, and thereupon the decree-holder, without certifying the terms of such adjustment to the Court, petitioned for the discharge of the debtor, who was accordingly released. Subsequently the decree-holder again applied for execution of his decree. He was met by the objection that an adjustment had taken place. The matter was not made the subject of inquiry, because it was a proceeding taken out of Court. The High Court, however, held that the decree-holder was bound to state why he applied to have the debtor discharged, and that if no adequate reason were shown that he must be taken to have had his decree satisfied. The case was accordingly remanded to give the decree-holder an opportunity of stating this—*Chango* vs. *Kaluram*, 4 Bom., 121.

The property of the debtor remains liable to attachment and sale—*Janoki Singh Roy* vs. *Kaloo Mundul*, B. L. R. (F. B.), 888.

Writ of Habeas Corpus—A Court will release a defendant when the jailor holds no warrant—*In the matter of Shah Sahib*, 1 Ind. Jur., N. S., 19 ; but not if the warrant is only informal—*In re Bholanath Maley*, Bourke, 96. As to the effect of a return, on a warrant of the Small Cause Court in Calcutta, see *In the matter of Omirtc Lall Dey*, I. L. R., 1 Cal., 78 ; *In the matter of Gunesh Sundari Debi*, 5 B. L. R., 418 ; *In re Soorendro Nath*, I. L. R., 5 Cal., 106.

Instalments—Where a decree is payable in instalments, the debtor cannot be imprisoned for default in the payment of each instalment—*Damodar* vs. *Malhari*, I. L. R., 7 Bom., 106.

Limitation.—An application to arrest a debtor in contravention of this section does not give a starting point for limitation under clause 179 (4) schedule ii of the Limitation Act—*Chattar* vs. *Newal Singh*, I. L. R., 12 Alla., 64.

342. No person shall be imprisoned in execution of a decree for a longer period than six months ;

Imprisonment not to exceed six months.

or for a longer period than six weeks if the decree be for the payment of a sum of money not exceeding fifty rupees.

When not to exceed six weeks.

Act VIII of 1859, section 278. This section applies to H. C. and P. S. C. C.

Where a person is imprisoned under section 481, *post*, imprisonment suffered after decree must be taken into consideration in calculating the six months—*Ghanashamdas* vs. *Johari Mull*, I. L. R., 7 Bom., 481.

On the expiration of the period, the prisoner is entitled to his discharge, whether the imprisonment has been continuous or only at intervals—*Khoda Buksh* vs. *Sukroolah*, 5 Alla., 220. The imprisonment is not a satisfaction of the decree, and the debtor can

be adjudicated an insolvent for it—*In the matter of Rughubhai Ram Chandra*, 6 Bom., 86; *Janoki Singh Roy* vs. *Kaloo Mundul*, B. L. R., (F. B.), 888.

Contempt.—This section and section 341, *ante*, do not apply to cases of imprisonment for contempt of Court—*Martin* vs. *Lawrence*, I. L. R., 4 Cal., 655.

Period.—This section does not empower a Judge to fix a term of imprisonment at his discretion within the maximum—*Subud* vs. *Singi*, I. L. R., 13 Mad., 141.
See note under section 481, *post*.

Endorsement on warrant.

343. The officer entrusted with the execution of the warrant shall endorse thereupon the day on, and the manner in, which it was executed, and, if the latest day specified in the warrant for the return thereof has been exceeded, the reason of the delay, or if it was not executed, the reason why it was not executed, and shall return the warrant with such endorsement to the Court.

If the endorsement is to the effect that such officer is unable to execute the warrant, the Court shall examine him on oath touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

Act VIII of 1859, section 272. This section applies to H. C. and P. S. C. C.
The nazir can delegate the execution to a subordinate officer by endorsing his name on the warrant. If the endorsement is irregular it does not invalidate the arrest—*Abdul Karim* vs. *Bullen*, I. L. R., 6 Alla., 385.

CHAPTER XX.

OF INSOLVENT JUDGMENT-DEBTORS.

This Chapter does not apply to debtors on the Original Side of the High Court, section 360A, *infra*.

Power to apply for declaration of insolvency.

344. Any judgment-debtor arrested or imprisoned in execution of a decree for money, or against whose property an order of attachment has been made in execution of such a decree, may apply in writing to be declared an insolvent.

Any holder of a decree for money may apply in writing that the judgment-debtor may be declared an insolvent.

Every such application shall be made to the District Court within the local limits of whose jurisdiction the judgment-debtor resides or is in custody.

Act VIII of 1859, section 273.

Execution.—Where execution has been obtained *ex-parte*, the order for execution is not *res judicata* as to the existence of a decree—*Ishwardass* vs. *Dosibai*, I. L. R., 7 Bom., 316.

District Court.—Formerly the application must always have been made to the District Court—*Purbhudas* vs. *Chugun*, I. L. R., 8 Bom., 196; *Gunjadhur* vs. *Datto*, I. L. R., 9 Bom., 368; unless the debtor was under arrest, when the application might have been made to a Court invested with powers under section 360, *post*—*Narasayya* vs. *Narasamma*, I. L. R., 7 Mad., 511; and this is still the law—*Joynarayan* vs. *Mudhoo*,

I. L. R., 16 Cal., 13. Where an application was made eleven days before the applicant's property was attached, and after the attachment a creditor objected that the Court had no jurisdiction, it was held that such an objection should be disregarded—*Makhan Lal* vs. *Gulzari*, I.L. R., 6 All., 289. See, however, *Gungadhur* vs. *Datto*, I.L. R., 9 Bom., 368.

The Deputy Commissioner of Akyab has power to entertain applications under this section—*In the matter of Abdool Hameed*, I. L. R., 4 Cal., 94; but not the Deputy Commissioner of Chota Nagpore—*Joynarayan* vs. *Mudhoo*, I. L. R., 16 Cal., 13.

Persons Liable.—This section applies to those defendants only—*In the matter of Benarussee Dutt*, Cor., 123—who have been arrested or imprisoned—*Smith* vs. *Boggs*, 5 B. L. R., App., 21; *In re Eduljee Rutonjee*, 10 B. L. R., App., 27, or whose property has been attached under a money-decree, and who have not filed a petition of insolvency—*Kristo Lal Gossain* vs. *Joy Gopal Bysak*, 21 W. R., 185, and have themselves petitioned the Court—*Kheta Mal* vs. *Chuni Lal*, I. L. R., 2 Alla., 173, 179; *Sheo Prasad* vs. *Miller*, I. L. R., 2 Alla., 474, p. 479. It does not apply to cases of insolvency, where the debtor's property has vested in the Official Assignee—*Kissoree Mohun Chatterjee* vs. *Kanny Lal Dutt*, 1 Ind. Jur., N. S., 247. See, however, *In re Hastie*, I. L. R., 11 Cal., 451.

Small Cause Court.—This Chapter applies to proceedings in Mofussil Small Cause Courts—*Lallu Ganesh* vs. *Ranchod*, I. L. R., 2 Bom., 641; but not to a Collector acting under Act VII (B. C.) of 1868—*In the matter of Bodru Rahman*, 3 C. L. R., 508.

A defendant who was brought up under arrest in execution of a decree before a Small Cause Court presented an application under section 273, Act VIII, 1859, that he has only landed property, and this he was willing to place at the disposal of the Court. It was held that the plaintiff should be called upon to show cause why he should not proceed against that immoveable property as provided by Act XXIII of 1861, section 8, that the fact that it was necessary to proceed by means of the process of another Court made no material difference: and that though the strict terms of section 273 could not be applied with effect to a proceeding in a Court of Small Causes, they were applicable so as to give full effect to what was the purpose intended by the Legislature, *viz.*, that the property described in the application should appear to be disposable in execution of the decree—*Shaw* vs. *Subramier*, 5 Mad., 108; and see *Komarasami* vs. *Govindu*, I. L. R., 11 Mad., 136.

Contents of application.

345. The application, when made by the judgment-debtor, shall set forth—

(*a*) the fact of his arrest or imprisonment, or that an order for the attachment of his property has been made, the Court by whose order he was arrested or imprisoned, or by which the order of attachment was made, and, where he has been arrested or imprisoned, the place in which he is in custody;

(*b*) the amount, kind and particulars of his property, and the value of any such property not consisting of money;

(*c*) the place or places in which such property is to be found;

[If the application for discharge does not state the place in which the property may be found, it must be refused—*Watkins* vs. *Rajah Roheenee Dullub*, 10 B. L. R., App., 11.]

(*d*) his willingness to put it at the disposal of the Court;

(*e*) the amount and particulars of all pecuniary claims against him; and

(*f*) the names and residences of his creditors, so far as they are known to or can be ascertained by him.

The application, when made by the holder of a decree for money, shall set forth the date of the decree, the Court by which it was passed, the amount remaining due thereunder,

and the place where the judgment-debtor resides or is in custody.

Act VIII of 1859, section 273.

Subscription and verification of application.

346. The application shall be signed and verified by the applicant in manner hereinbefore prescribed for signing and verifying plaints.

Act VIII of 1859, sections 273, 280.

Service of copy of application and notice.

347. The Court shall fix a day for hearing the application, and shall cause a copy thereof, with a notice in writing of the time and place at which it will be heard, to be stuck up in Court and served at the applicant's expense—

where the applicant is the judgment-debtor—on the holder of the decree in execution of which he was arrested or imprisoned or the order of attachment was made, or on the pleader of such decree-holder, and on the other creditors (if any) mentioned in the application:

where the applicant is the decree-holder—on the judgment-debtor or his pleader.

The Court may, if it thinks fit, publish at the applicant's expense the application in such official Gazettes and public newspapers as it thinks fit.

Where the applicant is the judgment-debtor, the Court may exempt him from any payments under this section if satisfied that he is unable to make them.

Act VIII of 1859, section 281; Act XXIII of 1861, section 8.
Notice.—Notice is essential—*Komarasami* vs. *Govindu*, I. L. R., 11 Mad., 136.

Power to serve other creditors.

348. The Court may also, if it thinks fit, cause a like copy and notice to be served on any other person alleging himself to be a creditor of the applicant and applying for leave to be heard on the application.

Powers of Court as to judgment-debtor under arrest.

349. Where the judgment-debtor is in custody under the foregoing provisions of this Code the Court may, pending the hearing under section 350, order him to be immediately committed to jail, or leave him in the custody of the officer to whom the service of the warrant was entrusted, or release him on his furnishing sufficient security that he will appear when called upon.

Act XXIII of 1861, section 8.

The words "under arrest" in this section as it stood formerly have been repealed, and the words "in custody" to "Code" inclusive inserted by Act VII of 1888, section 31.

In Custody.—The words "under arrest" mean "under detention" or "detained in custody," and any person, who, though arrested, has not been committed to jail, may apply to be declared an insolvent, and the Court may, pending the application, release him on giving security for his appearance—*Mahomed Husein* vs. *Radhi*, I. L. R., 12 Bom., 46, dissenting from—*In re Hastie*, I. L. R., 11 Cal., 451; see also *Ex-parte Ponsent*, I. L. R., 8 Mad., 276. But this section does not apply if the debtor is in jail, he can then only be released under section 341, *ante*—*In re Quarme*, I. L. R., 8 Mad., 503. See note under section 336, *ante*.

Security.—A security-bond given under this section cannot be enforced summarily —*Moidin* vs. *Chandu*, I. L. R., 7 Mad., 273.

Procedure at hearing.

350. On the day so fixed, or on any subsequent day to which the Court may adjourn the hearing, the Court shall examine the judgment-debtor, in the presence of the persons on whom such notice has been served or their pleaders, as to his then circumstances and as to his future means of payment, and shall hear the said decree-holder, the other creditors mentioned in the application and the other persons (if any) alleging themselves to be creditors, in opposition to the judgment-debtor's discharge; and may, if it thinks fit, grant time to the said decree-holder and other creditors or persons to adduce evidence, showing that the judgment-debtor is not entitled to be declared an insolvent.

Act VIII of 1859, section 281; Act XXIII of 1861, section 8.

The judgment-creditor does not, by making a verified application, throw the onus upon the judgment-debtor of proving the existence of circumstance which shows that he is not entitled to be declared an insolvent. It is only after the Court is satisfied that the allegations made by the debtor in his petition and examination are true that the creditors should be called on to show cause—*Gladstone, Wyllie & Co.* vs. *Woomesh Chunder*, 25 W. R., 95; *Abdool Rahman* vs. *Abdool Sobhan*, 12 W. R., 125; *Seton* vs. *Bijohn* 17 W. R., 165; S. B. L. R., 255. As to the amount of evidence necessary in cases in which the creditor does not *produce* evidence, see *Abdool Settar* vs. *Makhum Kooer*, 2 W. R., 182.

Where the prisoner is examined under this section on behalf of the decree-holder any fee, if demandable at all, is demandable from the creditor—*Edmond* vs. *Niersis*, 16 W. R., 84.

Section 359.—After the hearing under this section has taken place, the Court can at the instance of a creditor take action under section 359, *post*—*Kadir Baksh* vs. *Bhawani*, I. L. R., 14 Alla., 145.

Declaration of insolvency and appointment of Receiver.

351. If the Court is satisfied—

(*a*) that the statements in the application are substantially true;

(*b*) that the judgment-debtor has not, with intent to defraud his creditors, concealed, transferred or removed any part of his property since the institution of the suit in which was passed the decree in execution of which he was arrested or imprisoned, or the order of attachment was made, or at any subsequent time;

(*c*) that he has not, knowing himself to be unable to pay his debts in full, recklessly contracted debts or given an unfair

preference to any of his creditors by any payment or disposition of his property;

(*d*) that he has not committed any other act of bad faith regarding the matter of the application,

the Court may declare him to be an insolvent, and may also, if it thinks fit, make an order appointing a Receiver of his property, or if it does not appoint such Receiver, may discharge the insolvent.

If the Court is not so satisfied, it shall make an order rejecting the application.

Act XXIII of 1861, section 8; Act VIII of 1859, section 281.

Secured Creditors.—A declaration of insolvency does not get rid of a mortgage—*Shridhar Narayan* vs. *Atmaram*, I. L.R., 7 Bom., p. 466; nor does a sale by the Receiver—*Shridhar Narayan* vs. *Kristnaji*, I. L. R., 12 Bom., 272. An applicant who at his own request was declared an insolvent; but nothing further was done, and no Receiver was appointed as he had no property.

Suit by Creditor.—Subsequently one of his scheduled creditors sued him, obtained a decree and attached the salary he was earning: *Held*, his insolvency was not a bar to the execution-proceedings—*Badal* vs. *Birch*, I. L. R., 15 Cal., 763; but see *Gaur* vs. *Shankar*, I. L. R., 14 Alla., 358.

Burden of Proof.—The burden of proof lies on the debtor. He must bring his case within the section—*Mumtaz Hossein* vs. *Brij Mohun Thakoor*, I. L. R., 4 Cal., 888; *Nubbi Buksh* vs. *Chasni*, I. L. R., 6 Cal., 168; *Bavachi* vs. *Leslie*, I. L. R., 2 Mad., 219. A person seeking the assistance of the Court must make a full disclosure. If a *primâ facie* case is made out that the applicant has not fully disclosed his property, but has wilfully concealed it in part, he is bound, as having the best knowledge of the circumstances, to rebut that evidence on oath—*Gunga Churn* vs. *Kulinga*, 12 W. R., 422. If a debtor is found not to have entered in his list property in his possession he cannot be discharged, but must be dealt with under section 359, *post*—*Gunga Gobind* vs. *Bonomales*—14 W. R., 54.

The applicant should place his stipend or annuity at the disposal of the Court—*Asudut Dowla* vs. *Haminsud Dowla*, 15 W. R., 204, though apparently he will not be refused his discharge solely for not doing so, if he is without present means of payment and has given every facility in his power to his creditors to obtain his existing property—*Coombe* vs. *Caw*, 13 B. L. R., 268; *Chyet Ram* vs. *Ram Chunder Dutt*, Bourko, 101.

Paragraph (a.)—The inaccuracies, if any, must be intentional—*Karim Bakhsh* vs. *Misri Lal*, I. L. R., 7 Alla., 295.

Paragraphs (b), (c), (d).—If the statements in the application are substantially true, and the judgment-debtor has not brought himself within clauses (*b*), (*c*), or (*d*) of this section, the Court is bound to grant the application—*Salamat Ali* vs. *Minahan*, I. L. R., 4 Alla., 337. Thus the fact that the scheduled assets exceed his liabilities is not a good ground for refusing—*Jowalla Nath* vs. *Parbatty*, I. L. R., 14 Cal., 691. To bring the case within clause (*b*) there must have been an active concealment, &c., since the date of the decree—*Sukrit Narain* vs. *Raghunath*, I. L. R., 7 Alla., 445.

Bad Faith.—A repaired B's ship on the express representation that the repairs should be paid for by a letter of credit which the owners had sent for that purpose. B applied the funds to the payment of other creditors. H sued him and obtained a decree, in execution of which B was imprisoned. It was held that B had been guilty of bad faith and of giving undue preference—*Passmore* vs. *Calcutta Docking Co.*, Bourke, 74; subsequently, bad faith, under section 275, Act VIII, 1859, was limited to bad faith in respect of the application, and not to the act committed in incurring the liability—*Butler* vs. *Lloyd*, 12 B. L. R., App. 12; and where the original debt was converted into a judgment-debt, the Judge should not go behind the decree to see in what way the original debt had been incurred—*Salamat Ali* vs. *Minahan*, I. L. R., 4 Alla., 337. On the other hand, it has been held that a Judge is, under this section, entitled to enter into all acts of bad faith towards creditors at the period at which the applicant was contemplating insolvency—*Bavachi* vs. *Leslie*, I, L. R., 2 Mad., 219.

Discharge.—Where a judgment-debtor is declared to be discharged under this section, but the procedure prescribed in it has not been followed, the order must be

treated as a nullity, and will not bar a subsequent application to arrest him—*Luchmee Narain* vs. *Bheerio Pershad*, 2 Agra, Mis., 4; and see *Arunachala* vs. *Ayyavu*, I. L. R., 7 Mad., 318.

Appeal—An appeal lies when the order is passed under this section—*Komarasami* vs. *Govindu*, I. L. R, Mad., 136; or if purporting to be passed under it is without jurisdiction—*Sethu* vs. *Venkatarama*, I. L. R., 9 Mad., 112. The last paragraph is new; but before it, an order rejecting an application was an order under the section—*Nubbi Baksh* vs. *Chami*, I. L. R., 6 Cal., 168; *Bavachi* vs. *Leslie*, I. L. R., 2 Mad., 219.

Abatement of.—See *Rameshar Singh* vs. *Bisheshar*, I. L. R., 7 Alla., 734.

Creditors to prove their debts.

352. The creditors mentioned in the application, and the other persons (if any) alleging themselves to be creditors of the insolvent, shall then produce evidence of the amount and particulars of their respective pecuniary claims against him; and the Court shall by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts; and shall frame a schedule of such persons and debts; and the declaration under section 351 shall be deemed to be a decree in favour of each of the said creditors for their said respective debts.

Schedule to be framed.

A copy of every such schedule shall be stuck up in the Court-house.

Nothing in this section shall be deemed to entitle a partner in an insolvent-firm or, when he has died before the insolvency, his legal representative, to prove in competition with the creditors of the firm.

Shall Then.—See *Madho Prasad* vs. *Bhola Nath*, I. L R., 5 Alla., 268. A creditor may apply so long as there are assets undistributed—*Lakshmanan* vs. *Muttia*, I. L. Rr, 11 Mad., 1.

Produce Evidence — *Quære*, if a creditor does not appear can the debtor prove—*Haro Pria* vs. *Shama Charn*, I. L. R., 16 Cal., 592.

Decree.—Unless the procedure laid down in this section is followed, and a schedule is framed, a decision under section 351 is not a decree—*Arunachala* vs. *Ayyavu*, I. L. R., 7 Mad., 318.

Unscheduled Debtor.—A was declared an insolvent under section 351, and creditors directed to appear. None did, so no schedule was prepared, and the case was struck off: *Held*, any creditor could appear within ninety days from the date of the order under section 351, *ante*—*Madho Prasad* vs. *Bhola Nath*, I. L. R., 5 Alla., 268; but not later—*Parshadi Lal* vs. *Chunni*, I. L. R., 6 Alla., 142. If a creditor does not come in and his name is not entered in the schedule he can execute his decree against the property of the insolvent after his discharge *Haro Pria* vs. *Shama Churn*, I. L. R., 16 Cal., 592. See note under section 355, *post*.

If a creditor examines the applicant, the former must pay the costs of recording the evidence in the case—*Edmond* vs. *Niersis*, 10 W. R, 84.

Insolvent Firm—The general rule is, that where there is a bankruptcy of a firm and also the bankruptcy of an individual member of the firm, that the estate of the firm and the separte estate of the individual are kept distinct from each other, and a bankrupt firm cannot prove against the separate estate in competition with the creditors of that separate estate; nor can the creditors of a separate partner prove against the joint estate in competition with the creditors of that estate; but if an individual partner fraudulently as to his partners, applies the partnership funds to his own use, the creditors of the firm are entitled to prove against the separate estate of the individual partner—*Read* vs. *Bailey*, 3 App. Cas., 94.

Section 283.—The fact of a debtor entering a debt in the schedule, does not prevent his creditor suing to have it declared that property in the hands of a third party is liable to be sold in execution—*Abdul* vs. *Behari*, I. L. R., 10 Alla., 194.

353. Any creditor of the insolvent who is not mentioned in such schedule may apply to the Court for permission to produce evidence of the amount and particulars of his pecuniary claims against the insolvent, and, in case the applicant proves himself to be a creditor of the insolvent, for an order directing his name to be inserted in the schedule as a creditor for the debt so proved.

Application by unscheduled creditors.

Any creditor mentioned in the schedule may apply to the Court for an order altering the schedule so far as regards the amount, nature or particulars of his own debt, or to strike out the name of another creditor, or to alter the schedule so far as regards the amount, nature or particulars of the debt of another creditor.

In the case of any application under this section, the Court, after causing such notices as it thinks fit to be served, at the applicant's expense, on the insolvent and the other creditors, and hearing their objections, if any, may comply with or reject the application.

Act XV, 1877, sched. II, art. 174, declares that the period of limitation is ninety days.

354. Every order under section 351 shall be published in the local official Gazette and every order under that section appointing a Receiver shall operate to vest in the Receiver all the insolvent's property (except the particulars specified in the first proviso to section 266), whether set forth in his application or not.

Effect of order appointing Receiver.

The words between "and" and "shall operate" have been inserted by Act VII of 1888, section 31, clause (2).

After-Acquired Property.—See *Kristocomul* vs. *Suresh Chunder*, I. L. R., 8 Cal., 556.

355. The Receiver so appointed shall give such security as the Court may direct and shall possess himself of all such property, except as aforesaid;

Receiver to give security and collect assets.

and on his certifying that the insolvent has placed him in possession thereof, or has done everything in his power for that purpose, the Court may discharge the insolvent upon such conditions (if any) as the Court thinks fit.

Discharge of insolvent.

Act VIII of 1859, section 281; Act XXIII of 1861, section 8.

Discharge the Insolvent — A was declared an insolvent, and notice was given to B, a mortgagee of nine fields. B did not appear. This debt was not scheduled. A Receiver was appointed, who sold one out of the nine fields, and returned the other eight to the insolvent, who was discharged: *Held*, his discharge was no answer to a suit by the mortgagee for possession of the eight fields—*Shridhar Narayan* vs. *Atmaram*, I. L. R., 7 Bom., 455.

Duty of Receiver.

356. The Receiver shall proceed under the direction of the Court—

(*a*) to convert the property into money:

(*b*) to pay thereout debts, fines and penalties (if any) due by the insolvent to Government:

(*c*) to pay the said decree-holder's costs:

(*d*) to discharge, according to their respective priorities, all debts secured by mortgage of the insolvent's property:

(*e*) to distribute the balance among the scheduled creditors rateably according to the amounts of their respective debts and without any preference:

His right to remuneration.

and such Receiver may retain as a remuneration for the performance of his duties a commission, to be fixed by the Court, not exceeding the rate of five per centum upon the amount of the balance so distributed (the amount of the commission so retained being deemed a distribution), and shall deliver the surplus, if any, to the insolvent or his legal representative:

Delivery of surplus.

Provided that, in any local area in which a declaration has been made under section 320 and is in force, no sale of immoveable property paying revenue to Government or held or let for agricultural purposes shall be made by the Receiver; but, after he has sold the other property of the insolvent, the Court shall ascertain, (*a*) the amount required to satisfy the claims of the scheduled creditors after deducting the moneys already received, (*b*) the immoveable property of the insolvent remaining unsold, and (*c*) the incumbrances, if any, existing thereon, and shall forward a statement to the Collector containing the particulars aforesaid; and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by sections 322 to 325, both inclusive, as he thinks fit, and subject to the provisions of those sections so far as they may be applicable; and shall hold at the disposal of the Court all sums that may come to his hands by such exercise.

Convert the Property into Money —When property is mortgaged, the Receiver can only sell the equity of redemption, unless he has paid the mortgage-debt or has the consent of the mortgagee—*Shridhar* vs. *Krishnaji*, I. L. R., 12 Bom., 273.

Commission—A Receiver has a lien for his commission on the assets after payment of the charges specified in clauses (*b*), (*c*), and (*d*)—*Mahadeva* vs. *Kuppusami*, I. L. R., 15 Mad., 233.

Effect of discharge.

357. An insolvent discharged under section 351 or 355 shall not be arrested or imprisoned on account of any of the scheduled debts. But (subject to the provisions of section 358) his property, whether previously or subsequently acquired (except the particulars specified in the first proviso to section 266 and except the property vested in the Receiver), shall, by order of the Court, be liable to attachment and sale until the debts due to the scheduled creditors are satisfied to the extent of one-third, or until the expiry of twelve years from the date of the order of discharge under section 351 or 355.

Act VIII of 1859, section 282.

Arrested or Imprisoned—The protection from arrest is limited to judgment-debts appearing in the schedule—*Panna Lall* vs. *Kanhaiya*, I. L. R., 16 Cal., 85.

Property—The insolvent is not liable to be arrested on account of the scheduled debts, but his property may be attached and sold. See *Janoke Singh Roy* vs. *Kallo Mundul*, B. L. R., (F. B.,) 889; *Venkatakrishna* vs. *Coelho*, I. L. R., 6 Mad., 170. See also *Haro Pria* vs. *Shama Charn*, I. L. R., 16 Cal., 592. If the defendant has not been declared an insolvent, he cannot be discharged under this section, but under section 341.

Declaration that insolvent is discharged from liability.

358. If the aggregate amount of the scheduled debts is two hundred rupees or a less sum, the Court may, and in any case after the scheduled debts have been satisfied to the extent of one-third, or after the expiry of twelve years from the order of discharge, the Court shall declare the insolvent discharged as aforesaid absolved from further liability in respect of such debts.

Act VIII of 1859, section 282.

Consent Order.—Where opposition was withdrawn and petitioner was declared an insolvent by consent of parties, but the opposition was withdrawn on condition that he should pay Rs. 80 per month to a Receiver, it was held he had no claim to be discharged on paying one-third—*Downes* vs. *Richmond*, I. L. R., 5 Alla., 258.

Procedure in case of dishonest applicant.

359. Whenever, at the hearing under section 350, it is proved that the applicant has—

(*a*) been guilty, in his application, of any concealment or of wilfully making any false statement as to the debts due by him, or respecting the property belonging to him, whether in possession or in expectancy, or held for him in trust;

(*b*) fraudulently concealed, transferred or removed any property; or

(*c*) committed any other act of bad faith regarding the matter of the application,

the Court shall, at the instance of any of his creditors, sentence him by order in writing to imprisonment for a term which may extend to one year from the date of committal;

or the Court may, if it think fit, send him to the Magistrate to be dealt with according to law.

Act VIII of 1859, section 281.

(*c*.) **Bad Faith.**—See note on section 351, *ante*.

Procedure—When a Judge proceeds under this section he does not re-try the questions of fact decided by him under section 350, *ante*, but acting on them must deal with the applicant in the manner described in this section—*Kadir Bakhsh* vs. *Bhawani*, I. L. R., 14 Alla., 145.

Investment of other Courts with powers of District Courts.

Transfer of cases.

360. The Local Government may, by notification in the official Gazette, invest any Court other than a District Court with the powers conferred on District Courts by sections 344 to 359 (both inclusive), and the District Judge may transfer to any Court situate in his district and so invested any case instituted under section 344.

A Court so invested may entertain an application under section 344 by any person who has been arrested or imprisoned, or against whose property an order of attachment has been made, in execution of a decree for money passed by that Court.

The second paragraph has been inserted by Act VII of 1888, section 31, clause (3). See the following cases under the old section—*In re Waller*, I. L. R., 6 Mad., 430; see the case of *Sethu* vs. *Venkatrama*, I. L. R., 9 Mad., 112; *Purbhudas* vs. *Chugun*, I. L. R., 8 Bom., 196; *Narrasayya* vs. *Narasimma*, I. L. R., 7 Mad., 510. See section 344, *ante*.

Appeal.—Where a case has been transferred to a Subordinate Judge and he acts under the last paragraph, the appeal lies to the District Judge and not to the High Court —*Sitharama* vs. *Vythilinga*, I. L. R., 12 Mad., 472.

District Court.—The Judicial Commissioner of Chota Nagpur is the District Court for Chota Nagpur, and a Deputy Commissioner cannot act under this section unless the case has been transferred to him—*Joynarayan* vs. *Mudho*, I. L. R., 16 Cal., 13.

Inapplicability of this Chapter to Presidency-towns.

360A. Nothing in this Chapter shall apply to any Court having jurisdiction within the limits of the towns of Calcutta, Madras or Bombay.

This section has been inserted by Act VII of 1888, section 31 (*d*).

PART II.

OF INCIDENTAL PROCEEDINGS.

CHAPTER XXI.

OF THE DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

The provisions of this Chapter apply to appeals, section 582, *post*.

No abatement by party's death, if right to sue survives.

361. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

Illustrations.

(*a*) A covenants with B and C to pay an annuity to B during C's life. B and C sue A to compel payment. B dies before the decree: the right to sue survives to C, and the suit does not abate.

Anderson vs. *Martindale*, 1 East., 497.

(*b*) In the same case, all the parties die before decree. The right to sue survives to the representative of the survivor of B and C, and he may continue the suit against A's representative.

(*c*) A sues B for libel. A dies. The right to sue does not survive, and the suit abates.

(*d*) A, a member of a Hindu joint family under the Mitakshara law, institutes a suit for partition of the family-property. A dies, leaving B, a minor son, his heir. The right to sue survives to B, and the suit does not abate.

Act VIII of 1859, section 99; C. L. P. Act, section 136. This section applies to H. C. and P. S. C. C.

Before Decree. Illus. (a).—After judgment the action does not abate, but the benefit of the judgment goes to the legal representative of the person obtaining it—*Muhammad Husain* vs. *Khushalo*, I. L. R., 9 Alla., 131. See *Davies* vs. *Anderson*, W. N. (84), 94.

Illustration (d).—See the case of *Padarath Singh* vs. *Raja Ram*, I. L. R., 4 Alla., 235.

Cause of Action.—The cause of action means the right to bring the action—*Chandramohan Dutt* vs. *Biswambhur Laha*, 1 B. L. R., 42. See "CAUSE OF ACTION," p. 82, *ante*.

Special Statutes.—By section 37, Act IX, 1872, "promises bind the representatives of the promissors in case of the death of such promissors before performance, unless a contrary intention appears from the contract," and in all such cases the cause of action will survive. By section 268, Act X, 1865, "all demands whatsoever, and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.

Illustrations: (*a*)—A collision takes place on a railway in consequence of some neglect or default of the officials, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without bringing any action. The cause of action does not survive. (*b*) A sues for a divorce. A dies. The cause of action does not survive to his representative."

Plaintiff.—Wherever a breach of contract or a tort has been committed in the lifetime of the deceased, his executor is entitled to maintain an action if it is shown on the face of the proceedings that an injury has accrued to the personal estate—*Twycross* vs. *Grant*, 4 C. P. D., 40; *Benod* vs. *Sharat Chander*, I. L. R., 8 Cal., 845; see also *Pulling* vs. *The Great Eastern Ry. Co.*, 9 Q. B. D., 110; *Hatchard* v. *Mege*, 18 Q. B. D., 771.

A, as reversioner, sued a Hindu widow to set aside some illegal acts done by her. B intervened, and claimed to be the next reversioner. The widow died during the suit: *Held*, the suit abated, and the dispute between A and B must be decided in a new suit—*Ramjun* vs. *Mussammut Lachee*, 1 Agra, 49.

Arbitration.—See *Bowker* v. *Eikens*, 15 C. D., 565.

Defendant Deceased.—The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his estate or moneys. In such cases, whatever the original form of the action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance, in such cases the action, though arising out of a wrongful act, does not die with the person. The property, or the proceeds or value which, in the lifetime of the wrong-doer, would have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrong-doer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby—*Phillips* vs. *Homfray*, 24 C. D., 439, p. 454; and see *Haridas* vs. *Ramdas*, I. L. R., 13 Bom., 677. See also *Peak* vs. *Gurney*, L. R., 6 H. L., 377.

Where one defendant ceased to have any interest in the suit before he died, it was held, that it might proceed against the other defendants, without his representatives—*Moung Khine* vs. *Burn*, 6 W. R., Ref., 2.

Possession of Land.—A suit for possession of land and mesne profits does not abate, because the land has been washed away—*Unno Poorna Debia* vs. *Ram Lochun Ghose*, 5 W. R., 227; or the defendant has died—*Noboo Coomar Ghose* vs. *Rajah Indrodeb*, W R., Mis., 1864, p. 1.

Trusts—The Judicature Rules (order 50, rule 1) declare that "an action shall not become abated by reason of the marriage, death or bankruptcy of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite;*" and it has been held that the words "survive or continue" mean "survive or continue" in some person who is before the Court; and where a sole plaintiff in an action filed a liquidation petition under which a trustee was appointed and the trustee did not appear, the action was struck out of the list of cases—*Eldridge* vs. *Burgess*, 7 C. D., 411; but where two trustees were appointed and one elected to go on, making the other a defendant, the action was allowed to proceed—*Jackson* vs. *North-Eastern Railway Co.*, 5 C. D., 844; and where a sole petitioner died after an order made on the petition, the Court allowed the petition to be continued and carried on by the representatives of the petitioner—*In re Atkin's Trust*, 1 C. D., 82.

Procedure in case of death of one of several plaintiffs or defendants if right to sue survives.

362. If there be more plaintiffs or defendants than one, and any of them dies, and if the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Act VIII of 1859, section 100. This section applies to H. C. and P. S. C. C.

The cause of action means "the right to bring the action." Where A and B sued as joint owners for damages on account of trespass, and B died, the cause of action did not survive to A and the representatives of B, but only to A—*Chandramohun Dutt* vs. *Biswambhur*, 1 B. L. R., 42.

In a suit for possession of timber, one of the defendants who, in pursuance of an agreement, had given possession of the timber to a co-defendant, died. It was held that, as he had ceased to have any interest in the logs before his death, his representatives should not be made parties, and that the suit survived against the other defendants alone —*Moung Khine* vs. *Burn*, 6 W. R., Ref., 2.

363. If there are more plaintiffs than one, and any of them dies, and if the right to sue does not survive to the surviving plaintiff or plaintiffs alone but survives to him or them and the legal representative of the deceased plaintiff jointly, the Court may cause the legal representative, if any, of the deceased plaintiff to be made a party, and shall thereupon cause an entry to that effect to be made on the record and proceed with the suit.

Procedure where one of several plaintiffs dies and right to sue does not survive to surviving plaintiffs alone.

Act VIII of 1859, section 101. This section applies to H. C. and P. S. C. C. It has been substituted by Act VII of 1888, section 32.

It was held that section 363, Act XIV of 1822, did not apply to proceedings in execution of decree—*Golabdass* vs. *Lakshman Narhar*, I. L. R., 3 Bom., 221; *Dulari* vs. *Mohun Singh*, I. L. R., 3 Alla., 759.

364. Repealed by Act VII of 1888, section 32.

365. In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives, apply to the Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall thereupon enter his name and proceed with the suit.

Procedure in case of death of sole, or sole surviving, plaintiff.

Act VIII of 1859, section 102. This section applies to H. C. and P. S. C. C. The last paragraph has been substituted by Act VII of 1888, section 32.

Practice : Decree.—Where a suit is brought against the legal representative of a deceased Hindu for the debts of the latter the Court should give a decree whether they had inherited any property from him or not—*Lallu* vs. *Trithuvan*, I. L. R., 13 Bom., 658, and see note under section 234, *ante*.

Execution—This section does not apply to a suit in which a decree has been made—*Cally Churn Mullick* vs. *Bhugobutty Churn*, 5 C. L. R., 108; nor to proceedings in execution of decree—*Golabdass* vs. *Lakshman Narhar*, I. L. R., 3 Bom., 221; *Dulari* vs. *Mohun Singh*, I. L. R., 3 Alla., 759; *Stowell* vs. *Ajudhia*, I. L. R., 6 Alla., 259; compare *Phillips* vs. *Homfray*, 24 C. D., 439, pp. 442, 450; *Bowker* vs. *Evans*, 15, Q. B. D., 565.

Legal Representative.—An executor under Act V of 1881 is the legal representative of the deceased before probate; but if there are several executors, one of them cannot carry on a case without proving the will—*Moosa* vs. *Essa*, I. L. R., 8 Bom., 241; see *Janaki* vs. *Dhanu*, I. L. R., 14 Mad., 454.

A sued B in consequence of certain malicious and wrongful conduct on the part of B, and got a decree. B appealed, sold to C four annas of property liable to be attached in execution of A's decree, and died: *Held* that C was not his representative to carry on the appeal, since C was in nowise concerned with the original cause of action, and the right of action did not relate to the property he had bought—*Macleod* vs. *Kunhoje*, 9 W. R., 271.

A appealed, gave the property connected with the suit to B by deed of gift and died, B was allowed to carry on the appeal as heir against joint-heirs, but not as donee—*Lutesfoonissa* vs. *Rajcoor*, 8 W. R., 84. See "LEGAL REPRESENTATIVE," section 252, *ante*.

Limitation.—If no application is made within six months by the legal representative of a deceased plaintiff, deceased plaintiff-appellant or defendant appellant, the suit will be considered as having abated. Act VIII of 1888, section 60—*Khettronath* vs. *Gossain Dass*, 11 W. R., 543; but the Court may revive the suit under section 371, *post*—*Bhoyrub Dass* vs. *Doman*, I. L. R., 5 Cal., 139; *Fulvahu* vs. *Goculdas*, I. L. R., 9 Bom., 275. See section 366, *post*.

Abatement where no application by representative of deceased plaintiff.

366. If within the time limited by law no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate, and shall, on the application of the defendant, award to the defendant the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff;

or the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both those purposes.

Explanation—A certificate of heirship, or a certificate to collect debts, does not of itself constitute the person holding it the legal representative of the deceased. But when the person holding any such certificate obtains thereby property belonging to the deceased, he may be treated as a legal representative liable in respect of such property.

Act VIII of 1859, section 102. This section applies to H. C. and P. S. C. C.

This section does not apply to a suit in which a decree has been made—*Cally Churn* vs. *Bhuggobutty*, 4 C. L. R., 108; not to proceedings in execution of decree—*Dulari* vs. *Mohan*, I. L. R., 3 Alla., 759; *Stowell* vs. *Ajudhia*, I. L. R., 6 Alla., 259.

Where a special appellant died after the High Court had referred for trial to the Court below an issue based on objections taken by the respondent under section 348, Act VIII of 1859, it was held that the respondent could not insist that the appeal should proceed—*Jaita* vs. *Babu*, 3 Bom., 81.

An appeal was preferred by B as heir of A, a party to the suit, who had died subsequent to the decision of the Lower Court, and time was given to enable B to prove that he was the legal representative. He did not do so for a long time: *Held*, that the appeal must abate, that the course the appellant should have pursued was to apply to the Court for permission to carry on the appeal, and then the Court would have passed an order to enable him to prove that he represented the deceased (section 367); but instead of doing that he appealed first, and then delayed in proving his heirship—*Kowari* vs. *Lochmun Pershad*, 2 Sev., 892.

Succession Certificates Act.—Section 4 prohibits any Court from passing a decree against a debtor of a deceased person for payment of his debt except on production by the person claiming of a probate or letters of administration (This rule applies to consent decree—*Santaji* vs. *Ravji*, I. L. R., 15 Bom., 105) and is the only limitation to carrying on the proceedings—*Fonegrosa* vs. *Pragji*, I. L. R., 16, Bom., 519. See also *Narayan* vs. *Tatia*, I. L. R., 15 Bom., 580. This does not apply to executions pending when the Act came in—*Rama Rau* vs. *Chella Yamma*, I. R. L., 14 Mad., 458.

Joint Family.—In Bombay a decree was obtained by one of two undivided brothers. He died, and as the debt was joint, it was held that the surviving brother did not require a certificate—*Raghavendra* vs. *Bhima*, I. L. R., 16 Bom., 349.

Plaintiff.—This includes appellant—*Rajmani Dabee* vs. *Chunder Kant*, I. L. R., 8 Cal., 440. See note under section 368, *post*.

If complete legal representation is vested in several persons an application by one is sufficient, and the applicant is entitled to have the names of the others put on the record to have them bound by the decree—*Bhikaji* vs. *Purshotam*, I. L. R., 10 Bom., 220.

Appeal.—No appeal lies from an order passed under the first paragraph of this section directing a suit to abate—*Ahmed Ata* vs. *Mata Badul Lal*, I. L. R., 3 Alla., 844. An appeal does lie and the order is a decree—*Bhikaji* vs. *Purshotam*, I. L. R., 10 Bom., 220.

Limitation.—An application of a defendant, plaintiff-respondent or defendant-respondent under this section must be made within six months from the death of the deceased—Act VII of 1888, section 60.

If application be not made within six months from the death of a sole plaintiff, the suit abates; but, under section 371, *post*, it may be revived on the application of the legal representative within sixty days from the time when the right to apply accrued—See 'LIMITATION,' section 371, *post;* see also for previous practice—*Bhoyrab Doss Johurry* vs. *Doman Thakoor*, 4 C. L. R., 374; *Fulvahu* vs. *Goculdas*, I. L. R., 9 Bom., 275.

Procedure in case of dispute as to representative of deceased plaintiff.

367. If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit.

Act. VIII of 1859, section 103. This section applies to H. C. and P. S. C. C.

When a person claims to represent a deceased decree-holder, and to execute the decree, the application should not be summarily rejected, but the applicant should be called on to prove his right to represent the deceased—*Wooma Churn Mookerjee* vs. *Lakhee Naran Chowdhry*, W. R., Mis., 10.

Quære.—Whether this section refers to applications in execution of decree?—*Abedoonnissa* vs. *Ameroonnissa*, 4 Ind. App., 66, p. 71; and see also *Bishen Dayal* vs. *The Bank of Upper India*, I. L. R., 13 Alla., 290.

A Hindu widow sued to recover possession of her husband's estate and died. Two adverse claimants to the estate appeared, and were made co plaintiffs. It was held that, though the procedure was irregular, the judgment should not be set aside on that ground, as the defendants had raised no objection at the time—*Parbutty* vs. *Higgin*, 17 W. R., 475; and where two persons claimed each to represent the judgment-debtor, it was held that with the consent of the decree-holder both might be placed on the record—*Lakhmibai* vs. *Suntapa*, I. L. R., 13 Bom.,

If a party, in order to prevent a suit abating, treats a person as representative of the deceased and puts his name on the record, and the case is decided in his presence he cannot afterwards urge that the person on the record is not the legal representative—*Alla Hafiz* vs. *Lalun*, 2 Sev., 22.

At or Before the Hearing.—In a suit, the Judge placed two rival claimants on the record, and after hearing in final decree, he decided in favour of one claimant, the order was set aside—*Vithu* vs. *Bhima*, I. L. R., 15 Bom., 145.

Practice.—The application must be made to the Court trying the suit. Thus, a District Judge has no power to act under this section where the cause is before a Subordinate Judge, although the latter may not be in Court on the day of the application—*Bipro Chunder* vs. *Ram Lochun Deb*, W. R., 1864, p. 121.

As to the liability of the legal representative to pay costs, see *Boynton* vs. *Boynton*, 4 App. Cas., 733.

Remedies.—The orders may be set aside on appeal from the decree, even though no ppeal has been perferred from the order—*Her Narain* vs. *Kharag*, I. L. R., 9 Alla., 47, provided the party complaining was a party to the decree—*Sankali* vs. *Murlidhar*, . L. R., 12 Alla., 200; *Vithu* vs. *Bhima*, I. L. R., 15 Bom., 145.

Procedure in case of death of one of several defendants.

368. If there be more defendants than one, and any of of them die before decree and the right to sue does not survive against the surviving defendant or defendants alone,

or of sole, or sole surviving, defendants.

and also in case of the death of a sole defendant, or sole surviving defendant where the right to sue survives,

the plaintiff may make an application to the Court, specifying the name, description and place of abode of any person whom he alleges to be the legal representative of the deceased

defendant, and whom he desires to be made the defendant in his stead.

The Court shall thereupon enter the name of such representative on the record in the place of such defendant,

and shall issue a summons to such representative to appear on a day to be therein mentioned to defend the suit;—

and the case shall thereupon proceed in the same manner as if such representative had orginally been made a defendant and had been a party to the former proceedings in the suit:

provided that the person so made defendant may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative.

When the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period.

The legal representative of a deceased defendant may apply to have himself made a defendant in place of the deceased defendant, and the provisions of this section. so far as they are applicable, shall apply to the application and to the proceedings and consequences ensuing thereon.

Act VIII of 1859, section 104. This section applies to H. C. and P. S. C. C. The last paragraph has been inserted by Act VII of 1888, section 32.

In a suit for dissolution of partnership two of the defendants died. More than a year after their death the plaintiff applied to put the names of their legal representatives on the record: *Held*, the application fell under this section and not under section 372, *post*—*Jumna Dass* vs. *Sorabji*, I. L. R., 16 Bom., 27.

A suit having been dismissed, plaintiff appealed. Defendant died and his death was notified to the Court; but plaintiff did not attempt to make the heirs of the deceased parties, and a decree was given against A's estate: *Held*, the decision must be set aside, and the procedure under this section followed—*Monee Lall* vs. *Fuzul Hossein*, 14 W. R., 337; and where the sole defendant in a suit dies before a decree, a decree passed against him on the supposition that he is alive, cannot be executed—*Roop Narain* vs. *Ramayee*, 3 C. L. R., 192.

The case proceeds as if the representative had originally been made a defendant. Therefore, if plaintiff loses the action after application, he must pay full costs—*Benge* vs. *Swain* 23, L. J., C. P., 182.

For the procedure in England in an administration-suit against an executrix as sole defendant and she dies, see *Cash* vs. *Parker*, 12 C. D., 293.

Appeal.—In case of the death of a respondent, a procedure analogous to that laid down in this section must be followed—*Lakshmabai* vs. *Balkrishna*, I. L. R., 4 Bom., 654; *Raj Mani* vs. *Chandra Kant*, 10 C. L. R., 437; I. L. R., 8 Cal., 440; *Baldeo* vs. *Bismillah*, I. L. R., 9 Alla., 118; overruled in *Debi Din* vs. *Chunna*, I. L. R., 10 Alla., 264; but now see section 582, *post*.

Application.—Before the amendment of this section it was held that the Court could not act under it except upon application of plaintiff or appellant—*Sadhu Saran Singh* vs. *Dwarka Singh*, 12 C. L. R., 45; *Lakshmabai* vs. *Balkrishna*. I. L. R., 4 Bom., 654; otherwise if the case fell within section 372, *post*—*Rajaram Bhagwat* vs. *Jabai*, I. L. R., 8 Bom., 151. And though the Court acting under this section was bound to place on the record the person named by the applicant, yet, acting under section 32, *ante*, it could also add the name of any person, who had a good *primâ facie* claim to be considered the legal representative of the deceased—*Athiappa* vs. *Ayanna*, I. L. R., 8 Mad.,

300; *Raynor* vs. *Mussooris Bank*, I. L. R., 7 Alla., 681; *Oriental Bank* vs. *Charriol*, I. L. R., 12 Cal., 642, not so—*Muhammad* vs. *Khushalo*, I. L. R., 10 Alla., 223.

Legal Representative.—The section as amended allows the legal representative to apply, and so the unsettled question, namely, the applicability of section 32, *ante*, has now little practical value. If there are two claimants, the Court should decide between them and not put both on the record—*Muhammad* vs. *Khushalo*, I. L. R., 10 Alla., 223.

Execution.—This section does not apply to the case of the death of a judgment-debtor in execution—*Stowell* vs. *Ajudhia*, I. L. R., 6 Alla., 255; approved in *Sheo Prasad* vs. *Hira*, I. L. R., 12 Alla., 440, but see *Biyyaka* vs. *Fakira*, I. L. R., 12 Mad., 211; *Krishnayya* vs. *Unnissa*, I. L. R, 15 Mad., 399.

Forma Pauperis.—This section does not apply to investigations under section 407, *post*—*Janardan* vs. *Anant*, I. L. R., 7 Bom., 373.

Limitation.—Applications under this section to have the legal representative of a defendant, plaintiff-respondent or defendant-respondent on the record must be made within six months from the death of the deceased—Act VII of 1888, section 66, and if not made within that period even by the legal representative of the deceased, the appeal must abate unless the applicant shows cause for not making the application—*Jamnadas* vs. *Soralji*, I. L. R., 16 Bom., 27.

Suit not abated by marriage of female party.

369. The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may thereupon be executed against her alone.

If the case is one in which the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may with such permission be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

Act VIII of 1867, section 105; C. L. P. Act, 1852, section 141. This section applies to H. C. and P. S. C. C.

Where a person died during the progress of a suit, his wife was brought on the record, and judgment given against her, which was affirmed on appeal. Between the original and final judgment she married again. It was held that the decree could not be executed against the second husband—*Bindabun Chunder* vs. *Mackintosh*, 9 W. R., 442.

When plaintiff's bankruptcy or insolvency bars suit.

370. The bankruptcy or insolvency of a plaintiff in any suit which his assignee or the receiver appointed under section 351 might maintain for the benefit of his creditors shall not bar the suit, unless such assignee or receiver declines to continue the suit and to give security for the costs thereof within such time as the Court may order.

Procedure when assignee fails to continue suit or give security.

If the assignee or receiver neglect or refuse to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's bankruptcy or insolvency, and the

Court may dismiss the suit and award to the defendant the costs which he has incurred in defending the same, to be proved as a debt against the plaintiff's estate.

Act VIII of 1859; C. L. P. Act, 1852, section 142. This section applies to H. C. and P. S. C. C.

This section only applies to actions pending when the bankruptcy or insolvency occurs—*Stanton* vs. *Collier*, 23 L. J., Q. B., 116. It does not declare that the assignee shall be made a party to the suit, as the Act does in the case of persons representing a party deceased. The practice in India has been to add or substitute the assignee's name, and he may be called on to deposit the costs of an appeal—*Heeralal Seal* vs. *Carapiet*, 13 W. R., 431; *Ibrahim* vs. *Abdur Rahiman*, 12 Bom., 257.

Defendant cannot plead the abatement without giving the official assignee an opportunity of prosecuting the suit—*Ibrahim* vs. *Abdur Rahiman*, 12 Bom., 257.

Trustees in Bankruptcy.—See *Jackson* vs. *N. E. Ry.*, 5 Q. B., 844.

Form of Order.—*Lekhraj* vs. *Shamlal*, I. L. R., 16 Bom., 404.

Effect of abatement or dismissal.

371. When a suit abates or is dismissed under this Chapter, no fresh suit shall be brought on the same cause of action.

Application to set aside abatement or dismissal.

But the person claiming to be the legal representative of the deceased or bankrupt or insolvent plaintiff may apply for an order to set aside the order for abatement or dismissal; and, if it be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

This section applies to H. C. and P. S. C. C.

Object of the Section.—This section only refers to orders passed under the last paragraph of section 368, and the second paragraph of section 370—*Bessessur Bhugut* vs. *Murli*, I. L. R., 9 Cal., 163; and see *Goddard* vs. *Poole*, W. N., 1875, p, 230.

Practice.—A Judge can make an order under section 366, *ante* coupled with an order under this section—*Fulvahu* vs. *Goculdas*, I. L. R., 9 Bom., 275.

When plaintiff dies testate, and there is difficulty in obtaining probate of his will mere neglect to apply for limited administration will not be a bar to obtaining an order under this section—*Bhoyrub Doss* vs. *Doman*, 4 C. L. R., 374. See also *Fulvahu* vs. *Goculdas*, I. L. R., 9 Bom., 275.

No Fresh Suit—This clause does not take away plaintiff's right to bring a new suit, after a former action abated under section 102, Act VIII of 1859—*Pallikunath* vs. *Mullankaji*, I. L. R., 3 Mad., 31; *Bepin Behari* vs. *Brojonath*, I. L. R., 8 Cal., 357.

It has been held not to apply to the case of a defendant or respondent who has died or become insolvent—*Suri Bhatta* vs. *Sitarama*, I. L. R., 7 Mad., 195; but now see section 582, *post*.

Limitation.—An application under this section or under this section and section 582, *post*, to revive must be made within sixty days from the order of abatement or dismissal—Act VIII of 1888, section 66.

Procedure in case of assignment pending suit.

372. In other cases of assignment, creation or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person

to whom such interest has come either in addition to or in substitution for the person from whom it has passed, as the case may require.

Judicature Acts, Order 50, Rule 3. This section applies to H. C. and P. S. C. C.

"Other Cases."—That is cases other than those mentioned in the preceding sections—*Benode Mohini* vs. *Sharat Chunder*, I. L. R., 8 Cal., 837; (compare *Jamnadas* vs. *Sorabji*, I. L. R., 16 Bom. 27); such as the case of assignment by a respondent who subsequently died—*Rajaram* vs. *Jibai*, I. L. R., 9 Bom., 151; where the assignee is arrayed on the same side of the suit as his assignor—*Radha Prasad* vs. *Rajendra*, I. L. R., 5 Alla., 209.

Official Assignee—The official assignee in insolvency proceedings instituted before suit brought against the insolvent cannot be made a party under this section—*Miller* vs. *Budh Singh*, I. L. R., 18 Cal., 43.

In Addition to or in Substitution.—See *Jamnadas* vs. *Sorabji*, I. L. R., 16 Bom., 27.

All parties whose interests may be attached, such as purchasers, or assignees *pendente lite*, should be added as parties—*Ahmedbhoy* vs. *Vulleebhoy*, I. L. R., 8 Bom., 323.

Application.—See "APPLICATION," section 368, *ante*.

Pending the Suit.—This section has been held to apply to the case where one of the defendants died after decree in a suit for partition—*Sham Lal* vs. *Monemohine*, 5 C. L. R., 109; and where, in a suit respecting a will, there was a decree that a scheme should be settled, but that decree was not proceeded with, and no scheme was settled, no final order made, the suit was treated as pending—*Gocool Chunder* vs. *Administrator-General*, 5 C. L. R., 569; *Govind Chunder* vs, *Rungunmoney*, I. L. R., 6 Cal., 60.

The Court may revive without consent or notice, when the parties who ought to give consent or get notice are dead—*Gocool Chunder* vs. *The Administrator-General*, 5 C. L. R., 569.

This section does not apply to any assignment, creation or devolution of any interest after the passing of the decree. It does not apply to execution-proceedings. A attached 24 bank shares as the property of B. C sued A for them as his own property, and gaining obtained possession of the shares and sold them to D. On appeal A succeeded: *Held*, he was not entitled to put D on the record of the execution-case and enforce restitution against him—*Raynor* vs. *Mussoorie Bank*, I. L. R., 7 Alla., 681; *Goodall* vs. *Mussoorie Bank*, I. L. R., 10 Alla., 97.

Looking at sections 232, 233, it would seem as if this section would not apply to execution of decrees assigned by the decree-holder. A Court is not bound to re-admit the assignee of a decree to execute it—*Bishtoo Churn* vs. *Kishen Gopal*, 13 W. R. 207; but when a decree is sold, and the sale is admitted, the judgment-debtor cannot contest the right of the purchaser to execute it—(*Id.*); *Sunnobarnissa Khanum* vs. *Meherchand*, W. R., 1864, p. 313.

An assignee or purchaser of a decree takes it subject to the right of set-off, section 230, *ante*—*Opendro Mohun* vs. *Poorno Chunder*, 19 W. R., 85; *Kaim Ali* vs. *Luckhy Kant*, 10 W. R., F. B., 32.

A Hindu widow sold a portion of her interest in a suit to A, and died after decree: *Held*, A only brought her life-interest, and could not execute the decree—*Govind Narain* vs. *Gour Monee*, 17 W. R., 20.

Appeals.—This section applies to appeals—*Rajaram* vs. *Jibai*, I. L. R., 9 Bom., 151 and section 582, *post*.

Power for Court to extend period of limitation prescribed for certain applications.

372A. The provisions of section 5 of the Indian Limitation Act, 1877, applicable to appeals, shall apply to applications under sections 365, 366, 368 and 371.

This section has been added by Act VII of 1888, section 34.

CHAPTER XXII.

OF THE WITHDRAWAL AND ADJUSTMENT OF SUITS.

Power to allow plaintiff to withdraw with liberty to bring fresh suit.

373. If, at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff (*a*) that the suit must fail by reason of some formal defect, or (*b*) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court many grant such permission on such terms as to costs or otherwise as it thinks fit.

If the plaintiff withdraw from the suit, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh suit for the same matter or in respect of the same part.

Nothing in this section shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of others.

Act VIII of 1859, section 97. This section applies to H. C. and P. S. C. C.

The words "at any time after the institution of the suit" would seem to imply that leave to withdraw can be given by any Court, Original or Appellate. In *Watson* vs. *The Collector of Zillah Rajshahye*, 13 Moore, 160, the Privy Council decided that there was no power in the Courts in India similar to that exercised by the Courts of Equity and Common Law in England to dismiss a suit with liberty to bring a fresh suit for the same matter or to enter a non-suit. Their power was limited to questions of form: (1) of mis-joinder of parties or of matters in suit; (2) where a material document had been rejected for not having a proper stamp and; (3) where there had been an improper valuation of the subject-matter of the suit, but not to cases where issue had been joined, and the plaintiff failed to produce evidence in support of the issues. This decision referred to the procedure in force in 1857, and not to Act VIII of 1859, but has been applied to the Procedure Code—See the case of *Muddum RamDoss* vs. *Israil Ali*, 21 W. R., 291; *Bundwari Das* vs. *Mashiat*, I. L. R., 9 Alla., 690, and where a suit for possession of property was dismissed on the ground that plaintiff could not prove his title to the whole property although he could to the extent of one-third, it was held that the decision was *res-judicata* in regard to the one-third, although the decree declared he could bring a second suit for it—*Sukh Lal* vs. *Bhikhi*, I. L. R., 11 Alla., 187. Under Act VIII of 1859, the Court granted leave to withdraw in regular appeal.—*Khatoon Koonwar* vs. *Hardoot Narain*, 20 W. R., 163; *Gregory* vs. *Dooley Chand* 14 W. R., O. J., 17; and even in special appeal—*Juggunnath Deb* vs. *Moheboollah*, 17 W. R., 164: and this was the procedure followed in Madras—*Kareem Bee* vs. *Begum Bee*, 3 Mad., 368. In Act VIII the corresponding section ran as follows: "At any time *before* final judgement." So that where leave was granted in and not before the final judgement, the point was seized hold of to set aside the order—*Shsoraj Nundun* vs. *Rajcoomar*, 24 W. R., 23. The words "final judgement" have been omitted, and on the whole the better opinion seems to be that this section applies to a suit at any stage, whether in the Original or Appellate Courts, and even to proceedings in execution—*Subbaramien* vs. *Ponnusawmy*, 5 Mad., 298; *Gunga Ram* vs. *Data*, I. L. R., 8 Alla., 82; though not to suits under Act Xof 1859—*Beer Chunder* vs. *Tarinee Churn*, 11 W. R., 46: but see *Womanath Roy* vs. *Sreenath*, 15 W. R., 260.

Under the Dekkhan Agriculturists' Relief Act the Special Judge has only a limited power to call for and examine a record. *Held*, if the application to revise does not show jurisdiction he cannot allow a withdrawal—*Muktaji* vs. *Managi*, I. L. R., 12 Bom., 684.

Leave Granted.—Leave has been granted where the plaintiffs were desirous of registering a document on which the suit was based—*Misser Debee Pershad* vs. *Buldeo*, 5 Alla., 116; or unable to adduce evidence within the period fixed by the Court for hearing—*Koomar Poresh* vs. *Surut Soondures*, 16 W. R., 100; when important evidence had been wrongly admitted by the first Court—*Gregory* vs. *Dooley Chand*, 14 W. R., O. J. App., 17; where the plaintiff had a good claim for contribution; and the best evidence to determine the amount had not been given—*Khatoon Koonwar* vs. *Hardoot Narain*, 20 W. R., 163; or where the form of the suit was bad—*Juggunnath* vs. *Moheboollah*, 17 W. R., 164; but perhaps the rule is different if the suit must fail on the merits—*Zahurrunnissa* vs. *Khudo*, I. L. R., 3 Alla., 528.

Plaintiff can recall his petition of withdrawal any time before the final order has been passed—*Rambhuros Lall* vs. *Gopee Bebee*, 6 Alla., 66; but see *Rajah Shumsher Bahadoor* vs. *Mirza Mahomed Ali Beg*, 3 Agra, 158.

It has been held that a Court may allow one of several co-plaintiffs to withdraw from a suit without power to bring another, even though the other co plaintiffs do not consent—*Mohannaya Chowdharain* vs. *Durga Churn Shaha*, 9 C. L. R., 332.

Leave not Granted.—In Madras, a party cannot withdraw at all without sanction—*Kareem Bee* vs. *Begum Bee*, 3 Mad., 368; in Bengal, if the plaintiff withdraws without express permission to bring a fresh suit, he is precluded from filing a second suit for the same matter—*Juggobundo Chatterjee* vs. *Watson*, Bourke, 162; *Aboo Telah* vs. *Abdool Nubee*, 20 W. R., 415; and if the record does not indicate that permission has been granted, the applicant should apply for a review—*Pearee Mohun Dutt* vs. *Goroodass Dutt*, 20 W. R., 401. It is not necessary that a suit brought under Act VIII (B. C.) of 1869 should be withdrawn in order to bring a suit under the present Procedure Code—*Jallaloodeen* vs. *Burne*, 18 W. R., 99; but see *Ram Churn Banerjee* vs. *Torita Churn Paul*, 18 W. R., 343.

A person withdrawing without sanction is now liable for costs. This set aside the case of *Brass* vs. *Teruvengada Pillai*, 1 Mad., 247. See *Kareem Bee* vs. *Begum Bee*, 3 Mad., 368.

Arbitration.—After an action has been referred to arbitration and the case has not been withdrawn from the arbitrators, a Judge has no jurisdiction to allow a withdrawal *ex-parte*—*Sheoambar* vs. *Devdat*, I. L. R., 9 Alla., 168, and if the arbitrator finds the facts in regard to all but a small portion against the plaintiff, the plaintiff should not be allowed to withdraw—*Statel Schmidt* vs. *Walford*, 4 Q. B. D., 217.

This Section does Apply.—This section applies to rent-suits in the North-West Provinces—*Madho Prakash* vs. *Murli*, I. L. R., 5 Alla., 406; and to execution-proceedings—*Sarju* vs. *Seta Ram*, I. L. R., 10 Alla., 71; not so—*Radha Kishen* vs. *Radha Pershad*, I. L. R., 18 Cal., 515, section 375A, *infra*. It applies only to cases in which the plaintiff withdraws his suit without the defendant's consent. Thus, where plaintiff, in pursuance of an agreement to submit the dispute to arbitration entered into with the defendant, withdrew his suit without leave of the Court, it was held that a new suit was not barred by this section—*Juggobundo Chatterjee* vs. *Watson*, Bourke, 162. He might also have sued to enforce the agreement—*Golab Singh* vs. *Cheda Singh*, 3 Agra, 135.

It does not apply if the suit is not against the same parties—*Mukhoda Sunduri* vs. *Ramchurn*, 11 C. L. R., 194.

Minor—See section 462, *post*.

Form of Order.—The proper order to be recorded is not one of dismissal, but one simply permitting the applicant to withdraw the suit with liberty to bring a fresh suit for the same matter on payment of costs or otherwise as the Court may think fit—*Doucett* vs. *Wise* 1 W. R., 322; and see the form in *Gregory* vs. *Dooley Chand*, 14 W. R., O. J., 17; and where the suit was dismissed with liberty to bring a fresh suit, the decision was set aside on appeal—*Banwari Das* vs. *Muhammad*, I. L. R., 9 Alla, 690.

Where an Appellate Court, instead of deciding upon an appeal, referred the appellant to a new suit, the order, whether right or wrong, if accepted by the parties, is binding on them—*Rajib Sarkhel* vs. *Rajah Nilmonee Singh Deo*, 20 W. R., 44.

Effect of Order.—Where a suit was withdrawn in order to bring a fresh suit which would include a portion of the claim arising out of the cause of action, but not included in the suit withdrawn, it was held that the additional portion of the claim was not barred under section 7, Act VIII of 1859—*Ilia Baksh* vs. *Imam Baksh*, I. L. R., 1 Alla., 324. See also *The London Bank* vs. *Burjorji*, I. L. R., 9 Bom., 346.

The effect of withdrawing an appeal, no matter what the terms of the compromise may be, is that the decision of the Lower Court is *res judicata* on the points raised in it—*Vythilinga* vs. *Vijoyattammal*, I. L. R., 6 Mad., 43; and its decree can be executed—*Patlaji* vs. *Ganu*, I. L. R., 15 Bom., 370; but the statement of facts stated in the compromise cannot be impugned save for fraud or the like—*Nilakandan* vs. *Padmanabha*, I. L. R., 14 Mad., 153.

Practice.—No order should be passed without notice to the opposite party—*Kalian Singh* vs. *Lakhraj Singh*, I. L. R, 6 Alla., 211; *Misser Debee Pershad* vs. *Buldeo*, 5 Alla., 116. As a rule of practice, the other side should be served with due notice of the application for leave, when it is made after the notice of the day fixed for hearing has been issued—*Kareem Bee* vs. *Begum Bee*, 3 Mad., 368.

Stamp on Application.—See *Reference*, I. L. R., 8 Mad., 15.

Appeal.—No apeal lies—*Kalian Singh* vs. *Lakhraj Singh*, I. L. R., 6 Alla., 211; *Jogodindro* vs. *Sarut*, I. L. R., 18 Cal., 322; an appeal does lie—*Gunga Ram* vs. *Data*, I. L. R., 8 Alla., 82.

Limitation.—Where an appeal is allowed to be withdrawn after the respondent has filed ojections, this by itself is not a sufficient reason for extending the period of appeal in favour of the respondent desiring to appeal—*Gour Huri* vs. *Pran Nath*, 12 C. L. R., 395. See note on section 561, *post*.

Limitation law not affected by first suits.

374. In any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought.

Act VIII of 1859, section 97. This section applies to H. C. and P. S. C. C.

The parties to a suit executed a written agreement, which was duly registered, whereby the plaintiff agreed to withdraw the suit and accept, by way of purchase the property of the defendant specified in the agreement, in adjustment of the suit. The agreement was not recorded. Plaintiff proceeded with his suit, obtained a decree, and sold the property and more in execution. Defendant appealed, but his appeal was dismissed, on the ground that the agreement entered into was not a final adjustment of the suit which would preclude its being proceeded with. Defendant then sued for specific performance; but his suit was dismissed under section 2 of Act VIII. Finally, he sued for damages on account of the sale of the property not mentioned in the agreement, and it was held that he was entitled to recover—*Thota Venkata Chella Sami Chettior* vs. *Kristnasawmy Iyer*, 8 Mad., 1.

Compromise of suit.

375. If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction.

Act VIII of 1859, section 98. This section applies to H. C. and P. S. C. C.

Mortgage.—This section can not be extended to proceedings held under section 83 of Act IV of 1882—*Tatayya* vs. *Pichayya*, I. L. R., 13 Mad., 316.

When Complete.—The Sudder Dewany held that, before deeds of adjustment, withdrawal of claim, or the like, which may have been filed in Court by a petition, have been brought before the Court for its order and decree in the case, a plaintiff is at full liberty, on his own responsibility, to recall any such application and ask the Court for judgment on the merits; and nothing but the act perfected by acknowledgment in Court, and the Court's sanction and adoption of it can deprive him of the right—*Syed Mehdee Alee Khan*, S. D, Sum. Decis., May 22nd, 1851; and this rule has been followed in Calcutta; *Harasundari* vs. *Kumar Dukhinessur*, I. L. R, 11 Cal., 250; and see *Bandhu* vs. *Shas Muhammad*, I. L. R., 14 Alla., 350; but this is not the rule in Bombay or Madras—*Buttonrey Lalji* vs. *Pooribal*, I. L. R., 7 Bom., 304; *The Goculdass Manufacturing Coy.* vs. *Scott*, I. L. R., 15 Bom., 209; *Karuppan* vs. *Ramasami*, I. L. R., 8 Mad., 482; *Appasami* vs. *Manikram*, I. L. R., 9, Mad., 103; but whichever view is correct, whether the question is decided on motion or in a suit, the order is not void. See *Gilbert* vs. *Endean*, 9 C. D., 259.

After Judgment.—Where a deed of compromise was filed after judgment had been written and signed, but not delivered, it was held that that the Court was bound to pass a decree in accordance with it.—*Raj Narain Deb Chowdhry* vs. *Kadir Mohamed*, 1 Shome, 112.

How Carried Out.—When a suit is compromised, the compromise ought to be carried out by proper deeds, and filed in Court, especially where infants are concerned, so as to have the assent of the Court at the time—*Abdool Ali* vs. *Mozuffer Hossein Chowdhry*, 16 W. R. (P. C.), 22. The Court will then pass a decree so far as it relates to the suit, and such decree will be final, and must be set aside before any suit can be brought on the original cause of action. Even a compromise out of Court must be considered as superseding all former rights of suit, and to establish the deed of compromise as the only basis of right for the future—*Ameer Begum* vs. *Noor Begum*, 1 Agra, F. B., 1; *Bishnu Coomar* vs. *Joy Hurish*, 2 W. R., 209. Once entered in the decree, the remedy is by execution, and not by a new suit—*Luckhee Narain Roy* vs. *Ram Mohun Doss*, 13 W. R., 151; *Gopi Mohun Dass* vs. *Tincouri Gupta*, 1 C. L. R., 254. But the decree must be accordance with the compromise—*Muleeka* vs. *Jumeele*, L. R., Ind. App., Sup. Vol., 144.

A consent decree upon a compromise will not be granted unless the suit be entered in the cause list of the Court—*Pell* vs. *Valetta*, 5 C. L. R., 464.

Whole or any Part.—Where the compromise, is single, and embodies a new contract much wider in its scope than the adjustment of the claim in suit, the Judge is not bound to enforce it under this section—*Fajalah Ali* vs. *Ramaruddin*, I. L. R., 13 Cal., 170. See, however, the case of *Appasami* vs. *Manikram*, I. L. R., 9 Mad., 103.

Against Parties not Joining.—Where a consent decree is sought to be enforced against persons on the record, but not parties to the compromise, the dispute falls within the scope of section 244, *ante*—*Sankara Vadivammal* vs. *Kumarasamya*, I. L. R., 8 Mad., 473.

Against One Co-contractor.—A judgment signed by consent against one co-contractor is a bar to any subsequent suit against the other co-contractors, even if it has been set aside by consent of the defendant—*Hammond* vs. *Schofield*, 1 Q. B. (1891), 453.

Who Can Compromise.—Pleaders, unless especially empowered so to do, cannot compromise cases conducted by them—*Mussamut Sirdar Begum* vs. *Mussamut Irrutool Nissa*, 2 Alla., 149; nor can a guardian compromise on behalf of a minor unless the compromise be bound to be for the minor's benefit—*Roshun Jehan* vs. *Syed Enaet Hossein*, W. R., 1864, p. 83; see also *Bibee Solomon* vs. *Abdul Azeez*, I. L. R., 6 Cal., 687.

As to how far a compromise entered into by a Hindu widow binds the reversioners, see *Imrit Konwar* vs. *Roopnarain Singh*, 6 C. L. R., 81; *Sheo Narain Sing* vs. *Khurgo Koery*, 10 C. L. R., 336.

A Corporation can compromise a suit—*In re Providence Insurance Society*, 8 C. D., 334.

An agreement to take an oath by the parties to a suit has been held not an adjustment within this section—*Connopalen Uthalchadayan Haje* vs. *Perotta Meloden Ramen Nambiar*, 4 Mad., 422; *Vasudeva* vs. *Naraina*, I. L. R., 2 Mad., 356. See now Act X. of 1873, sections 8, 9, 10; *Muhammad* vs. *Cheda*, I. L. R., 14 Alla., 141.

Limitation.—As to when a person withdrawing can obtain the benefit of section 14 of the Limitation Act, see *Narasimma* vs. *Muttayan*, I. L. R., 13 Mad., 451.

Decree How Set Aside.—A compromise can only be set aside on the ground of fraud in a regular suit—*Gilbert* vs. *Endean*, 9 C. D., 259, 266; *Sheo Gollam Lall* vs. *Bani Prosad*, I. L. R., 5 Cal., 27; or by review of judgment—*Aushootosh Chunder* vs. *Tara Prasanna*, I. L. R., 10 Cal., 612.

Interpretation of Compromise.—*Chowdhry Chintamun* vs. *Mussamut Nowlucko*, 2 Ind. App., 273. It must be such an agreement as a Court can pass a decree upon and there is nothing more to be done—*Muhammad* vs. *Cheda*, I. L. R., 14 Alla., 141.

Applications for execution of decrees not affected.

375A. Nothing in this Chapter shall apply to any application or other proceeding in any suit subsequent to the decree.

Explanation.—An application to the Appellate Court pending an appeal is not an application subsequent to the decree appealed from within the meaning of this section.

Section 2, Act VI of 1892.

CHAPTER XXIII.

OF PAYMENT INTO COURT.

Deposit by defendant of amount in satisfaction of claim.

376. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

This section applies to H. C. and P. S. C. C.

In regard to denying the plaintiff's cause of action and pleading payment into Court, see *Berdan* vs. *Greenwood*, 3 Ex. D., 251.

As to when a Court will, in a suit for account, direct payment into Court, see *The London Syndicate* vs. *Lord*, 8 C. D., 84.

Payment into Court.—As to what amounts to such a payment, see *Gujudhur Paura* vs. *Naik*, I. L. R., 8 Cal., 528; *Srinivasa* vs. *Malayacha*, I. L. R., 7 Mad., 211.

Notice of deposit.

377. Notice in writing of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs, be paid to the plaintiff on his application.

This section applies to H. C. and P. S. C. C.

See section 36, *ante*. It would appear as if the money should be paid to the plaintiff's agent or pleader unless the Court required his attendance in person.

Otherwise Direct.—When there are conflicting claims an order under this section is necessary—*Haji Abdul* vs. *Noor*, I. L. R., 16 Bom., 141.

Interest on deposit not allowed to plaintiff after notice.

378. No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited be in full of the claim or fall short therefore.

This section applies to H. C. and P. S. C. C.

The general rule, apart from this section, is, that a creditor is not bound to accept a sum tendered to him which is less than what is due to him. He is entitled to require payment of the principal and interest in full, and his refusal to receive part of what is due to him will deprive him of his right to interest—*Kunya Singh* vs. *Tooydun Singh*, 7 W. R., 20; *Watson & Co.* vs. *Dhonendra Chunder*, I. L. R., 3 Cal., 6, p. 16. This rule has not been fully followed out in our Courts, and judgment-debtors have been allowed the benefit of their deposits in the way of giving interest on the sum deposited—*Poreshnath Mukerjee* vs. *Kristo Mohun*, 12 W. R., 50, from the date of notice—*Kali Dass Ghose* vs. *Puran Kpomaree Bibee*, 16 W. R., 304; but whether this section governs cases in which the tender is made direct to the creditor is doubtful, see *Chunder Kant* vs. *Jodoo Nath*, 1 C. L. R., 470; I. L. R., 3 Cal., 468.

Procedure where plaintiff accepts deposit as satisfaction in part.

379. If the plaintiff accept such amount only as satisfaction in part of his claim, he may prosecute his suit for the balance; and if the Court decides that the deposit by the defendant was a full satisfaction of the

plaintiff's claim, the plaintiff must pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

Procedure where he accepts it as satisfaction in full.

If the plaintiff accept such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pass judgment accordingly, and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations.

(*a*) A owes B Rs. 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(*b*) B sues A under the circumstances mentioned in *Illustration* (*a*). On the plaints being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shewn that the litigation was necessary.

(*c*) A owes B Rs. 100 and is willing to pay him that sum without suit. B claims Rs. 150, and sues A for that amount. On the plaint being filed, A pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. B accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

This section applies to H. C. and P. S. C. C.

In an action to recover Rs. 25,378, defendants tendered Rs. 14,619, and on settlement of issues paid in by leave of the Court Rs. 17,645, which the plaintiff accepted: *Held*, plaintiff was entitled to his costs down to the settlement of issues—*Ardesir Limje* vs. *Sorabji*, 1 Bom., 70.

CHAPTER XXIV.

OF REQUIRING SECURITY FOR COSTS.

When security for costs may be required from plaintiff at any stage of suit.

380. If at the institution or at any subsequent stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India independent of the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time to be fixed by the order, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

On the application of any defendant in a suit for money in which the plaintiff is a woman the Court may, at any stage of the suit, make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable

property within British India independent of the property in suit.

Act VIII of 1859, sections 34, 35. This section applies to H. C. and P. S. C. C. The last paragraph has been inserted by Act VII of 1888, section 5.

As to security on staying execution, see sections 545—7, and 608, *post;* and as to security for costs where an appeal has been filed, see section 549, *post.*

Suit for Money.—A suit for possession of ornaments and other things or in the alternative their value is within the section—*Degumbari* vs. *Aushootosh*, I. L. R., 17 Cal., 610.

British India.—The Cantonment of Wadhwan in Kathiawar is within British India—*Triccam* vs. *Bombay Railway*, I. L. R., 9 Bom., 244. See section 382, *post.*

The mere presence in British territory at the time of suit will not get rid of the liability to give security, and in one case a residence of four months, with a statement that the residence was intended to be permanent, was considered insufficient—*Mahomed Shuffi* vs. *Laldin*, I. L. R., 3 Bom., 227; compare *Gosvami* vs. *Govardhanlalji*, I. L. R., 14 Bom., 541.

Foreign Territory.—The inhabitant of a foreign territory, such as Hill Tipperah, must give security, even though the defendant is also a resident, in foreign territory—*Koroona Moyee* vs. *Ooma Churn*, 12 W. R., 465; or if he is plaintiff as a relator, suing to enforce a public right—*Cazee Muzhur Hossein* vs. *Denobundoo*, Bourke, 40; but a plaintiff residing in British territory, though in another province, is not so bound—*Gahan* vs. *Owen*, Coryt., 11.

Practice.—The law apparently does not require the personal attendance of the sureties in Court, though such attendance is customary; see *Rajah Man Singh* vs. *Jalaloodeen*, S. D., N. W., 1854, 358. If security has been furnished, fresh security will not be demanded, unless it is shown that the sureties are in nowise subject to, and have no property within, jurisdiction—*Gibson* vs. *Chisholm*, Fulton, 480.

Where an appellant in bankruptcy failed to give security for costs, and the respondent, without previously writing to appellant's solicitors, gave notice of motion to dismiss the appeal, and subsequently the security was given, it was held that the appellant was liable for the costs of the motion—*Ex-parte Isaacs*, 10 C. D.; and see *In re Cartapara Mining Company*, 19 C. D., 457. As to the case of a trustee in bankruptcy, see *Pooley's Trustee* vs. *Whetham*, 28 C. D., 42.

If plaintiff is suing for another, and is not the real litigant, he can be called on to give security for costs—*Khajah Assennoollajoo* vs. *Solomon*, I. L. R., 14 Cal., 533; *Gobind Dass* vs. *Ramsahay Jemadar*, Fulton, 157.

The heirs of the Hindu testator suing the trustees of a religious trust created by the testator, but in which the heirs have no interest, should give security for costs—*Brojomohun Dass* vs. *Hurrololl Dass*, 6 C. L. R., 58.

For the proper mode of proceeding on a security bond, see *Poynor Bibee* vs. *Nujjoo*, I. L. R., 5 Cal., 437.

Effect of failure to furnish security.

381. In the event of such security not being furnished within the time so fixed, the Court shall dismiss the suit unless the plaintiff or plaintiffs be permitted to withdraw therefrom under the provisions of section 373, or show good cause why such time should be extended, in which case the Court may extend it.

Where a suit is dismissed under this section, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as tosecurity, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

The dismissal shall not be set aside unless the plaintiff has served the defendant with notice in writing of his application.

The provisions of the Indian Limitation Act, 1877, with respect to an application under section 103, and of this Code with respect to an appeal from an order rejecting such an application, shall apply, so far as they can be made applicable, to an application under this section for an order to set aside the dismissal of the suit, and to an appeal from an order rejecting such an application, respectively.

Act VIII of 1859, section 35. This section applies to H. C. and P. S. C. C. This section except up to "section 373" of the first paragraph has been inserted by Act VII of 1888, section 33.

Before dismissing a suit under this section, the Court should see that notice of the order requiring security has been served on the appellant or his pleader—*Timmu* vs. *Deva Rai*, I. L. R., 5 Mad., 265.

The Time so Fixed.—The time may now be extended, see also the following cases —*In re Soorj Mukhi*, I. L. R., 2 Cal., 272; *Burjore* vs. *Bhagana*, I. L. R., 10 Cal., 557.

A person whose suit has been dismissed under this section, may, if defendant in a subsequent suit, rely on the same matter put forward in the previous suit. *Quære:* Could he do so if he were plaintiff in the subsequent suit?—*Rungrav* vs. *Sidhi Mahomed*, I. L. R., 6 Bom., 482. See section 103, *ante*.

Appeal.—An order dismissing a suit under this section is a decree and open to appeal—*Williams* vs. *Brown*, I. L. R., 8 Alla., 108.

Residence out of British India.

382. Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcomming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of section 380.

This section applies to H. C. and P. S. C. C.

When a plaintiff leaves British India before the case is decided, the defendant should apply to the Court under this section to take security for costs—*In re Calcutta and South-Eastern Railway Company*, 8 W. R., 217; and then, unless there is a reasonable probability that he will be forthcoming whenever he may be called on to pay costs, or, that he has sufficient immoveable property in British India to meet them, he must give security.

As to security in appeals, see section 549, *post*.

CHAPTER XXV.

OF COMMISSIONS.

A.—Commissions to Examine Witnesses.

Cases in which Court may issue commission to examine witness.

383. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of persons resident within the local limits of its jurisdiction, who are exempted under this Code from attending the Court, or who are from sickness or infirmity unable to attend it.

Act VIII of 1859, section 175. This section applies to H. C. and P. S. C. C.

Discretion.—The Court has a discretion to grant or refuse a commission, and the question is whether a sufficient case has been made out—*Burney* vs. *Eyre*, 1 Hyde, 68; but it is not a fair exercise of that discretion to refuse, because the Judge does not exactly

see the useful end that might be obtained by examining the witnesses—*Huree Dass* vs. *Meer Moazzum*, 15 W. R., 447.

When and When not Granted.—A commission will be granted almost as a matter of course to examine a material witness if any way ill or infirm—*Huree Dass* vs. *Meer Moazzum*, 15 W. R., 477; even if the cause is on the peremptory board of the day, if the issuing of it is not calculated to prejudice the defendants or subject them to loss or inconvenience—*Jansch* vs. *Dundas*, 1 Hyde, 269; and the costs are generally costs in the cause—*Gahan* vs. *Owen*, Coryt., 11; but a commission will not issue to examine a party at his own instance and to enable him to give evidence in his own favour, unless he can show that he is seriously ill, &c.—*Doucett* vs. *Wise*, 1 Ind. Jur., N. S., 357; nor to exami a lady not exempted under the Code, as she may be examined in her palki—*Nusrut Banoo* vs. *Mahomed*, 18 W. R., 230; nor an infant of tender years—*Re Sreemutty Beashadeeny*, 2 Hyde, 152; nor for any cause not stated in the section—*Marshall* vs. *Chirne*, 2 Tay and Bell, 194.

A commission cannot issue save under the circumstances stated in the section. It cannot issue to a Magistrate to take the evidence of a prisoner, simply because he cannot attend—*Gopal Chunder* vs. *Kurnodhur*, 7 W. R., 349.

As to the procedure in case of prisoners, see Act XV of 1869, Part III.

Order for commission.

384. Such order may be made by the Court either of its own motion, or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

Act VIII of 1859, section 175. This section applies to H. C. and P. S. C. C.

A commission should not issue without notice to the opposite party—*Tarucknath* s. *Gouree Churn*, 3 W. R., 147.

When witness resides within Court's jurisdiction.

385. The commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute the same.

Act VIII of 1859, section 175. This section applies to H. C. and P. S. C. C.

Persons for whose examination commission may issue.

386. Any Court may in any suit issue a commission for the examination of—

(*a*) any person resident beyond the local limits of its jurisdiction;

(*b*) persons who are about to leave such limits before the date on which they are required to be examined in Court; and

(*c*) civil and military officers of Government who cannot, in the opinion of the Judge, attend the Court without detriment to the public service.

Such commission may be issued to any Court, not being a High Court or the Court of the Recorder of Rangoon, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may, subject to any rules of the High Court in this behalf, think fit to appoint.

The Court on issuing any commission under this section shall direct whether the commission shall be returned to itself or to any subordinate Court.

Act VIII of 1859, section 175. This section applies to H. C. and P. S. C. C. The words from "resides" to the end of the paragraph have been substituted by Act VII of 1888, section 34.

The Court has a discretion to refuse or grant a commission to examine a person beyond the local limits—*Burney* vs. *Eyre*, 1 Hyde, 68, but the discretion must be exercised judicially—*Huree Dass* vs. *Meer Moazzum*, 15 W. R., 447; and the application should be supported by some reason other than the mere distance of the residence of the witness. If the witness is a stranger, commission will be right and reasonable, but not if he is the servant of the applicant—*Amrith Nath* vs. *Dhunput Singh*, 20 W. R., 253; costs will be costs in the cause—*Gahan* vs. *Owen*, Coryt., 11.

It will be granted as a matter of course to examine a material witness, but not a party at his own request, unless he can show very strong reasons—*Doucett* vs. *Wise*, 1 Ind. Jur., N. S., 357. Notice should be given to the opposite party—*Tarucknath* vs. *Gouree Churn*, 3 W. R., 147.

Resident—A was imprisoned for a criminal offence in a jail outside the local limits of a Small Cause Court, and the Judge issued a commission to the Magistrate to examine him: *Held*, that as A's family continued to reside within jurisdiction, the fair inference was, that A intended to return, and no commission should issue—*Gopal Chunder* vs. *Kurnodhur*, 7 W. R., 349.

Commission to examine witness not within British India.

387. When any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that his evidence is necessary, the Court may issue such commission.

Act VIII of 1859, sections 177, 178. This section applies to H. C. and P. S. C. C.

This section is much wider than section 177 of Act VIII. If witnesses are examined under oath or affirmation, as required by the commission, the evidence will be admissible without the consent of the parties, upon proof being given of the facts required by section 390 to be proved in order to render the depositions capable of being read in evidence—*Aga Mohammed* vs. *Mirza Nuzirullah*, 2 B. L. R., 73.

Six months has not been considered too long for a commission for the examination of witnesses in England to be outstanding—*Mackellar* vs. *Wallace*, Fulton, 16.

Revision.—An order refusing to issue a commission on the ground that the evidence is not necessary is not subject to revision under section 622, *post*—*In re The Nizam of Hyderabad*, I. L. R., 9 Mad., 256.

Court to examine witness pursuant to commission.

388. Every Court receiving a commission for the examination of any person shall examine him pursuant thereto.

This section applies to H. C. and P. S. C. C.

Return of commission with depositions of witnesses.

389. After the commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court out of which it issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto, and the evidence taken

under it, shall (subject to the provisions of the next following section) form part of the record of the suit.

Act VIII of 1859, section 179. This section applies to H. C. and P. S. C. C.

It is the duty of the party obtaining a commission for the examination of witnesses to take all such steps as are necessary to secure their attendance before the Commissioner—*Leckraj* vs. *Paleeram*, 2 Alla., 210. They must be examined by counsel, and not by attorney—*Hoffman* vs. *Framjee*, Coryt., 7. A party who has not joined in a commission is entitled to cross-examine the witnesses examined under it—*Gregory* vs. *Dooley Chand*, 14 W. R., O. J., 17.

The return should show, on the face of it, that the Commissioner had administered the oath to himself and the interpreter (if any)—*Prankrishna Chandra* vs. *Biswanath Chandra*, 8 B. L. R., App., 101; and that the evidence was recorded as the law requires —*Bala* vs. *Meghburn*, 14 W. R., 269; and taken within the period allowed. The commission may be open, or to be executed on or before a certain date. Where a Commissioner took evidence after the last return day had expired, it was held that the depositions were inadmissible—*Gregory* vs. *Dooley Chand*, 14 W. R., O. J., 17.

Documents attached to the return of a commission, and identified with the documents referred to in the evidence, may be read at the hearing of the suit in which the commission issued, unless they have been objected to on being tendered in evidence before the Commissioner. Objection to the inadmissibility of such document should be taken before the Commissioner—*Struther* vs. *Wheeler*, 6 C. L. R., 109

The report only proves itself in the particular suit in which it is made—*Denobundho Ghose* vs. *Nistarini*, 12 C. L. R., 50.

When depositions may be read in evidence.

390. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless

(*a*) the person who gave the evidence is beyond the jurisdiction of the Court, or dead, or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or

(*b*) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in the last preceding clause, and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Act VIII of 1859, section 179; 1 Wm. IV, cap. 22, section 10. This section applies to H. C. and P. S. C. C.

It is the duty of the party obtaining the commission to tender the return in evidence.

Defendant was examined by commission at her own request, and plaintiff proposed to read part of her evidence, contending that though the defendant had not formally put in the Commissioner's return, yet it formed part of the record (see section 393), and gave him the right to reply, and his contention prevailed—*Dwarkanath Dutt* vs. *Gunga Dayi*, 8 B. L. R., App., 102.

A Court may refuse to hear evidence taken by commission, unless it has been proved that the witness is beyond the jurisdiction, dead or unable to attend, &c., at the time of trial—*Prithee Bullubh Pal* vs. *Hara Dhun*, 22 W. R., 331; but where it appears from the deposition itself that the person was examined outside jurisdiction, that is sufficient—*Girdhar Nagjishet* vs. *Ganpat Moroba*, 11 Bom., 129.

Taxation of Costs—See *The Goculdass Manufacturing Co.* vs. *Scott*, I. L. R., 1 Bom., 209.

Provisions as to execution and return of commissions to apply to commissions issued by foreign Courts.

391. The provisions hereinbefore contained as to the execution and return of commissions shall apply to commissions issued by—

(*a*) Courts situate beyond the limits of British India and established by the authority of Her Majesty or of the Governor-General in Council, or

(*b*) Courts situate in any part of the British Empire other than British India, or

(*c*) Courts of any foreign country for the time being in alliance with Her Majesty.

This section applies to H. C. and P. S. C. C.

B.—Commissions for Local Investigations.

Commission to make local investigations.

392. In any suit or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits, or damages or annual nett profits, and the same cannot be conveniently conducted by the Judge in person, the Court may issue a commission to such person as it thinks fit, directing him to make such investigation and to report thereon to the Court:

Provided that, when the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

Act VIII of 1859, sections 180, 307. This section applies to H. C. and P. S. C. C.

Section Applies.—This section applies to a proceeding under section 158 of the Bengal Tenancy Act—*Deoki Singh* vs. *Seo Gobind*, I. L. R., 17 Cal., 277.

Judge in Person.—Where the Judge makes a local investigation, he should put the result on record, so that the parties may see what he considers established—*Joy Coomar* vs. *Bundhoo Lal*, 12 C. L. R., 490; I. L. R., 9 Cal., 363.

Issue a Commission.—A Judge is allowed the widest discretion in granting or refusing a local investigation—*Nirod Krishno* vs. *Woomanath*, I. L. R., 4 Cal., 718; 3 C. L. R., 235. There is no appeal from his order, and though the propriety of it may be questioned in regular appeal (section 591, it cannot be made the basis of a special appeal—*Graham* vs. *Lopez*, 1 W. R., 141; *Bykunt Nath* vs. *Pearee Monee*, *id.*, 199; *Poorno Persad* vs. *Chundernath*, *id.*, 349; *Kristo Chunder* vs. *Brojo Mohun*, 22 W. R., 183; but see *Rash Behares* vs. *Saheb Roy*, 12 W. R., 76. He is not bound to issue a commission of his own motion—*McDonald* vs. *Munar Roy*, 3 W. R., Act X, 153. He should refuse it when the matter can be conveniently disposed of by himself, such as examining witnesses—*Shadhoo Singh* vs. *Ramanoograha*, 9 W. R., 83; *Shustee Ram* vs. *Nobo Kant*, 14 W. R., 190; but see *Kristo Chunder* vs. *Brojo Mohun*, 22 W. R., 183; and if he grants it he should take care not to delegate his functions to the Ameen, such as the trial of one of the more important issues in the case—*Burodia Churn* vs. *Ajoodhya*, 23 W. R., 287, but confine him to obtaining such information (with regard to the physical features of the place in dispute, the identification of land depicted in maps with the parcels which are the subject of the suit, the identification of maps with one another by the aid of objects to be found on the land) as ought to be obtained on the spot—*Bindabun Chunder* vs. *Nobin Chunder*, 17 W. R., 282;

Ram Dhun vs. *Ram Monee*, 21 W. R., 280; 17 W. R., 472; and an Ameen should not be deputed in a case of disputed boundary where the question turns chiefly on possess before the date of the suit—*Kalee Dass Acharjee* vs. *Khettro Pal Singh Roy*, 17 W. R., 472.

If the Court considers it necessary to order an inquiry into the value of certain moveables, such an inquiry cannot be left to be made after decree—*Jugodumba Debia* vs. *Rohinee Debia*, 23 W. R., 423.

When a Judge has ordered a fresh local investigation, his successor should not interfere with the order, but carry it out before disposing of the case—*Shurrioollah* vs. *Bawl Mundul*, 1 W. R., 102. Nor, where one inquiry has been carried on, should a second issue for the same purpose without setting aside the first—*Azim Ali Khan* vs. *Surussutty*, 23 W. R., 93.

Act X.—A Collector can issue a commission under Act X, 1859, at any stage of the case—*Roghoonath Panjah* vs. *Ghosal*, 6 W. R., Act X, 11; and direct the Ameen to examine witness—*Gour Chunder* vs. *Rash Beharee*, 10 W. R., 43; but he can not delegate his power under section 38, Act VIII, 1869, to an Ameen—*Shetal Shaikh* vs. *Hills*, 24 W. R., 184.

Notice.—Notice should be given to the parties of the time when the local investigation will be held—*Kristo Monee Debia* vs. *Eglinton*, 12 W. R., 139; *Jhubhoo Sahooo* vs. *Mussamut Josoda Kooer*, 17 W. R., 230.

Such Person.—It is not necessary now that the Commissioner should, if possible, be an officer of Court—see *Doorga Doss* vs. *Gooroo Churn*, 6 W. R., Act X, 81. The Judge of the first Court should not be deputed to hold a local enquiry by the Appellate Court—*Roy Sooltan* vs. *Laloo Kooer*, 17 W. R., 300.

The District Judge can appoint a Munsif to be Commissioner—*Cheramun Singh* vs. *Anoop*, 11 C. L. R., 533.

Remand.—In appeal, the District Judge reversed the decision of the Subordinate Judge, remanded the case and ordered a fresh local enquiry by the Munsif, but as he was unable to go, the Judge appointed his sherishtadar. The Subordinate Judge acted on his report. On appeal to the Judge the plaintiff objected to the report on the ground of partiality. It was held he could not afterwards object to the report on the ground that the Judge had no authority to remand the case—*Mahomed Anjob* vs. *Gouripershaud*, 6 W. R., 62. See section 562, *post*.

Procedure of Commissioner.

393. The Commissioner, after such local inspection as he deems necessary, and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing, signed with his name, to the Court.

Report and depositions to be evidence in suit.

The report of the Commissioner and the evidence taken by him, (but not the evidence without the report,) shall be evidence in the suit and shall form part of the record; but the Court, or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to the manner in which he has made the investigation.

Commissioner may be examined in person.

Act VIII of 1859, section 180; 5 B. L. R., App., 70. This section applies to H. C. and P. S. C. C.

A day should be fixed for return of the Ameen's report and then for hearing objections to it—*Ram Narain* vs. *Goburdhun Lall*, 21 W. R., 2.

Evidence.—An Ameen's report, if the investigation has been completed—*Kalee Doss* vs. *Deb Narian*, 13 W. R., 412, is evidence upon whatever materials it is based—*Chunder Coomar Dutt* vs. *Joy Chunder Dutt*, 19 W. R., 213; *Jannobee Chowdrain* vs. *The Collector of Mymensing*, 8 W. R., 287; *Sheo Narain* vs. *Bhood Singh*, 11 W. R., 424; in the suit in which it is made, but in it only—*Dinobundho* vs. *Nistarini*, 12 C. L. R., 50 (see note under section 389, *ante*), though the depositions are not attached—*Chunder Monee* vs. *Nilambur*, 7 W. R., 43; or, if attached, have been partly rejected as not taken on oath—*Dole Gobind* vs. *Chamoo*, 10 W. R., 312 (else they also are admissible, *Abdool Gunee* vs

Bhutto Sheikh, 22 W. R., 350); or the commission has been granted without sufficient reason—*Shah Nuthoo* vs. *Ghanessam*, 8 W. R., 267, or irregularly—*Umbica Churn* vs. *Goluck Chunder*, 9 W. R., 596; *Rajnath* vs. *Doorga*, 12 W. R., 136; but see *Ram Dhun* vs. *Ram Monee*, 21 W. R., 280; otherwise if the Ameen has held the enquiry beyond the territorial jurisdiction of the Court directing it—*Nidhoo Sircar* vs. *Phillipe*, 10 W. R., 153.

Form Part of the Record.—The report and deposition are to be taken as evidence in the case—not conclusive evidence—and form part of the record—*Azim* vs. *Alimooddeen*, 17 W. R., 270; and must be taken into consideration by the Appellate Court—*Rajnath* vs. *Doorga*, 12 W. R., 136; and unless any objection is raised to the report in the first Court or in the grounds of appeal, it should not be listened to—*Seth Gujmull* vs. *Chahee*, 2 Ind. App., 34; but see *Tweedie* vs. *Poorno Chunder*, 2 W. R., 138.

The value of the report depends upon the evidence on which it is founded—*Braja Sundari Deoya* vs. *Punchanun Bose*, 3 R. J. and P., 339; *Issur Chunder* vs. *Joogul Kishore*, 21 W. R., 281. A Court may reject part and accept part—*Poresh Nauth Mookerjee* vs. *Martin*, 1 W. R., 93.

Agreement.—If the servants of all the parties present point out the same boundary or starting point these must be taken to be correct—*Hemmuni Singh* vs. *Canty*, I. L. R., 17 Cal., 304.

Appeal: Power of Appellate Court.—An Appellate Court should not interfere with the result of a local enquiry except on clearly defined and sufficient grounds, which must be stated in its judgment—*Surut Soonduree* vs. *Prosunno Coomar*, 15 W. R., 20; 13 Moore, 607; but see *Protab Chunder* vs. *Surnomoyee*, 19 W. R., 361; especially if it has been accepted by the first Court. Nor should a Court of first instance question the correctness of map attached to a report, which is not impugned by either party—*Brijonath* vs. *Lall Meah*, 14 W. R., 391; and the Ameen's report may be looked at to explain a map—*Mahamed Anwar* vs. *Raj Chunder*, 17 W. R., 522. If the Court finds the report deficient in any point, it can send for the Commissioner and examine him—*Sheo Dyal* vs. *Hodgkinson*, 24 W. R., 342; on the other hand, the report should not be made the basis of a judgment to the total disregard of the other evidence on the record—*Bustee Sahoo* vs. *Jeo Narain*, 24 W. R., 338.

Practice.—On the return of the Commissioner's report, a day should be fixed to hear objections and notice given to the parties—*Ram Narain* vs. *Goburdhun*, 21 W. R., 2. The report cannot be rejected because the Ameen's remuneration has not been paid—*Jagat Kishore* vs. *Dinanath*, I. L. R., 17 Cal., 281.

Extension of Time.—See *Hormusji* vs. *Bomonji*, I. L. R., 9 Bom., 250.

C.—Commissions to Examine Accounts.

Commission to examine or adjust accounts.

394. In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

Act VIII of 1859, section 181. This section applies to H. C. and P. S. C. C.

Appeal.—A decree directing the defendant to account is a final decree, and as such appealable to the Privy Council under section 595, *post*—*Rahimbhoy* vs. *Turner*, Ind. App., 6.

The High Court at Calcutta has held, that when the books are in Court, and not impugned, a commission should not issue, and if it does issue, in no case can the Commissioner examine witnesses—*Chand Ram* vs. *Brojo Gobind*, 19 W. R., 14. This decision cannot be now considered good law (see section 398).

Where a decree has been passed referring the matter to the Commissioner's office to have accounts taken and property sold, the Court has still power to add a party to the suit—*Vakatchand Lakhmichand* vs. *The Advocate-General*, 8 Bom., 96.

As to the procedure in taking accounts, see *Degamber Mozumdar* vs. *Kallynath*, I. L. R., 7 Cal., 654; *Annoda Persad* vs. *Dwarkanath*, I. L. R., 6 Cal., 754.

Court to give Commissioner necessary instructions.

395. The Court shall furnish the Commissioner with such part of the proceedings and such detailed instructions as appear necessary,

and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the enquiry, or also to report his own opinion on the point referred for his examination.

Court to receive Commissioner's proceedings or direct further inquiry.

The proceedings of the Commissioner shall be received in evidence in the suit, unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such furth inquiry as is requisite.

Act VIII of 1859, section 181. This section applies to H. C. and P. S. C. C.

As to the nature of the certificate or report made by the Commissioner, what it should contain and how far the Court can deal on motion with matters before him, see the case of *Rustomji* vs. *Kessowji*, I. L. R., 3 Bom., 161.

The Commissioners under this section need not be sworn or affirmed—*Nursing* vs. *Narain*, 3 Alla., 217.

Practice—In Madras, Appellate Courts do not enter into the details of an account taken by a Commissioner and discussed in the first Court, especially if no particular items are objected to: they only decide the principle upon which the account should be taken—*Venkata Reddi* vs. *Venkatara Maiya*, 1 Mad., 418; *Sarapu Venkadesan* vs. *Malai Isvaraiya*, *id.*, 1; and where a Commissioner was appointed to investigate the state of accounts between the parties, and the judgment was founded on his report, the High Court, on regular appeal, refused to take a fresh account— *Sarapu Vankadesan* vs. *Malai Isvaraiya*, 1 Mad., 1. In Bombay the opposite opinion prevails, and there the Appellate Courts, if dissatisfied for any reason, direct further enquiry—*Ahmed* vs. *Khasaji*, 6 Bom., 148.

Where an Ameen was directed by an order of Court to adjust an account, and no objection was taken to his proceedings by the plaintiff in whose presence the account was taken: *Held*, the account should not have been disturbed by the Appellate Court—*Kantee Chunder* vs. *Gopee Madhub*, 11 W. R. 3. See "APPEAL," section 393, *ante*.

Plaintiff sued his mohurrir the defendant for an account of such sums as he would be found to have misappropriated (estimating it at 2,500 rupees) and filed his account-books in Court without alleging that they had been tampered with: *Held*, that, he should have made up the account himself, and should not have been allowed an Ameen—*Chand Ram* vs. *Brojo Gobind*, 19 W. R., 14.

Consent—In a suit for account it was ordered, by consent of parties, that the cause should be referred to a Commissioner to take accounts, who in taking them was to decide on all questions of fact, leaving questions of law to the Court: *Held*, that the reference was different from the ordinary reference under section 181, Act VIII of 1859, and that it was doubtful whether the Court could re-open a question of fact, relating to the account decided by the Commissioner—*Watson* vs. *Mehedee*, 1 Ind. App., 346.

Extension of Time.—See *Hormusji* vs. *Bomonji*, I. L. R., 9 Bom., 250.

Costs: Regular Suit.—Where the costs of a Commissioner were not prepaid, and though defendant was ordered in the decree to pay costs of the suit the amount was not entered in it: *Held*, the Commissioner could sue the party who moved the Court to appoint him for work and labour, but not the party made liable for costs—*Gopatratnamayyar* vs. *Bupala*, I. L. R., 4 Mad., 399.

Limitation.—As to mutual open and current accounts, see *Lakshmayya* vs. *Jagannaththam*, I. L. R., 10 Mad., 199; *Satayya* vs. *Rangareddi*, *id.*, 259.

D.—Commission to make Partition.

Commission to make partition of non-revenue-paying immoveable property.

396. In any suit in which the partition of immoveable property not paying revenue to Government appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights.

Procedure of Commissioners.

The Commissioners shall ascertain and inspect the property, and shall divide the same into as many shares as may be directed by the order under which the commission issues, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

The Commissioners shall then prepare and sign a report, or (if they cannot agree) separate reports, appointing the share of each party, and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall either quash the same and issue a new commission, or (where the Commissioners agree in their report) pass a decree in accordance therewith.

This section is new. It applies to H. C. and P. S. C. C.

Decree —An order directing a partition is a decree—*Bholanath Dass* vs. *Sonamoni*, I. L. R., 12 Cal., 273; *Bepin Behari* vs. *Lalmohun*, I. L. R., 12 Cal., 209 *Dulhin* vs. *Radha*, I. L. R., 19 Cal., 463.

Value of Suit —Where the relation of the persons is that of coparceners the value of the property and not the share claimed determines the jurisdiction; otherwise if they are only joint owners—*Ramayya* vs. *Sattarayudu*, I. L. R., 13 Mad., 25; but in Allahabad and Bombay apparently the value of the share is decisive—*Hikmet Ali* vs. *Waliunnissa*, I. L. R., 12 Alla., 506; *Lakshman* vs. *Babaji*, I. L. R., 8 Bom., 31; while in Calcutta the value of the whole property is taken as the guide—*Boidya Nath* vs. *Makhan*, I. L. R., 17 Cal., 680.

Not Paying Revenue —A suit for partition by metes and bounds of revenue-paying land is not cognizable in the Civil Court, though a suit to define plaintiff's share and then to refer the partition to the Collector is within jurisdiction—*Rutlun Monee* vs. *Brojo Mohun*, 22 W. R., 11; *Ajoodhia Lall* vs. *Gumani*, 2 C. L. R., 134; *Chundernath Nundi* vs. *Hur Narain*, I. L. R., 7 Cal., 153; *Zuhrun* vs. *Gouri*, I. L. R., 15 Cal., 198, followed in *Debi* vs. *Sheo Lall*, I. L. R., 16 Cal., 203.

It was held under the previous law that in effecting a partition under this section, the rules laid down in Regulation XIX of 1814 (repealed) should be followed as far as they were applicable—*Janokee* vs. *Luchmun*, 17 W. R., 137.

Commissioners —The Court is not bound to appoint more than *one* Commissioner —*Gyan Chunder* vs. *Durga Churn*, 8 C. L. R., 415; I. L. R., 7 Cal., 318.

Commissioners have been looked on as officers of Court acting by a majority, although there is no clause so directing in the commission—*Rajendra Matilal* vs. *Ramnarayan Matilal*, 3 B. L. R., App., 3; it is now different as regards Commissioners appointed to make a partition. Commissioners have no lien on the return for their fees, and cannot refuse to give it up until they are paid—*Rajmoheeny Dabee* vs. *Muddoosoodun Dey*, Bourke, 24.

Practice.—As to the mode of attacking a report in Bombay, see *Navrettam* vs. *Harichand*, I. L. R., 13 Bom., 368.

E.—General Provisions.

Expenses of commission to be paid into Court.

397. Before issuing any commission under this Chapter the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be

fixed by the Court, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Act VIII of 1859, section 182. This section applies to H. C. and P. S. C. C.

In a suit for partition the costs of a commission to examine a lady issued at her own request were made costs in the suit—*Monirooddin Biswas* vs. *Shoshebhusun*, I. L. R., 5 Cal., 866.

Powers of Commissioners.

398. Any Commissioner appointed under this Chapter may, unless otherwise directed by the order of appointment,—

(*a*) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(*b*) call for and examine documents and other things relevant to the subject of enquiry;

Ecclesiastical Courts are very unwilling to let wills out of their custody. The Supreme Court has, where a commission issued in Calcutta in regard to a will, directed its Registrar to produce the will before the Commissioners—*Unnopoornah Dabee* vs. *Kolochomoney*, Fulton, 83.

(*c*) at any reasonable time enter upon or into any land or building mentioned in the order.

Act VIII of 1859, section 182. This section applies to H. C. and P. S. C. C.

Authority.—Instructions to a Commissioner should issue in the presence of the parties, and if they do not object, they cannot afterwards complain if the Commissioner carried out his instructions—*Bissessur* vs. *Kanchun*, 11 W. R., 155. Unless limited by the wording of the commission—*Shibo Soondures* vs. *Ram Chunder*, 17 W. R., 469, he has the widest power and discretion to enquire into the matters referred to him for investigation—*Mohun Lall* vs. *Urnopoorna*, 9 W. R., 566; but he cannot go beyond his order—*Ram Dhun* vs. *Ram Monee*, 21 W. R., 280; *Bustee Sahoo* vs. *Jeo Narain*, 24 W. R., 338, or delegate his authority—*Meer Hesmunt Ali* vs. *Zullam*, 1 Shome, 15. Thus, if he is directed to make an enquiry into mesne profits he should not enquire into the date of dispossession, which should have been fixed by the decree—*Bejoy Gobind* vs. *Kales Prosunno*, 16 W. R., 294. So, he should not record evidence if expressly restricted to a comparison of the disputed land with a chitta—*Doorga Churn* vs. *Neem Chand*, 24 W. R., 208. So, where an Ameen asked leave to enquire into the title by inspecting documents, and was refused, it was held that he could not investigate at all the title or possession—*Shiboo Soondures* vs. *Ram Chunder*, 17 W. R., 469.

In Bombay, on the Original Side, an attachment will issue to compel a party to a suit to obey an order made by a Commissioner taking accounts, upon the certificate of the Commissioner that such order has been made and disobeyed, without, in the first instance, making such order a rule of Court—*Dhurandhardas* vs. *Bhau Gobind*, 10 Bom., 4.

Attendance, examination and punishment of witnesses before Commissioner.

399. The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Chapter, whether the commission in execution of which they are so required has been issued by a Court situate within, or by Court situate beyond, the limits of British India.

For the purposes of this section, the Commissioner shall be deemed to be a Court of Civil Judicature.

This section applies to H. C. and P. S. C. C.

A person attending before an arbitration appointed by order of Court to take a reference is protected from arrest—*In the matter of Jaggeshur Roy*, 5 C. L. R., 170.

Court to direct parties to appear before Commissioner.

400. Whenever a commission is issued under this Chapter, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

Procedure *ex-parte*.

If the parties do not so appear the Commissioner may proceed *ex-parte*.

Act VIII of 1859, section 181. This section applies to H. C. and P. S. C. C.

A party refusing to appear before an Ameen is not at liberty afterwards to take any objection to his report—*Bamun Doss* vs. *Brojo Kishore*, 6 W. R., 130.

The Commissioner may proceed *ex parte*, but is he compelled to do so? In the case of *Essan Chunder* vs. *Soorjo Lall*, Marsh., 139, it was decided that where a plaintiff fails to appear before a Commissioner and the defendant appears, the plaintiff is liable to have his suit dismissed with costs.

Charges against Ameens should be quickly inquired into—*Abdool Kureem* vs. *Campbell*, 8 W. R., 172.

PART III.

OF SUITS IN PARTICULAR CASES.

CHAPTER XXVI.

SUITS BY PAUPERS.

Suits may be brought in *formâ pauperis*.

401. Subject to the following rules, any suit may be brought by a pauper.

Explanation.—A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

Act VIII of 1859, section 297. This section applies to H. C. and P. S. C. C.

Pauper Appeals.—See section 592, *post*.

Subject-matter of the Suit.—The inquiry into pauperism under sections 408 and 409, takes place before any suit is in existence, where on such an investigation the other side deposited articles claimed of the value of one hundred rupees, it was held that these articles did not form any portion of the subject-matter of the suit, and the petitioner was not a pauper—*Dwarkanath* vs. *Madhavrav*, I. L. R., 10 Bom., 207.

Plaintiff.—A plaintiff may be allowed to carry on as a pauper a suit instituted in the ordinary way—*Nirmul Chandra* vs. *Doyal Nath*, I. L. R., 2 Cal., 130; *Ranji* vs. *Shakharam*, I. L. R., 8 Bom., 615. A Hindu father's wealth is not a bar to a son suing as a pauper to prove his adoption—*Chutoo Ram Tewari*, Petitioner, S. D. Sum. Decis., Sept. 7, 1846; nor does a husband's wealth preclude a wife from suing as a pauper, when she cannot claim from him the means of carrying on the suit—*Laloonissa*, Petitioner, S. D. Sum. Decis., Dec. 15, 1845. See also *Missur* vs. *Mutty Lall*, Fulton, 490.

Minor.—A suit can be brought in *formâ pauperis* on behalf of a pauper minor by a next friend—*Golaupmonee Dossee* vs. *Prosonomoye*, 11 B. L. R., 373, who is not a pauper—*Venkatanarasayya* vs. *Achemma*, I. L. R., 3 Mad., 3, but the failure of the suit is no ground for throwing the costs of the suit on the next friend—*Brijessuree* vs. *Kishore*, 25 W. R., 316.

Representative.—There is no necessity to inquire if the representative of a pauper is also a pauper: the Court, if satisfied that he is the legal representative, should allow him to carry on the suit—*Bhagbut* vs. *Buloram*, 3 W. R., Mis., 20.

Fiduciary Character.—An executor or administrator can sue in *formâ pauperis* —*In re Bill*, I. L. R., 7 Mad., 390.

As to the case of an executor defending a suit where there are no assets, see Seton, p. 886.

Defendant.—A defendant may be allowed to defend a suit in *formâ pauperis*—*Doorga Churn* vs. *Nittokally*, 6 C. L. R., 120; I. L. R., 5 Cal., 819.

Respondent.—Cross-objections under section 561, *post*, cannot be heard in *formâ pauperis*—*Brajeshwari* vs. *Guroo Churn*, I. L. R., 11 Cal., 735.

What suits excepted.

402. No suit shall be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language or assault.

Act VIII of 1859, section 298. This section applies to H. C. and P. S. C. C.

Subject to these restrictions the privilege extends to actions *ex delicto* as well as *Contract*—*Muluh Deen* vs. *Runjeet Singh*, Fulton, 386.

Application to be in writing.

Contents of application.

403. The application for permission to sue by a pauper shall be in writing, and shall contain the particulars required by section 50 in regard to plaints in suits: a schedule of any moveable or immoveable property belonging to the petitioner, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner hereinbefore prescribed for the signing and verification of plaints.

Act VIII of 1859, sections 299, 300. This section applies to H. C. and P. S. C. C.

An unsuccessful application of a wife to sue for dower in *formâ pauperis*, though opposed by her husband in a counter-petition denying his liability, is not such a demand and refusal of the dower as to constitute a cause of action. The application merely expresses an intention to demand, if allowed to do so, in a particular way—*Khajooroonissa* vs. *Ryeesoonissa*, 2 Ind. App., 235.

See note under section 407, *post*.

Presentation of application.

404. Notwithstanding anything contained in section 36, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court under section 640 or section 641, in which case the application may be presented by a duly authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Act VIII of 1859, section 301. This section applies to H. C. and P. S. C. C.

This section is imperative, and a petition to sue in *formâ pauperis*, must be presented in person, unless the pauper is exempted from appearing in Court under sections 640, 641—*Ex-parte Devgir Guru Sumbhagir*, 4 Bom., 91; *Burgess* vs. *Sidden*, I. L. R., 10 Mad., 193.

Authorized Agent.—It is not necessary that the duly authorized agent should be a pauper—*Bhagbut* vs. *Buloram*, 3 W. R., Mis., 20; he may be a pleader—*Kishoree Mohun* vs. *Gour Monee*, 15 W. R., 198; but then he must be specially authorized as the pauper's attorney; an ordinary vakalutnamah is not sufficient—*Bhugobutty Kooer* vs. *Gunesh*, 21 W. R., 308.

If the applicant does not appear in person, he may be examined by commission. See section 406.

Rejection of application.

405. If the application be not framed or presented in the manner prescribed by sections 403 and 404, the Court shall reject it.

Act VIII of 1859, section 302. This section applies to H. C. and P. S. C. C.

Examination of applicant.

406. If the application be in proper form and duly presented, the Judge may, if he thinks fit, examine the petitioner, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

If presented by agent, Court may order applicant to be examined by commission.

When the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken under the provisions of this Code.

Act VIII of 1859, section 304. This section applies to H. C. and P. S. C. C.

The Judge must apparently conduct the examination under the first clause. He cannot delegate it to any other person—See *Reg.* vs. *Mir Saheb Kussamia*, 1 Bom., 100.

Rejection of application.

407. If it appear to the Court.—

(*a*) that the applicant is not a pauper, or

(*b*) that he has, within the two months next before the presentation of the application, disposed of any property fraudulently or with a view to obtain the benefit of this Chapter, or

(*c*) that his allegations do not shew a right to sue in such Court, or

(*d*) that he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter,

the Court shall reject the application.

Act VIII of 1859, section 304; 14 W. R., 281. This section applies to H. C. and P. S. C. C.

Subject-matter of Proposed Suit.—See note under section 409 *ante*.

Examination.—The examination referred to in this section is that of the petitioner or his agent, and at this stage the Court has no power to examine witnesses—*In the matter of Parkash Ojha*, Petitioner, 25 W. R., 74.

Right to Sue.—If it appears that the suit is bad on the merits—*Dulari* vs. *Vallabdas*, I. L. R., 13 Bom., 126; *Chunder Churn Paul* vs. *Ram Narain Sein*, Coryt., 8; see otherwise *Koka* vs. *Koka*, I. L. R., 4 Mad., 322, or barred—*In the matter of Parkash Ojha*, Petitioner, 25 W. R., 74; *Chattarpal* vs. *Raja Ram*, I. L. R., 7 Alla., 661; or that the Court has no jurisdiction—*In the matter of Gunga Dass*, 14 W. R., 281; or that a previous application has been refused—*Baboo Bisheshur Singh* vs. *Moheshur Buksh Singh*, S. D., N. W., 1864, 189; or that any other of the circumstances mentioned in this section exists, the Judge must reject the application.

Any Agreement—Plaintiff being about to sue to redeem a village, agreed to pay his vakil a lump sum of Rs. 1,500, and in default to realize it out of the revenue of the property: *Held*, plaintiff could not sue as a pauper—*Manohar* vs. *Lakshman*, I. L. R., 9 Bom., 371.

Appeal.—There is no appeal from as order rejecting an application under this section—Section 588. But where a Judge, without any enquiry into the alleged poverty of the petitioner, struck off her petition on the ground that she had subsequently to filing the petition, applied to withdraw it, an appeal was allowed—*Baldeo* vs. *Gula Kuar*, I. L. R., 9 Alla., 129, compare, however, *Dwarkanath* vs. *Madhavrav*, I. L. R., 10 Bom., 207, and remarks of Sir Montague Smith in *Skinner* vs. *Orde*, I. L. R., 2 Alla., 241, p. 245.

Revision.—An order under this section is subject to revision—*Muhammed* vs. *Ajudhia*, I. L. R., 10 Alla., 467. It cannot be set aside under the Charter Act—*In the matter of Babur Ali*, 24 W. R., 62; *Khojedoonnissa*, Petitioner, 7 W. R., 486.

Limitation.—If one of the defendants dies during the enquiry, the special limitation under section 368, *ante*, does not apply—*Janerdan Jithal* vs. *Anant*, I. L. R., 7 Bom. 373.

Notice of day for receiving evidence of applicant's pauperism.

408. If the Court sees no reason to refuse the application on any of the grounds stated in section 407, it shall fix a day (of which at least ten days' previous notice shall be given to the opposite party and the Government Pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

Act VIII of 1859, section 305. This section applies to H. C. and P. S. C. C.

Procedure at hearing.

409. On the day so fixed, or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may cross-examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in section 407.

The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

Act VIII of 1859, section 306. This section applies to H. C., except so much as requires the making of a memorandum, and P. S. C. C.

If a pauper adds in his plaint to the defendants named in his application to sue as a pauper, an enquiry into his possession of property, &c., must be gone into Court in the presence of the new defendants—*Hur Chunder Lahori*, Petitioner, S. D. Sum Decis., July 26, 1847.

The examination must be conducted by the Judge in person—*In the matter of Eknath-bin-Madhoba*, 1 Bom., 102; and it is not limited to the question of pauperism; but embraces all the matters referred to in section 407—*In the matter of Gunga*, Petitioner, 14 W. R., 281; 11 B. L. R., App., 23.

No day was fixed, and on default by non-appearance, the Judge struck off the application "for the present." It was held that, as there had been no refusal to allow the applicant to sue as a pauper, the applicant might renew his application—*Rajah Bhog Sing* vs. *Ranee Maha Koonwer*, 3 Agra, Mis., 1. So an application struck off for want of prosecution, may be re-admitted—*In the matter of Rani Umasundary Debi*, 5 B. L. R., App., 29.

A successfully opposed an application to sue in *formâ pauperis* in a Subordinate Judge's Court on the ground of over-valuation: *Held*, he could not afterwards turn round and object to the jurisdiction of the Munsif—*Brohmo Moyee* vs. *Anund Chunder*, 22 W. R., 120.

A was allowed to sue in *formâ pauperis* by the Delhi Court. Subsequently his application was returned, for presentation in the Court at Meerut: *Held*, the Meerut Court was not bound by the previous order, but should proceed *de novo*: *Held*, also, that the time spent in prosecuting the suit in the Delhi Court should be deducted—*Skinner* vs. *Orde*, 6 Alla., 225; I. L. R., 1 Alla., 230; compare *Skinner* vs. *Ordeo*, I. L. R., 2 Alla., 241; 6 Ind. Ap., 126, but where an application for leave to appeal as a pauper was rejected, a regular appeal filed subsequently but after limitation had expired was not allowed to relate back—*Bishnath* vs. *Jaganath*, I. L. R., 13 Alla., 308.

Revision.—See *Ram Sahai Singh* vs. *Maniram*, 6 C. L. R., 223, where the High Court refused to interfere under section 622.

Review.—An order under this section refusing leave to sue as a pauper is subject to review—*Adarji* vs. *Manikji*, I. L. R., 4 Bom., 414.

Procedure if application admitted.

410. If the application be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted under Chapter V, except that the plaintiff shall not be liable to any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

Act VIII of 1859, section 308. This section applies to H. C. and P. S. C. C.

Shall be Deemed a Plaint.—There is no suit in existence until the application has been granted—*Dwarkanath* vs. *Madhavrav*, I. L. R., 10 Bom., 207. See "APPEAL," section 407, *ante*.

Appeal: Revision.—When an application is granted, the order cannot be set aside, on appeal or motion, by a superior Court. If, subsequently to permission being granted, it appears that the order has been obtained improperly, application should be made to the Court out of which the order issued—*In the matter of Khodejoonissa*, 7 W. R., 486. But the propriety of the order can be contested if the case is appealed, and where a Court gave leave to sue in *formâ pauperis*, a previous application having been refused, the suit was dismissed on appeal—*Baboo Bishessur Singh* vs. *Maharaja Muhessur Bakuh Singh*, S. D., N. W., 1864, p. 189.

Limitation.—Limitation depends on the date of the application and not on the day when the application is granted and registered—*Dhaole* vs. *Samval*, 4 Bom., 39; *Seetaram Gower* vs. *Goluknath Dutt*, Marsh., 174; *Naraguntу Lutchmee Davamah* vs. *Vengama Naidoo*, 9 Moore, 94. See also *Skinner* vs. *Orde*, I. L. R., 1 Alla., 230; I. L. R., 2 Alla., 241; *Khem Karan* vs. *Har Dayal*, I. L. R., 4 Alla., 37.

Stamp.—The exemption from liability to pay stamps only extends to the cases mentioned in the section. A pauper must pay the proper stamps and penalty (if any) on a document on which he relies—*Golam* vs. *Ekram*, 10 W. R., 357.

Costs when pauper succeeds.

411. If the plaintiff succeed in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he

had not been permitted to sue as a pauper; and such amount shall be a first charge on the subject-matter of the suit, and shall also be recoverable by the Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable under this Code.

Recovery of Court-fees.

Act VIII of 1859, section 309. This section applies to H. C. and P. S. C. C.

By the Government—Government has no lien on the decree for stamps. It can recover their value in the same manner as cash; but has no higher position than an ordinary judgment creditor. So where Government, after attaching plaintiff's decree, consented to its sale in execution of a decree against the pauper, and obtained an order by which it secured any surplus that might arise from the sale, it was held that it could not follow the purchaser when the sale did not yield a surplus—*Prankisto* vs. *The Collector of Moorshedabad*, 15 W. R., 205.

A pauper suit for possession was decreed, with *mesne* profits to be ascertained in execution, and Government was to be paid by plaintiff and defendant in shares proportionate to their ultimate shares when the amount of wasilat should be ascertained. The parties did not enquire into the *mesne* profits, and the Court on the motion of Government called on the parties to appear, and on default changed its order and directed that the fees should be realized from both jointly: *Held*, the first order was improper as a contingent order, but the Court could not change it after the decree had been passed and nothing remained to be done—*Shostee Churn* vs. *The Collector of Chittagong*, 13 W. R., 155.

Subject-matter of the Suit—A obtained a decree against B for Rs. 1,439 and costs Rs. 22. B got a decree for Rs. 879 costs. A was directed to pay a portion of the Court-fees. Government in order to realize A's portion, applied to attach and sell the sum of Rs. 1,399 due by B. B claimed to set off his Rs. 879 and a further sum due by A under another decree. No proceeding in execution had been taken in regard to these sums. *Held*:—

(*a*) That sections 246 and 247, *ante*, did not apply:

(*b*) That the sum of Rs. 1,439 was part of the subject-matter of the suit, and Government having a first charge against A, no set-off could be allowed—*Janki* vs. *The Collector of Allahabad*, I. L. R., 9 Alla., 64.

From any Party.—A defendant should not be made liable to pay Court-fees on any sum greater than that decreed against him.—*Chandrareka* vs. *The Secretary of State*, I. L. R., 14 Mad., 163.

First Charge.—See the following cases, *Janki* vs. *The Collector of Allahabad*, I. L. R., 9 Alla., 64; *Ganpat Putaya* vs. *The Collector of Kanara*, I. L. R., 1 Bom., 7; *The Collector of Moradabad* vs. *Muhammad*, I. L. R., 2 Alla., 196; but see *Ramachandra* vs. *Pitchaikuni*, I. L. R., 7 Mad., 434; and compare the argument in *Judah* vs. *The Secretary of State*, I. L. R., 12 Cal., 445.

Limitation—The period allowed to Government is the ordinary period for execution under art. 178 of the Limitation Act—*The Collector of Beerbhoom* vs. *Shreehurry*, 22 W. R., 512; *Appaya* vs. *The Collector of Vizagapatam*, I. L. R., 4 Mad., 155; *Venubai* vs. *The Collector of Nasik*, I. L. R., 7 Bom., 552.

Appeal.—Orders deciding any matter between Government and the party charged are open to appeal under section 244, cl. (*c*), *ante*—*Janki* vs. *The Collector of Allahabad*, I. L. R., 9 Alla., 64; *The Secretary of State* vs. *Bhagawanti*, I. L. R., 13 Alla., 326.

412. If the plaintiff fails in the suit, or if he is dispaupered, or if the suit is dismissed under section 97 or 98, the Court shall order the plaintiff, or any person made, under section 32, co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper;

Procedure when pauper fails.

and, if it find that the suit was frivolous or vexatious, it may also punish the plaintiff with fine not exceeding one

hundred rupees, or with imprisoment for a term which may extend to a month, or with both.

This section applies to H. C. and P. S. C. C.

Failed in the Suit.—Where a plaint in *formâ pauperis* has been admitted, but the Judge holding he has no jurisdiction, returns the plaint to the plaintiff, he has, no jurisdiction to make the plaintiff pay the Court-fees—*The Collector of Ratnagiri* vs. *Janardan*, I. L. R., 6 Bom., 591, and neither this section nor section 211, *ante*, apply to cases of failure, other than adjudicated failure—*The Collector of Kanara* vs. *Krishnappa*, I. L. R., 15 Bom., 77.

Where a petition for leave to sue in *formâ pauperis* has been filed and is pending, and the petitioner pays the necessary amount of stamp-fees, the petition should be treated for the purposes of limitation as a plaint from the date on which it was filed and not from the date of payment of the fees—*Skinner* vs. *Orde*, 4 C. L. R., 331; I. L. R., 2 Alla., 241. See note and section 409, *ante*.

Revision: Review.—Where the Court omitted to make an order as to which of the parties was to pay the stamp-fee, it was held the error could not be rectified on the application of Government—*Shoshee Churn* vs. *Kamarali*, 1 Shome, 266; and in another case it was decided that as Government was not a party to the suit it could not be heard in regard to a defective decree—*The Secretary of State*, Petitioner, 2 C. L. R., 461; but in Bombay the Collector of Revenue is allowed to apply under section 622, *post*, and have the error of a subordinate Court amended—*The Collector of Kanara* vs. *Krishnappa*, I. L. R., 15 Bom., 77.

Defendant.—This section does not apply to the costs of a successful defendant in a pauper suit—*Jetha* vs. *Gulraj*, I. L. R., 8 Bom., 577.

Refusal to allow applicant to sue as pauper to bar susbequent application of like nature.

413. An order of refusal made under section 409 to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by Government in opposing his application for leave to sue as a pauper.

Act VIII of 1859, section 310. This section applies to H. C. and P. S. C. C.

This section does not apply when the Court has not passed an order of refusal, for instance, if it returns the application to have the question for pauperism tried by a Court of concurrent jurisdiction—*Skinner* vs. *Orde*, 6 Alla., 225; I. L. R., 2 Alla., 241; or strikes off "for the present," the application for default by non-appearance—*Rajah Bhoj Singh* vs. *Ram Maha Koonwer*, 3 Agra, Mis., 1; or dismisses it in default of prosecution—*In the matter of Umavundari*, 5 B. L. R., App, 29. Under such circumstances the application may be renewed or revived.

Dispaupering.

414. The Court may, on motion by the defendant, or by the Government Pleader, of which one week's notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(*a*) if he is guilty of vexatious or improper conduct in the course of the suit;

(*b*) if it appears that his means are such that he ought not to continue to sue as a pauper; or

(*c*) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.

This section applies to H. C. and P. S. C. C.

If it appears from facts that have been discovered after permission to sue in *formâ pauperis* has been granted, that the applicant ought not to be allowed to continue to sue as a pauper, the remedy is by application under this section and not by appeal or motion in the superior Courts—*In the matter of Khodejoonissa*, 7 W. R., 486.

415. The costs of an application for permission to sue as a pauper and of an inquiry into pauperism are costs in the suit.

Costs.

This section applies to H. C. and P. S. C. C.

CHAPTER XXVII.

SUITS BY OR AGAINST GOVERNMENT OR PUBLIC OFFICERS.

416. Suits by or against the Government shall be instituted by or against (as the case may be) The Secretary of State for India in Council.

Suits by or against Secretary of State in Council.

This section applies to H. C. and P. S. C. C.

Notice.—See section 424, *post*.

Form of Suit—In all suits against Government, the Court should see that the defendant is properly described, and that no description is inserted other than what is prescribed by the law. Imperfect plaints should be invariably returned for amendment —Cal. Cir. O. No. 5, 1875. And see *Vijaya* vs. *The Secretary of State for India*, I. L. R., 7 Mad., 466, p. 478.

An action cannot be maintained against The Secretary of State. It must be brought against "The Secretary of State for India in Council"—*P. & C. S. N. Co.* vs. *The Secretary of State for India*, Bourke, 167; 5, Bom., App., 1; *Nobin Chunder Dey* vs. *The Secretary of State for India*, I. L. R., 1 Cal., 11, p. 14; 21 & 22 Vic., cap. 106, section 65. This error may be waived directly. Thus where A was sued as "Agent to the Governor-General on the part of Government," and defended the suit on behalf of Government through the Government Pleader, it was held to be substantially a suit against Government—*Roopan Tewaree* vs. *Buckle*, 10 W. R., 142, and see also *The Municipal Committee of Moradabad* vs. *Chatri*, 466, p. 478; I. L. R., 1 Alla., 269.

The Secretary of State must be sued where the cause of action has arisen—*Subaraya Mudali* vs. *The Government and Cunliffe*, 1 Mad., 286; *Rundle* vs. *The Secretary of State in Council*, 1 Hyde, 37. See also *Hearsay* vs. *The Secretary of State*, 6 Alla., 46; *Doya Narain* vs. *The Secretary of State*, I. L. R., 14 Cal., 256. He cannot claim the benefit of Act XVIII of 1850, protecting judicial officers—*Vijaya* vs. *The Secretary of State*, I. L. R., 7 Mad., 466.

Amendment.—Where a suit was wrongly brought against a Magistrate, the Bombay High Court in regular appeal allowed the name of the Magistrate to be struck out and that of The Secretary of State for India in Council to be inserted.—*Nilkanthapa Maikapa* vs. *The Magistrate of Taluka*, I. L. R., 6 Bom., 670; *Balaram* vs. *The Magistrate of Taluka*, I. L. R., 6 Bom., 673; compare *Chuni Lal* vs. *Ram Kishen*, I. L. R., 15 Cal., 460. See "PRACTICE," *post*.

Suit will not Lie.—No action will lie against the Government for possession of immoveable property without proof of title—section 9, Act I, 1877; or on account of its transactions with Foreign States—*The Secretary of State for India in Council* vs. *Kamachee Boye Sahaba*, 7 Moore, 477; *Doss* vs. *The Secretary of State for India in Council*, L. R., 19 Eq., 509; or, on account of any act *done* or contract entered into in the exercise of powers usually called Sovereign, that is, powers which cannot be lawfully exercised, except by a Sovereign or private individual delegated by a Sovereign to exercise them—*P. & O. S. N. Co.* vs. *The Secretary of State for India*, Bourke, 167; 5 Bom. App., 1; such as assuming the Government of a country, and resuming a jagheer—*The East India Company* vs. *Syed Ally*, 7 Moore, App., 555; *Bhagwan Singh* vs. *The Secretary of State for India*, 2 Ind. App., 38; or, for seizing the property of a native in a recently-conquered country (who had been refused the benefit of the articles of capitulation of a fortress of which he was Governor, but who had been permitted to reside under military surveillance in his own house, where the seizure was made), where the seizure was made if not *flagrante*, yet *nondum cessante bello*, the country was quiet and the Court

sitting—*Elphinstone* vs. *Bedrechund*, 1 Knapp., 316; or on account of any act done by officers and soldiers carrying on hostilities; or for the acts of any naval officers in seizing, as prize, property of a subject under the supposition that it was property of an enemy; or for any act done by a military or naval officer, or by any soldier or sailor, whilst engaged in military or naval duty; or for the acts of its officers or servants in the exercise of judicial functions—Reg. XI, 1822, section 38—*P. & O. S. N. Co.* vs. *The Secretary of State for India*, 5 Bom. App., Bourke, 167; or for the acts of officers appointed to impose and collect excise duties—*Nobin Chunder Dey* vs. *The Secretary of State for India*, I. L. R., 1 Cal., 11; but see *The Secretary of State* vs. *Hari Bhanji*, I. L. R., 5 Mad., 273; *Vijaya* vs. *The Secretary of State*, I. L. R., 7 Mad., 466, pp. 472, 478.

In the case of *Dhankji Dadaji* vs. *The East India Company*, Perry's O. Cases, 343, it was held that, after the Charter, the Company could not be held liable for the illegal acts of their officers, or committed under the orders of the Local Government, such as taking forcible possession of the dwelling-house of an ex-Dewan of the Gaekwar of Baroda, resident in Bombay, and the forcible seizure of his papers under the orders of the Local Government.

Suit will Lie—The Secretary of State has been held liable for the acts of officers in connection with settlements—*Shaikh Zuhoorooddeen* vs. *The Collector of Goruckpore*, 4 B. L.R., (P.C.), 31; the illegal levy of import duties by a Collector of Customs—*Hari Bhanji* vs. *The Secretary of State*, I. L. R., 4 Mad., 344; and the sale of waste lands—*Rundle* vs. *The Secretary of State*, 1 Hyde, 37. The Secretary of State is liable for the acts done by public servants in the conduct of undertakings, which might be carried on by private individuals without having any sovereign powers delegated to them—*P. & O. Co.* vs. *The Secretary of State for India*, Bourke, 167; 5 Bom. App., 1, when acting in the discharge of their duty, within the limits of their authority; or if they exceed that authority, when the Government, in fact or in law, directly or by implication, has ratified the excess—*The Collector of Masulipatum* vs. *Cavaly Vencata*, 8 Moore, 529; 2 W. R., P. C., 61; *The Secretary of State* vs. *Sheo Singh*, I. L. R., 2 Alla., 756. So, where Government coolies let fall an iron funnel, which they were carrying from the Kidderpore Dockyard to a steamer in the river, and the noise of its fall startled a horse, and he rushed over it and injured himself, The Secretary of State was held liable—*P. & O. Co.* vs. *The Secretary of State for India*, Bourke, 167; 5 Bom. App., 1; and so he is liable for negligence in the carriage of goods by the Government Bullock Train—*Id.*, *The Post Master of Bareilly* vs. *Earle*, 3 Alla., 195; and so also he can be sued if the Government, professing to be acting under municipal law, wrongfully removes a municipal commissioner—*Vijaya* vs. *The Secretary of State*, I. L. R., 7 Mad., 466. But where an officer in the Public Works Department entered into a contract in excess of his authority, it was held that Government was not bound by it—*Beer Kishore* vs. *Government of Bengal*, 17 W. R., 497.

Not an Act of State.—Lands were held as *jagheer* under the Sovereign of an independent State, and on the conquest of the territory by the East India Company the *jagheerdar* remained in the same position towards the Company: *Held*, the seizure of the tenure, and the arms and stores pertaining to it after the death of the *jagheerdars*, was not an act of State. Their Lordships of the Privy Council said:—

"The act of Government in this case was not the seizure by arbitrary power of territories, which up to that time had belonged to another Sovereign State: it was the resumption of lands previously held from the Government under a particular tenure upon the alleged determination of that tenure. The possession was taken under colour of a legal title; that title being the undoubted right of the sovereign power to resume and retain or assess to the public revenue all lands within its territories upon the determination of the tenure under which they may have been exceptionally held rent-free. If by means of the continuance of the tenure, or from other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would *primâ facie* be cognizable by the Municipal Courts of India"—*Forester* vs *The Secretary of State*, 12 B. L. R., 120; see also the case of *Viziaramarazu* vs. *The Secretary of State*, I. L. R., 5 Mad., 91; *Hari* vs. *Shaik Ajmudin*, I. L. R., 11 Bom., 235.

Government confiscated the property belonging to certain rebels, and put it up for auction sale to the highest bidder without reserving any right to object to the purchaser. The Government refused to perfect the sale, and, in a suit for specific performance, raised the defence that it was an act of State. Their Lordships of the Privy Council said:—

"It has been said that this suit could not be instituted by the respondent inasmuch as what was done was an act of State which could not be called into question. The meaning, as their Lordships understand it, of an act of State is something which pertains to the functions of Government. Suppose, for instance, any question had arisen with regard to the propriety of confiscating the rebels' property that would have been an act of State. Probably the determination of the Government to sell that confiscated property might also be treated as an act of State; but in the sale the Government was exactly in the situation of an individual selling his property by auction, and when the property was knocked down, the relation of vendor and vendee existed between the Govern-

ment and the highest bidder"—*Sheo Lall Bohra* vs. *Sheikh Mahomed*, 13 W. R. (P.C)., 4. Compare this case with *Nobin Chunder Dey* vs. *The Secretary of State*, I. L. R., 1 Cal. 11; there is some difficulty in reconciling them, and the High Court of Madras has declined to follow the latter—*The Secretary of State* vs. *Hari Bhanji*, I. L. R., 5 Mad., 273.

And where the East India Company when called upon to account for the property of a deceased State prisoner answered that they had dealt with it as sovereigns, their answer was set aside—*Essadah Bye* vs. *The East India Company*, 1 Tay. and Bell, 290. And the distinction is that Government is liable for acts professed to be done under a municipal law; but not for acts done in the exercise of its sovereign power which are not professedly justified by municipal law—*The Secretary of State* vs. *Hari Bhanji*, I. L. R., 5 Mad., 273; see also *Walker* vs. *Baird*, App. Cas., (1892), 491.

A suit will lie against Government to set aside a settlement and obtain possession and in such Government should be a party—*Mahomed Israil* vs. *Wise*, 21 W. R., 327; *Krishna Lall* vs. *Bhyrub Chunder*, 22 W. R., 52; but see *Krishna Chandra* vs. *Harish Chandra*, 8 B. L. R., 524; to declare that certain lands are not liable to assessment because they are included in a permanently settled estate—*The Secretary of State* vs. *Fahamalannissa*, I. L. R., 17 Cal., 590; to contest an order to pay revenue at an increased rate—*Kebul Ram* vs. *Government*, 5 W. R., 47; for specific performance of a contract of sale—*Rundle* vs. *The Secretary of State in Council*, 1 Hyde, 37; for damages on account of wrongful dismissal of a servant—*Hughes* vs. *The Secretary of State*, 7 B. L. R., 688; or other breach of contract—*Ross Johnson* vs. *The Secretary of State*, 2 Hyde, 153 but not for damages arising from a Magistrate taking up a public ferry—*The Collector of Patna* vs. *Romanath Tagore*, 7 W. R., 191; nor for a pension—Act XXIII, 1871, section 4.

The action taken by the revenue authorities under Act IX of 1847 is final, and cannot be questioned; but that does not debar a proprietor from bringing before a Civil Court his right to hold the property at any settlement that may be made—18 W. R., 23; W. R., 38; Reg. App., 268 of 1876—*Narain Chunder Chowdhry* vs. *Tayler*. And a suit to declare that land assessed forms part of a permanently settled estate will lie—*The Secretary of State* vs. *Ram Torab*, I. L. R., 7 Alla., 140.

Practice.—To question an act of State directly or indirectly the contention should be raised in a suit to which the Government has been made a party—*Umjad Ally* vs. *Mohum dee Begum*, 11 Moore, 550; 10 W. R., 25. Where the lands, the subject of the suit, are stated to be chowkidaree, or ghatwalee Government should be made a party—*The Collector of Beerbhoom* vs. *Mooktakhessee Dubeah*, S. D., 4th July, 1860. So in a suit to recover possession of a chur which had been leased to defendant: *Held*, Government a necessary party—*Cannon* vs. *Bissonath Adhicaree*, 5 C. L. R., 154.

Persons authorized to act for Government.

417. Persons being *ex-officio* or otherwise authorized to act for Government in respect of any judicial proceeding shall be deemed to be the recognized agent by whom appearances, acts and applications under this Code may be made or done on behalf of Government.

Act VIII of 1859, section 17, cl. 3; section 26, cl. 6. This section applies to H. C. and P. S. C. C.

Plaints in suits by Secretary of State in Council.

418. In suits by The Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of abode of the plaintiff, it shall be sufficient to insert the words "The Secretary of State for India in Council."

Act VIII of 1859, section 26. This section applies to H. C. and P. S. C. C. See note under section 416, *ante*.

Agent for Government to receive process.

419. The Government Pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving

processes against the said Secretary of State in Council issuing out of such "Court."

The words from "Court" to "shall" have been inserted by Act VIII of 1888, section 35.

Act VIII of 1859, section 52. This section applies to H. C. and P. S. C. C.

Appearance and answer by Secretary of State in Council.

420. The Court, in fixing the day for the said Secretary of State in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channels, and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State in Council or the Government, and may extend the time at its discretion.

Act VIII of 1859, section 67. This section applies to H. C. and P. S. C. C.

Attendance of person able to answer questions relating to suit against Government.

421. The Court may also in any case in which the Government Pleader is not accompanied by any person on the part of the said Secretary of State in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

Act VIII of 1859, section 67. The section applies to H. C. and P. S. C. C.

Service on public officers.

422. Where the defendant is a public officer, the Court may send a copy of the summons to the head of the office in which the defendant is employed, for the purpose of being served on him, if it appear to the Court that the summons may be most conveniently so served.

Act VIII of 1859, section 62. This section applies to H. C. and P. S. C. C.

The Registrar is not a necessary party to a suit under section 79 of the Registration Act III of 1877—*Radhakissen Rowra* vs. *Chooneeloll*, 5 C. L. R., 172.

Practice—All suits against an officer in his official capacity should describe him by his official title. If the plaint contains a description not in conformity with the law it should be returned—Cal. Cir. O. No. 5, 1875. See "AMENDMENT," section 416, *ante*, p. 391.

If the summons is not sent to the head of the office, it must be served in the usual way. The Government Pleader is not the agent of every public officer, as he is of the Government to accept service.

Governor and Council of Madras—The Madras High Court has no jurisdiction over the Governor and Council—*In the matter of Wallace*, I. L. R., 8 Mad., 24.

Judicial Officers.—By Act XVIII of 1850, no person acting judicially is liable to be sued in the Civil Courts for any act done or ordered by him to be done, in the discharge of his judicial duty, whether or not within the limits of his jurisdiction; provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of. No action at all will lie against a judicial officer while acting in the exercise of his jurisdiction—*Prahlad Maharudra* vs. *Watt*, 10 Bom., 346; and see App. Cas., 1892, p. 64; but if a Judge has not jurisdiction and has the knowledge, or even if he has the means of knowledge of his want of jurisdiction, he is liable—*Calder* vs. *Halket*, 2 Moore, 293; *In re Toy*, 1 Tay. and Bell, 219; *The Collector of Sea*

Customs vs. *Chithambaram*, I. L. R., 1 Mad., 89, unless it appears that he had an honest belief, framed on enquiry and consideration, that he was acting within his powers—*Ragunada* vs. *Nathamuni*, 6 Mad., 423; *Taraknath* vs. *The Collector of Hooghly*, 4 B. L. R., 37; *Vinayak* vs. *Bai Itcha*, 3 Bom., 36; *Vithoba* vs. *Corfield*, 3 Bom., App. 1; *Teyen* vs. *Ram Lal*, I. L. R., 12 Alla., 115. This immunity extends not merely in respect of acts in Court *sedente curia*; but in respect of all acts of a judicial nature, and issuing a warrant of arrest—*Calder* vs. *Halket*, 2 Moore, 293; adjudicating a penalty under section 24, Act VI of 1863—*The Collector of Sea Customs* vs. *Chithambaram*, I. L. R., 1 Mad., 89; postponing a sale in execution—*Meghraj* vs. *Zakir Hoossein*, I. L. R., 1 Alla., 280, are judicial acts. If, on the other hand, the act is within his jurisdiction, he is protected absolutely, and the question of good faith does not arise—*Meghraj* vs. *Zakir Hossein*, I. L. R., 1 Alla., 280; *Ousley* vs. *Plowden*, 1 Bouln., 165; *Teyen* vs. *Ram Lal*, I. L. R., 12 Alla., 115. Thus where a Judge was sued for words spoken, falsely and maliciously, and it appeared that they had been spoken while the Judge was trying a case in which the plaintiff was a party: *Held*, no cause of action, on the ground that no action would lie for words spoken or acts done in his judicial capacity in a Court of Justice—*Scott* vs. *Stansfield*, L. R., 3 Eq., 220; *Ali Kurreem* vs. *Sandys*, 1 Bouln., 1; *Seaman* vs. *Netherclift*, 1 C. P. D., 540; 2 C. P. D., 39; App. Cas., 1892, p. 64; but this immunity is in respect of the character of Judge, which if a man assume knowing that in fact he is not so, either in respect of the subject-matter or the parties, he has no immunity—*Calder* vs. *Halket*, 2 Moore, 293.

A plaint declaring that a Judge knowingly and maliciously issued an illegal order does not disclose a cause of action. Nor is stating that a Judge acted "maliciously and without authority" sufficient—*Girdharlal* vs. *Jaganath*, 10 Bom., 182. It must not only aver that he had no jurisdiction, but also that he had no reasonable and probable cause for supposing that he had jurisdiction—*Prahlad Maharudra* vs. *Watt*, 10 Bom., 346.

Municipal Commissioners when acting as Magistrates are entitled to the same privileges—*Shazada Halimoozzumah* vs. *Chairman of Hooghly*, 13 W. R., 340. In Bombay, such a suit against a municipality can only be heard by the District Judge—*The Ahmedabad Municipality* vs. *Mahamad Jumal*, I. L. R., 3 Alla., 146.

Executive Officer.—There is no such general protection granted to executive officers, and their acts may be questioned—*R.* vs. *Collins*, 2 Q. B. D., 35; *Sinclair* vs. *Broughton*, 9 Ind. App., 152; *Mukoond* vs. *Joy*, 1 W. R., 16. They are exempted in special cases—Act XVIII, 1850, section 1; Act V, 1861, section 43; and where they are allowed any special protection when acting under any Act, there is no rule of law more firmly established than that if they *bonâ fide*, and not absurdly, believe that they are acting in pursuance of the statute and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act—*Spooner* vs. *Juddow*, 4 Moore, 353.

The following rules were laid down in *Ousley* vs. *Plowden*, 1 Bouln., 165.

1*st*.—If an officer is authorized by law to do the act which he does, he is justified in doing it. Whatever his object or intention may be at the time he does it, he is not confined in his defence to the authority which alone he may have produced when he acted, and may resort to any authority which he possessed to justify his proceeding. See, however, *Gasper* vs. *Mytton*, 1 Tay., 291.

2*nd*.—In cases of breach of contract, such as the dismissal of a servant, the master may justify the dismissal, upon a ground other than that assigned by him at the time of dismissal, provided that, at that time, the cause existed and was known to him.

On the matters laid down in these rules see *Trent* vs. *Hunt*, 9 Exch. Rep., 14; *Cowan* vs. *Milbourn*, 2 Ex., 230; *Moothoormohun Roy* vs. *The Bank of Bengal*, I. L. R., 3 Cal., 392.

The removal of an obstruction by a Magistrate, in the exercise of powers given him under Act VI of 1868 (B. C.), section K, is an executive act, and even the circumstance that a fine has been imposed on the person who set up the obstruction does not protect the Magistrate, under Act XVIII of 1850, from an action to try the right of the person to have the obstruction there—*Chunder Narain* vs. *Brojo Bullub*, 21 W. R., 391.

The Madras High Court has jurisdiction to try suits against Revenue Officers for acts *ultra vires*, done in their official capacity—*The Collector of Sea Customs* vs. *Chithambaram*, I. L. R., 1 Mad., 89.

Extension of time to enable officer to make reference to Government.

423. If the public officer on receiving the summons considers it proper to make a reference to the Government before answering to the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel;

and the Court upon such application may extend the time for so long as appears to be requisite.

Act VIII of 1859, section 69. This section applies to H. C. and P. S. C. C.

This application must be made by the officer on his own behalf. It should not be made in the name of Government.

Notice previous to suing Secretary of State in Council or public officer.

424. No suit shall be instituted against the said Secretary of State in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action and the name and place of abode of the intending plaintiff and the relief which he claims; and the plaint must contain a statement that such notice has been so delivered or left.

Act XV of 1873, section 43 This section applies to H. C. and P. S. C. C. The words from "plaintiff" to "and" have been inserted by Act VII of 1888, section 36.

Act done in Official Capacity.—Where a Collector thinking three Mamlatdars had no right to give plaintiff certificates destroyed them, it was held to have been done in his official capacity—*Swamiray* vs *The Collector of Dharwar*, I. L. R., 15 Bom., 441. But where a minor under the Court of Wards was sued for a debt due by his father and the Collector was appointed guardian *ad litem*: *Held*, notice was not necessary—*Anantharaman* vs. *Ramasami*, I. L. R., 11 Mad., 317.

Adding Parties.—It has been held that this section does not prevent a Court adding The Secretary of State as a party to a suit under section 32, *ante*—*Bul Mokoond* vs. *Jirjudhun*, I. L. R., 9 Cal., 271.

Notice when Required—A public officer is entitled to notice only in those cases in which he is sued for damages on account of some wrong inadvertently committed by him in the discharge of his duty—*Shahebzadee* vs. *Fergusson*, I. L. R., 7 Cal., 499; *Chunder Sikhur* vs. *Obhoy Churn*, I. L. R., 6 Cal., 8; *Sardar Singji* vs. *Ganpat Singji*, I. L. R., 14 Bom., 395; *Bhau Balapa* vs. *Nana*, I. L. R., 13 Bom., 343; *Annaji* vs. *Subramanya*, I. L. R., 13 Mad, 442; *Joshi Kalidas* vs. *Dakor Municipality*, I. L. R., 7 Bom., 398; *Flower* vs. *Local Board*, 5 C. D., 347. See, however, *Birj Mohan Singh* vs. *The Collector of Allahabad*, I. L. R., 4 Alla., 102; p. 111; *Ranchhod* vs. *Dakor Municipality*, I. L. R., 8 Bom., 421.

Form of Notice.—It should be in the form of a notice, and not like a mere letter. An attorney's letter declaring that he has been instructed to take legal proceedings is informal—*Lewis* vs. *Smith*, Holt's N. P. C., 27; *Norris* vs. *Smith*, L. R., 2 P. & D., 353, nor is a notice objecting and asking a re-consideration of the order complained of sufficient—*Abhoonath Bose* vs. *Chairman of Municipal Commissioners of Kishnaghur*, 7 W. R., 92.

It must state the cause, but not the form of the action—*Sabin* vs. *Deburgh*, 2 Camp., 196; and the relief which he claims, and no other cause of action can be raised at the trial—*Ullman* vs. *The Justices of the Peace for Calcutta*, 8 B. L. R., 265. The section, in short requires that the intending plaintiff should substantially inform the officer of the ground of complaint so as to enable him to see if there is any ground for the action—*Jones* vs. *Bird*, 5 B. & Ald., 837; *Parbutti Churn* vs. *Nobin Chunder*, 13 C. L. R, 195; he should, therefore, set forth sufficiently clear the grounds of the complaint—*Smith & Co.* vs. *West Derby Local Board*, 3 C. P. D., 423; and the time and place where the act complained of was done—*Bresse* vs. *Jerdeen*, 12 L. J. Q. B., 234. Lastly, the notic should give the name and place of abode of the party intending to sue; *Dwarkanath Gupta* vs. *Corporation of Calcutta*, I. L. R., 18 Cal., 91, p. 92. See on this, *James* vs. *Swift*, 4 B. & C., 681; and also *Eales* vs. *Municipal Commissioners of Madras*, I. L R., 14 Mad., 386.

Service.—The notice must (in the cause of a public officer) be served personally or left at his office. The day of serving the notice and that of bringing the action must be both excluded in computing the two months—*Young* vs. *Higgon*, 6 M. & W., 49.

Public Officer.—A Collector appointed to manage a minor's estate is a public officer within this section—*Nursingrav* vs. *Luxumanrav*, I. L. R., 1 Bom., 318; a nazir appointed as guardian *ad litem* of a minor is not—*Mohun Ishuar* vs. *Hakse Rupa*, I. L. R., 4 Bom., 638; *Jadow Mulji* vs. *Chhagan*, I. L. R., 5 Bom., 360, nor is a Collector—*Anantharaman* vs. *Ramasami*, I. L. R., 11 Mad., 317; and see *Bhau Balapa* vs. *Nana*, I. L. R., 13 Bom., 343. See cases under "Public Officer," section 2, *ante*.

Special Appeal.—Want of notice cannot be raised for the first time in special appeal—*Municipal Committee* vs. *Chatra Singh*, I. L. R., 1 Alla., 269.

Arrests in such suits.

425. No warrant of arrest shall be issued in such suit without the consent in writing of the District Judge.

This section applies to H. C. and P. S. C. C.

Application where Government undertakes defence.

426. If the Government undertakes the defence of a suit against a public officer, the Government Pleader, upon being furnished with authority to appear and answer to the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register.

Act VIII of 1859, section 71. This section applies to H. C. and P. S. C. C.
When Government has undertaken the defence, the Government Pleader, in lieu of a vakalutnama, files a memorandum on unstamped paper—Cir. Civ. O., No. 23, Cal., 1871.
This does not change the nature of the suit, which will continue as before. The suit is against the officer, and against him, the decree, if any, must be passed.

Procedure where no such application made.

427. If such application is not made by the Government Pleader on or before the day fixed in the notice for the defendant to appear and answer to the plaint, the case shall proceed as in a suit between private parties, except that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

Defendant not liable to arrest before judgment.

Act VIII of 1859, section 71. This section applies to H. C. and P. S. C. C.
If the application is not made before the day fixed in the notice to appear and answer under section 422, or section 423, no note will be made in the register, and the suit will proceed as a private suit.

Exemption of public officers from personal appearance.

428. In a suit against a public officer in respect of such act as aforesaid, the Court shall exempt the defendant from appearing in person when he satisfies the Court that he cannot absent himself from his duty without detriment to the public service.

Act VIII of 1859, section 72. This section applies to H. C. and P. S. C. C.
The discretion to compel his attendance or otherwise rests with the Judge.

429. When the decree is against the said Secretary of State in Council or against a public officer in respect of such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

Procedure where decree is against Government or public officer.

Execution shall not issue on any such decree unless it remains unsatisfied for the period of three months computed from the date of the report.

This section applies to H. C. and P. S. C. C.
Execution shall not issue before three months, and until the period mentioned in the decree has expired.

CHAPTER XXVIII.

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS.

430. Alien enemies residing in British India with the permission of the Governor-General in Council, and alien friends, may sue in the Courts of British India as if they were subjects of Her Majesty.

When aliens may sue.

No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country, the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of Her Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of the second paragraph of this section, be deemed to be an alien enemy residing in a foreign country.

When foreign State may sue.

431. A foreign State may sue in the Courts of British India:

Provided that—

(*a*) it has been recognized by Her Majesty or the Governor-General in Council, and

(*b*) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State.

The Court shall take judicial notice of the fact that a foreign State has not been recognized by Her Majesty or by the Governor-General in Council.

This section applies to H. C. and P. S. C. C.

Alien.—As to the right of an alien to enter British territory see *Musgrove* vs. *Chesn*, App. Cas., (1891), 272.

If the foreign State has been recognized, the recognition is concluisve of the right to sue. A foreign State is limited to subjects stated, in the text, and cannot sue for anything else; infringing its prerogative right does not constitute a cause of action—*Emperor of Austria* vs. *Day*, 2 Giff., 628.

Private Rights—This is, those private rights of a State that must be enforced through a Court of Justice as distinguished from its political rights—*Hajon Manik* vs. *Bur Sing*, I. L. R., 11 Cal., 17.

Practice—Foreign States can only obtain relief subject to the rules of the Court, and pursuant to its rules of practice, and one of the conditions is that, like an individual, it will give discovery. Where a foreign State is plaintiff, the defendant should apply to it to name some person from whom discovery may be sought, and if it refuses, the Court will be justified in dealing with the suit as if it were the case of an ordinary individual in which discovery had been refused—*United States of America* vs. *Wagner*, 2 Ch. App., 590; *Republic of Peru* vs. *Weguelin*, L. R., 20 Eq., 140.

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs.

432. Persons specially appointed by order of Government at the request of any Sovereign Prince or ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent in the opinion of the Government to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

A person appointed under this section may authorize or appoint persons to make and do appearances, applications and acts in any such suit or suits as if he were himself a party to the suit or suits.

Act VIII of 1859, section 17. The words from "British India" to "to" and the last two paragraphs have been added by Act VII of 1888, section 37. This section applies to H. C. and P. S. C. C.

A political agent if not specially appointed cannot sue on behalf of a Prince—*Ventkarav Madhavrav*, I. L. R., 11 Bom., 53. See section 434A, *infra*.

Suits against Princes, Chiefs, Ambassadors and Envoys.

433. (1) Any such Prince or Chief, and any Ambassador or Envoy of a Foreign State, may, with the consent of the Governor-General in Council, certified by the signature of one of the

Secretaries to the Government of India (but not without such consent), be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, Ambassador or Envoy may be sued ; but it shall not be given unless the Prince, Chief, Ambassador or Envoy—

(*a*) has instituted a suit in the Court against the person desiring to sue him, or

(*b*) by himself or another trades within the local limits of the jurisdiction of the Court, or

(*c*) is in possession of immoveable propery situate within those limits and is to be sued with reference to such possession or for money charged on that property.

(3) No such Prince, Chief, Ambassador or Envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, Ambassador or Envoy.

(4) The Governor-General in Council may, by notification in the *Gazette of India*, authorize a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, Ambassador or Envoy named in the notification, the functions assigned by the foregoing sub-sections to the Governor-General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immoveable property, sue without such consent as is mentioned in this section, a Prince, Chief, Ambassador or Envoy from whom he holds or claims to hold the property.

This section has been substituted by Act VIII of 1888, section 30. It applies to C. and P. S. C. C.

Compare section 2, Act XIII of 1868, and the case of *Begum Bibee* vs. *The King of Oudh*, 11 W. R., 116.

The Rajah of Tipperah is subject to the Courts of British India in respect of the lands held within it, otherwise not, except in the cases mentioned in this section—*Bir Chunder* vs. *Ishan Chunder*, 3 C. L. R., 417 ; and he may institute a suit in his own name through his recognized agent—*Beer Chunder* vs. *Ishan Chunder*, I. L. R., 10 Cal., 136 ; see also *Beer Chunder* vs. *Raj Coomar*, I. L. R., 9 Cal., 535.

As to the Raja of Cherraponjee, see *Hajon Manik* vs. *Bur Sing*, I. L. R., 11 Cal., 17.

The Desai of Patadi is a ruling Chief within this section—*Kambhai* vs. *Himatsangja*, I. L. R., 8 Bom., 415.

Immoveable Property.—A suit to have maintenance charged on an estate is not a suit for immoveable property—*Beer Chunder* vs. *Raj Coomar*, 12 C. L. R., 473 I. L. R., 9 Cal., 535 ; compare *Mahalakshmamma* vs. *Venkataratnamma*, I. L. R., 6 Mad., 83, p. 87.

Style of Princes and Chiefs as parties to suits.

434. A Sovereign Prince or ruling Chief may sue, and shall be sued, in the name of his State:

Provided that in giving the consent referred to in the last foregoing section the Governor-General in Council or Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

This has been newly inserted, and the former section has become section 229B (*supra*).—See Act VII of 1888, sections 39 and 40.

Description.—The State should sue by the name by which it has been recognized by this country. In a monarchy all the public rights and interest of the nation are vested in, and represented by, the monarch; in a republic, they are the property of the State. Hence, in the former case, the suit should be entitled "*The Emperor of Austria* vs. *A*"—; or, "*The King of Spain* vs. B."; in the latter, the name of the State must be used, and the plaint should describe the case as "*The United States of America* vs. *A*"—*United States of America* vs. *Wagner*, 2 Ch. App., 582.

CHAPTER XXIX.

SUITS BY AND AGAINST CORPORATIONS AND COMPANIES.

Subscription and verification of plaint.

435. In suits by a Corporation, or by a Company authorized to sue and be sued in the name of an officer or of a trustee, the plaint may be subscribed and verified on behalf of the Corporation or Company by any director, secretary or other principal officer of the Corporation or Company, who is able to depose to the facts of the case.

Act VIII of 1859, section 26. This section applies to H. C. and P. S. C. C.

Plaints.—In all suits by or against a Corporation or any Company authorized to sue and be sued in the name of an officer or trustee, the name of the Corporation or the names of the officers or trustees of the Company shall be inserted in the plaint as plaintiff or defendant, as the case may be—*Ram Doss* vs. *Stephenson*, 10 W. R., 366; it cannot be sued through its agent—*Nubeen Chunder* vs. *Stephenson*, 15 W. R. 534; *Campbell* vs. *Jackson*, I. L. R.. 12 Cal., 41. In cases of an unincorporated or unregistered Company, the names of individuals must be given, if known; if not, the plaintiff should sue the Company by the name under which it carries on business, stating his inability to describe them better—*Koylas Chunder* vs. *Ellis*, 8 W. R., 45. Such a Company cannot sue in its own name by its secretary—*The Mhd. Association* vs. *Baksh Ram*, I. L. R., 6 Alla., 284.

Where the actuary of an Insurance Company, established in London by Act of Parliament, which gave him the privilege of suing there on behalf of the Company, sued in India, it was held, though the Act did not extend to this country that he might sue, inasmuch as the insured must be assumed to have notice of the Act under which he could sue and be sued, and the contract might be considered as in effect made by him only—*Jones* vs. *Tagore*, Fulton, 388.

Corporation.—As to the attributes of a Corporation, see *The Cantonment Committee* vs. *Barjorji*, I. L. R., 14 Bom. 286, p 289.

Relief.—As to the remedies against a Corporation, compare *Glossop* vs. *Heston Board*, 12 C. D.; 102; and *The Municipal Commissioners of Madras* vs. *Branson*, I. L. R. 3 Mad., 20.

Plaint.—Where a suit is preferred by a Corporation or registered Company, the plaint may be verified by any principal officer having a knowledge of the facts. In a suit

against a Corporation, interrogatories may be delivered, with the sanction of the Court, to any of its officers—Section 124, *ante*; *Wilson* vs. *Church*, 9, C. D., 552.

Service on Corporation or Company.

436. When the suit is against a Corporation or against a Company authorized to sue and be sued in the name of an officer or of a trustee, the summons may be served—

(*a*) by leaving it at the registered office (if any) of the Corporation or Company, or

(*b*) by sending it by post in a letter addressed to such officer or trustee at the office (or, if there be more offices than one, at the principal office in British India) of the Corporation or Company, or

(*c*) by giving it to any director, secretary or other principal officer of the Corporation or Company;

and the Court may require the personal appearance of any director, secretary or other principal officer of the Corporation or Company who may be able to answer material questions relating to the suit.

Act VIII of 1859, sections 45, 63. This section applies to H. C. and P. S. C. C. An executive engineer of a Railway Company is not an officer within para. (*c*) on whom service may be made—*Hanlon* vs. *The India Branch Railway Company*, 1 Hyde, 197.

CHAPTER XXX.

SUITS BY AND AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

Representation of beneficiaries in suits concerning property vested in trustees, &c.

437. In all suits concerning property vested in a trustee, executor or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties.

15 and 16 Vict., 86, s 42. Judicature Acts, Order 16, Rule 7. This section applies to H. C. and P. S. C. C.

And a Third Person.—If beneficiaries are added a few of them may be made to represent the whole body—*Gas Light and Coke Co.* vs. *Towse*, 35 C. D, 519, p. 526. It seems to apply to cases in which the contention is between the persons beneficially interested on the one hand, and a stranger on the other, and not to any contention between the beneficiaries themselves—*Hamond* vs. *Walker*, 3 Jur. N. S., 686.

Trustees Sufficient.—In England a bare trustee, unless for persons under a disability, cannot sustain a petition for adjudication of bankruptcy against the debtor—*Ex-parte Colley*, 9 C. D. 307; and in a suit for foreclosure against a trustee, the adult

beneficial owner should be made a party—*Mills* vs. *Jennings*, 13 C. D., 639, 649; see, however, *Ardesir* vs. *Hirabai*, I. L. R., 8 Bom., 474; but a trustee seeking to redeem represents the person beneficially interested—*Mills* vs. *Jennings*, 13 C. D., 639; so in a case for partition—*Simpson* vs. *Denny*, 10 C. D., 28, or for sale and partition—*Stace* vs. *Gaye*, 8 C. D., 451, the trustee is sufficient; see also *Bulley* vs. *Bulley*, 8 C. D., 479, 489.

As to the position of executors to a Hindu, before the Hindu Wills Act, see *Lallubhai* vs. *Mankuvarbai*, I. L. R., 2 Bom., 388.

If one or more trustees will not or cannot sue, they should be made defendants—*Luke* vs. *South Kensington Hotel Co.*, 11 C. D., 121.

Beneficiaries.—The parties beneficially interested should always be made parties in the cause when the executors or trustees are wholly uninterested in the matter—*Clegg* vs. *Rowland*, L. R., 3 Eq., 373; or they have from any cause an interest adverse to that of the beneficial owner—*Payne* vs. *Parker*, 1 Ch. App., 327; *Beresford* vs. *Ramasubba*, I. L. R., 13 Mad., 197; or refuse to sue—*Maldrum* vs. *Scozen*, 56 L. T. Rep., 472; and where one trustee sued another to realize a mortgage-security, the beneficial owners were made parties—*Butler* vs. *Butler*, 7 C. D., 120. It has been held that the heirs of a Hindu may sue trustees in respect of a breach of a charitable or religious trust, though they have no interest in the trust—*Brojo Mohun* vs. *Hurrololl*, 6 C. L. R., 58. As to claims against executors, &c., see section 44, rule *f*, *ante*.

The beneficial owner can sue to get the benefit of a decree obtained by his trustee—*Juggobundho Coondoo* vs. *Nil Comul*, W. R., 1864, p. 190.

As to the sale of deceased's farm for rent due by the executor, see *Lord Talbot* vs. *Moran*, 8 Q. B. D., 307.

Parties.—See "JOINT INTEREST" under section 26, *ante*.

Joinder of executors and administrators.

438. When there are several executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that executors who have not proved their testator's will, and executors and administrators beyond the local limits of the jurisdiction of the Court, need not be made parties.

This section applies to H. C. and P. S. C. C.

The exemption extends only to executors who have not proved their testator's wills, and executors beyond local jurisdiction. If any executor has actually administered, he must be made a party, although he has renounced and disclaimed—*Smithby* vs. *Hinton*, 1 Vern., 31.

As to the distinction between the possession of an administrator *ad litem*, and a general administrator in administration suits, see *Dowdeswell* vs. *Dowdeswell*, 9 C.D., 294.

Husband of married executrix not to join.

439. Unless the Court directs otherwise, the husband of a married administratix or executrix shall not be a party to a suit by or against her.

This section applies to H. C. and P. S. C. C.

CHAPTER XXXI.

SUITS BY AND AGAINST MINORS AND PERSONS OF UNSOUND MIND.

Minor must sue by next friend.

440. Every suit by a minor shall be instituted in his name by an adult person, who in such suit shall be called the next friend of the minor, and may be ordered to pay any costs in the suit as if he were the plaintiff.

If a minor has a guardian appointed or declared by an authority competent in this behalf, a suit shall not be instituted on behalf of the minor by any person other than such guardian except with the leave of the Court granted after notice to such guardian and after hearing any objections which he may desire to make with respect to the institution of the suit, and the Court shall not grant such leave unless it is of opinion that it is for the welfare of the minor that the person proposing to institute the suit in the name of the minor should be permitted to do so.

This section applies to H. C. and P. S. C. C. The last paragraph has been added by Act VIII of 1890.

Res Judicata.—A minor is as much bound by a judgment in his own action as if he were of full age—*Modhoo Soodun* vs. *Prithee Bullub*, 16 W. R., 231. See also *Grish Chunder* vs. *Miller*, 3 C. L. R., 17, and he and his property are bound by the decision—*Bonomallee Kesh* vs. *Hungshessur*, 17 W. R., 492; and he is liable to arrest—*Sherafutoollah* vs. *Adbedoonissa Bibee*, 17 W. R., 374; and he cannot be heard on the ground of non-representation by the Court executing the decree; but must apply for review or file a regular suit to procure an injunction restraining execution—*Nowab Mahomed Nooroollah Khan* vs. *Har Churn Rai*, 6 Alla., 98.

Setting Aside a Judgment.—As to the course which a minor on attaining his majority should adopt to get rid of a judgment prejudicial to his interests, see *Dabee Dutt Shahoo* vs. *Subodra Bibee*, 25 W. R., 449; *Raghubar* vs. *Bhikya*, I. L. R., 12 Cal., 69; *Venkatachalam* vs. *Mahalakshmamma*, I. L. R., 10 Mad., 272; *Daji Himat* vs. *Dhirajram*, I. L. R., 12 Bom., 18; *Mungniram* vs. *Gursahai*, I. L. R., 17 Cal., 347. As to a compromise, see section 375, *ante*, and section 462, *post*.

Parties.—In a suit upon a mortgage, given by a Hindu governed by Mitaks hara sons born since the date of the mortgage are not necessary parties—*Doolee Chand* vs. *Wooma Sunkur*, 7 C. L. R., 429; but see *Luchmun Doss* vs. *Giridhur Chowdhry*, 6 C. L. R.. 473; I. L. R., 5 Cal., 855.

Description.—The plaint should describe the minor plaintiff as "A B, a minor inhabitant of X, by his next friend C. D, inhabitant of Y, sues E F, &c., and the minor defendant as "A B, a minor, of whom C D, inhabitant of Y, is next frie See also *Mongula Dossee* vs. *Sharoda*, 20 W. R., 48.

Next Friend.—A minor cannot sue alone—*Noor Ahmed* vs. *Lulta*, 2 Alla., 189 but by his next friend, who is a species of attorney whose duty it is to prosecute the minor's right—*Bama Soondures* vs. *Grish Chunder*, 3 W. R., Act X, 138; and such a suit may be carried on in *formâ pauperis*—*Misser* vs. *Mutty Lal*, Fulton, 490. But if the suit has been commenced, and defendant appears and makes no objection, the irregularity cannot be raised after judgment—*In re Brocklebank*, 6 C. D., 358; *Kunhammud* vs. *Kutti*, I. L. R., 12 Mad., 90.

A person cannot be made next friend of a plaintiff without his express consent—section 32, *ante*. He is not a party to the suit, nor can he appeal in his own name—*Bhobotarini* vs. *Sree Ram*, I. L. R., 9 Cal., 629, and his duty ends with final judgment—the object of his appointment being to have some person before the Court liable for costs, he incurs no greater responsibility—*Geerreeballa* vs. *Chunder Kant*, I. L. R., 11 Cal., 213; see form in *Saddasook Koolariq* vs. *Ram Chunder*, I. L. R., 17 Cal., p. 631, and no other decree can be given against him personally—*Brojo Mohun* vs. *Roodronath*, 15 W. R., 192; nor can he execute a decree after the minor's decease—*Halodhur Roy* vs. *Judoonath*, 14 W. R., 162.

Certificate—By section 3, Act XL of 1858, no person in Bengal was entitled to institute or defend any suit connected with the estate of a minor, unless he had obtained a certificate under the Act, or the leave of the Court in which the suit was pending. But the next friend was entitled to sue for partition in the minor's name without permission where the minor was a member of a joint Mitakshara family, and Act XL of 1858 did not apply—*Gourrh Koeri* vs. *Gungadhur*, 4 C. L. R., 398; I. L. R., 5 Cal., 219; see, however, *Doorga Pershad* vs. *Kesho*, 9 Ind. App., 27; and the remarks on it in *Narsingrao* vs. *Venkaji*, I. L. R., 8 Bom., 395; *Babaji* vs. *Sheshgiri*, I. L. R., 6 Bom., 595. A similar Act, Act XX of 1864, was in force in Bombay. And it was held that a widow suing to have charge of property in trust for her minor of greater value than Rs. 250,

could not sue as next friend without getting a certificate under section 2, Act XX of 1864—*Murlidhur* vs. *Supdu*, I. L. R., 3 Bom., 149; *Daji Himat* vs. *Dhirajram*, I. L. R., 12 Bom., 18.

A foreign certificate of guardianship was not sufficient—*Maganbhai Purshotamdas* vs. *Vithoba*, 7 Bom., 7; but an order granting a certificate under Act XL of 1858 was, though the certificate had not been actually taken out—*Sahai Nand* vs. *Mungniram*, I. L. R., 12 Cal., 542; I. L. R., 17 Cal., 347; 16 Ind., App., 195; and see *Harendra* vs. *Moran*, I. L. R., 15 Cal., 40; but without a proper certificate the Courts might refuse to hear even a natural guardian—*Lalla Boodhmul* vs. *Lalla Gowree*, 4 W. R., 71.

Permission to Sue.—But Act XX of 1864 did not prevent a person carrying on as next friend a suit for a minor without a certificate—*Nag Thakur* vs. *Madnaji*, I. L. R., 8 Bom., 239; if no guardian had been appointed under the Act—*Jadow Mulji* vs. *Chhagan*, I. L. R., 5 Bom., 306. The same rule was followed under Act XL of 1858—*Luchmiput* vs. *Amir*, I. L. R., 9 Cal., 176, if he had obtained the permission of the Court—*Russick Das* vs. *Preonath*, I. L. R., 10 Cal., 102; but the permission need not have been in writing—*Newraj* vs. *Muksud Ali*, I. L. R., 12 Cal., 131; *Jogi Singh* vs. *Kunj Behari*, I. L. R., 11 Cal., 509; *Durga* vs. *Nilmoney*, I. L. R., 10 Cal., 135; though properly speaking it should be formally recorded as an act of judicial discretion open to appeal—*Mrinamoyi Dabia* vs. *Jogodishure*, I. L. R., 5 Cal., 450; in the order sheet—*Bhaba Pershad* vs. *The Secretary of State; Parmeshar* vs. *Bela*, I. L. R., 9 Alla., 509; I. L. R., 14 Cal., 159, and before the institution of the suit—*Russick Das* vs. *Preonath*, I. L. R., 10 Cal., 102.

In no case should money decreed be paid to the next friend unless he had obtained a certificate under Act XL of 1858—*Khajah Mahomed Khan* vs. *Mahomed Rajendro Kishore*, 2 Sev., 847; *Janaki* vs. *Hafiz*, I. L. R., 13 Cal., 47, and under Act XX of 1864, the case of a decree being given in favour of the minor the Court appointed an administrator under the Act—*Nag Thakur* vs. *Madnaji*, I. L. R., 8 Bom., 239.

Present Law.—Act XL of 1858, and Act XX of 1864 have been repealed by Act VIII of 1890, and the present law is found in the sections of the Code amended by this Act, namely, sections 440, 443, 446, 461 and 464.

Misdescription.—Where a mother sued for the property of her minor son, in her own name, not even saying she was guardian, and the first Court allowed the suit, but did not expressly sanction it, the Court in appeal could not reverse the decision on the ground that it was not properly laid. Such an objection was considered "as in no way affecting the merits of the case"—*Goonoo Monee* vs. *Ram Kumol*, 17 W. R., 144; for if a plaintiff minor has a cause of action no objection to the authority of his next friend will be admitted in appeal—*Hurdey Narain* vs. *Pundit*, 11 Ind. App., 26; and where a suit was brought by A for herself and as guardian of B, and the error did not affect the merits of the case, an objection to the form was not listened to in special appeal—*Alim* vs. *Jhalo*, I. L. R., 12 Cal., 48.

If a minor has been sued, the suit will not be set aside for a mere misdescription—*Jogi Singh* vs. *Kunj Behari*, I. L. R., 11 Cal., 509; *Bhala Pershad* vs. *Ram Sakh Dabi*, I. L. R., 14 Cal., 159; *Suresh Chunder* vs. *Jugut*, I. L. R., 14 Cal., 204; *Natesay Yan* vs. *Nara Jimmayyas*, I. L. R., 13 Mad., 481; *Hart Saran* vs. *Bhubaneswari*, I. L. R., 16 Cal., 40; 15 Ind. App., 195. In other cases the Courts have set aside a judgment, even in special appeal, if not properly laid against the minor—*Babaji* vs. *Maruti*, 11 Bom., 182; and held that a decree passed under other circumstances would not bind him—*Mrinamoyi Dabia* vs. *Jogodishuri*, I. L. R., 5 Cal., 450; 5 C. L. R., 361; followed in *Vishnu* vs. *Ram Chandra*, I. L. R., 11 Bom., 130; *Issur Chunder* vs. *Nobo Kristo*, 7 C. L. R., 407; *Daji* vs. *Kashibai*, I. L. R., 12 Bom., 18; *Ganga Prosad* vs. *Ambica*, I. L. R., 14 Cal., 754; and the purchaser with notice would be compelled to deliver up possession—*Junges Lall* vs. *Sham Lall*, 20 W. R., 120; and this view was to a certain extent up held by the members of the Judicial Committee of the Privy Council, who decided that a suit against a father in his own right and as guardian of his minor son is not a suit against the minor—*Narain Mitter* vs. *Kishen Soondery*, 11 B. L. R. (P. C.), 171, 191; *Shonai Bewa* vs. *Monoram Mundle*, 11 C. L. R., 15; and see *Guru Churn* vs. *Kali Kishen*, I. L. R., 11 Cal., 402; *Ganga Prosad* vs. *Umbica*, I. L. R., 14 Cal., 754; and that the manager of an estate is not the guardian of an infant co-proprietor so as to bind him by a decree—*Doorga Persad* vs. *Kesho*, 9 Ind. App., 27; see also *Debi Dutt* vs. *Subodra*, I. L. R., 2 Cal., 283. But where a Hindu widow during the course of a litigation adopted a son, but did not put him on the record, it was held that she was justified in pursuing the litigation *bonâ fide* for his benefit, and he was bound by the decree—*Hari Saran* vs. *Bhubaneswari*, I. L. R., 16 Cal., 40; 15 Ind. App., 195.

Costs.—When a next friend retains an attorney to act for the infant, no contract is created between the attorney and the infant upon which the attorney can sue the infant for costs—*Radhanath Bose* vs. *Lalloprosunno Ghose*, 2 Ind. Jur., N. S., 269; *Devkabai* vs. *Jefferson*, I. L. R., 10 Bom., 248, and see *Steed* vs. *Pierce*, L. R., 18 Eq., 192; see, however, *Watkins* vs. *Dhunnoo*, I. L. R., 7 Cal., 140.

The next friend may be ordered to pay costs, and if so, he cannot levy them from the minor's estate—*The Collector of Mymensing* vs. *Kali Chunder Chowdhry*, S. D., 1st of

Sept. 1860; see, however, *Devkabai* vs. *Jefferson*, I. L. R., 10 Bom., 248; but this is not done unless he has instituted a useless suit without due consideration—*Kenrick* vs. *Wood*, L. R., 9 Eq., 333; or it is proved that the plaintiff is not a minor—*Palmer* vs. *Walesby*, L. R., 3 Ch. App., 732; and whenever it is possible the Courts will allow his costs out of the infant's estate for any proceeding instituted for the infant's benefit, although unsuccessful, provided he appears to have acted *bonâ fide*—*Staines* vs. *Maddox*, Mosl., 319; *Cross* vs. *Cross*, 8 Beav., 455; but not otherwise—*Geereeballa* vs. *Chunder Kant*, I. L. R., 11 Cal., 213; *Devakabai* vs. *Jefferson*, I. L. R., 10 Bom., 248; and where a guardian is personally held liable for costs, it should be stated in the decree or order of Court; since ordinarily he is only liable in his representative capacity—*Komul Chunder* vs. *Surbessur Doss*, 21 W. R., 298; *Omrao Singh* vs. *Prem Narain Singh*, 24 W. R., 264.

Where an action was commenced in the name of a married woman by her next friend who, when challenged, could not produce his authority: *Held*, that the action should be dismissed with costs to be paid by the solicitors of the next friend—*Schjott* vs. *Schjott*, 19 C. D., 94. See "Court of Wards,' *infra*.

Minority of English Subjects.—If not domiciled in India is 21 years—*Rohilkhand* vs. *Kumaun Bank* I. L. R., 7 Alla., 490.

Minority if Guardian Appointed.—Where a guardian has been appointed before the age of 18 disability extends till the age of 21—Act IX of 1875, section 3, Act VI of 1890, section 52.—*Rudra* vs. *Bholanath*, I. L. R., 12 Cal., 612. See also *Birjmohun Lal* vs. *Rudra Perkash*, I. L. R., 17 Cal., 944.

Evidence of Minority.—The appearance of the alleged minor may be taken into consideration in deciding the question of minority—*Khetter Mohan Ghose* vs. *Ramessur*, W. R., 1864, p. 304; but it is not evidence of the highest order—*Kales Haidar* vs. *Sreeram Ghose*, W. R., 1864, p. 366.

Where the defendant contended that the suit could not be carried on without a guardian, because the plaintiff was a minor, and the plaintiff failed to prove his majority, and the suit was dismissed: *Held*, that the Court should have appointed a next friend—*Moorlee Dhur* vs. *Nathoonee Mahtoom*, 25 W. R., 184.

Limitation.—A suit by a next friend on behalf of a minor is governed by the law of limitation applicable to the minor—*Khodabux* vs. *Budree Narain*, I. L. R., 17 Cal., 137; and see *Yeknath* vs. *Waman*, I. L. R., 10 Bom., 240. It does not remove his disability—*Anantharama* vs. *Kurappanan*, I. L. R., 4 Mad., 119, which is purely personal—*Budra Kant* vs. *Nobo Kishore*, 12 C. L. R., 269. Thus, during minority a guardian may make two or more applications for execution, however long the interval between them—*Mun Mohun Buksee* vs. *Gunga Soondery*, 11 C. L. R., 34; I. L. R., 9 Cal., 181.

Court of Wards.—See Act IX of 1879 (B. C.) A female ward cannot give up her rights in favour of the next heir without the sanction of the Court—*Government* vs. *Monohur Deo*, W. R., Sup. No. 39; nor can she bind her estate by debt or mortgage—*Bal Krishna* vs. *Masuma Bibi*, I. L. R., 5 Alla., 142; 9 Ind. App., 182.

Where a suit was brought by the "Court of Wards on behalf of the minor Ram Chunder Deo Dhulub Deb," and the officer, who had caused it to be instituted, had left the country, it was held that the suit was wrongly brought, and that no costs could be given against the Court of Wards, or the minor in person, and the defendants were made to pay the costs as they were to blame for allowing it to proceed in an irregular way—*Bikromajeet Mullo* vs. *Court of Wards*, 21 W. R., 312.

Practice: Wrong Form.—Where a suit is brought in violation of this section, the plaint should be returned—*Russick Das* vs. *Preonath*, I. L. R., 10 Cal., 102.

Applications to be made by next friend or guardian *ad litem*.

441. Every application to the Court on behalf of a minor (other than an application under section 449) shall be made by his next friend, or his guardian for the suit.

This section applies to H. C. and P. S. C. C.

Next Friend.—If a guardian *ad litem* has not been appointed for a defendant, a next friend can apply to Court—*Jotendronath* vs. *Rajkristo*, I. L. R., 16 Cal., 771.

Plaint filed without next friend to be taken off file.

442. If a plaint be filed by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or

other person by whom it was presented. Notice of such application shall be given to such person by the defendant; and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit.

Costs.

This section applies to H. C. and P. S. C. C.

Taken off the File—See *Chinnia* vs. *Bauban Saib*, 5 Mad., 435; *Radha Kristo* vs. *Ram Chander*, 11 W. R., 300; *Beni Ram* vs. *Ram Lall*, I. L. R., 13 Cal., 189; *Rattonbai* vs. *Chabildas*, I. L. R., 13 Bom., 7.

Costs.—The person presenting the plaint is liable for costs when a plaint is filed by a minor without a next friend—*Shonai Bewa* vs. *Monoram*, 11 C. L. R., 15.

Neither this section nor section 441, *ante*, gives a Court authority to make a minor's estate liable for costs—*Amichand* vs. *The Collector of Sholapur*, I. L. R., 13 Bom., 234.

Scope of the Section.—This section refers to a case, where on the face of the plaint, it appears that it was filed by a person who was a minor. It does not contemplate any enquiry into the question of minority—*Beni Ram* vs. *Ram Lall*, I. L. R., 13 Cal., 189.

Remand.—No objection can be taken as to the minority of a plaintiff after remand by the High Court, unless the point was urged in the Appellate Court—*Beni Ram* vs. *Ram Lall*, I. L. R., 13 Cal., 189.

Appeal.—See the case of *Beni Ram* vs. *Ram Lall*, I. L. R., 13 Cal., 189.

443. Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case.

Guardian *ad litem* to be appointed by Court.

Where an authority competent in this behalf has appointed or declared a guardian or guardians of the person or property, or both, of the minor, the Court shall appoint him or one of them, as the case may be, to be the guardian for the suit under this section unless it considers, for reasons to be recorded by it, that some other person ought to be so appointed.

This section applies to H. C. and P. S. C. C. The last paragraph has been added by Act VIII of 1890.

As to this section see *Rohilkhand* vs. *Kumaun Bank*, I. L. R., 7 Alla., 490.

The manager of an estate was not the guardian under Act XL of 1858, of an infant co-proprietor of that estate for the purpose of defending a suit, unless he has obtained a certificate—*Doorga Persad* vs. *Kesho*, 9 Ind. App., 27; and the cases under "MISDESCRIPTION," section 440, *ante*. And now see the last paragraph of section 440, *ante*.

A guardian *ad litem* should always be appointed by the Court—5 Mad., App., viii; but not until it is proved to the satisfaction of the Court that the party is a minor (has been served with summons, if a defendant) and has had notice of the application to appoint—*Suresh Chunder* vs. *Juqut*, I. L. R., 14 Cal., 204; otherwise the minor's name should be struck out of the record—*Radha Kristo* vs. *Ram Chunder*, 11 W. R., 300; but see *In re Brocklebank*, 6 C. D., 358. The guardian may be a different person from the natural guardian—*Etwares* vs. *Ram Narain*, 13 W. R., 231.

A suit may be brought before a guardian is appointed, and limitation counts from the date of the plaint and not from the appointment of the guardian—*Khem Karn* vs. *Har Dayal*, I. L. R., 4 Alla., 37; but the plaintiff should make early application to have a guardian appointed, and then the Judge should appoint a guardian—*In re Motiram*

Rup Chand, 11 Bom., 21; but no order of appointment should issue without the consent of the party appointed, and if no relative or friend of the minor can be found willing to take out a certificate under the Minors' Act, and appear as guardian, the Judge should appoint an officer of Court or some respectable nominee of the minor—*Bahaji* vs. *Maruti*, 11 Bom., 185; *Dhondiba* vs. *Kusa*, 6 Bom., 219; *Issur Chunder* vs. *Nobo Kisto*, 7 C. L. R., 407; *Jadow Mulji* vs. *Chhagan*, I. L. R., 5 Bom., 306: *Woolf* vs. *Pemberton*, 6 C. D., 19; for it is the duty of the Court to see that a minor's interests are properly represented—*Nursinghmoyee Gooptia* vs. *Peary Soondree*, 2 Sev., 699; and if an officer of Court be appointed he should not be paid for his trouble—*Kerakoose* vs. *Serle*, 3 Moore, 329. As to appointing a *Nazir*, guardian *ad litem*, see *Mohan Ishwar* vs. *Haku Rupa*, I. L. R., 4 Bom., 638.

The order should run as follows on application made on behalf of the minor under tion 456:—

On Plaintiff's Application.—"Upon motion, &c., who alleged that the defendant C D is a minor and has been duly served with summons, and has not appeared, although the time for doing so expired upon the——and upon reading an affidavit of——and affidavit of notice to A, the person with whom the defendant C D was living at the time of service [if infant not residing with father or guardian] and to the father (or guardian) of the minor, let E be assigned guardian to the said defendant C D by whom he may defend this action—*Pemberton*, 112. As to who may be appointed a guardian, see sections 456, 457, *post*.

On Defendant's Application.—"Let A be assigned guardian of the infant B, by whom he may defend this action."

Satisfied of the Fact of His Minority.—See *Suresh Chunder* vs. *Jugut*, I. L. R., 14 Cal., 204.

Order obtained without next friend or guardian may be discharged.

Costs.

444. Every order made in a suit or on any application before the Court, in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, if the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

This section applies to H. C. and P. S. C. C.

This section enacts that no order by which a minor may in any way be concerned or affected can legally be made without him being represented by a next friend or guardian for the suit.—*Amichand* vs. *The Collector of Sholapur*, I. L. R., 13 Bom., 234.

Who may be next friend.

445. Any person being of sound mind and full age may act as next friend of a minor, provided his interest is not adverse to that of such minor, and he is not a defendant in the suit.

This section applies to H. C. and P. S. C. C

A married woman may be appointed.—*Asirun Bibi* vs. *Sharip Mundle*, I. L. R., 17 Cal., 488.

Removal of next friend.

446. If the interest of the next friend of a minor is adverse to that of such minor, or if he is so connected with a defendant whose interest is adverse to that of the minor, as to make it unlikely

that the minor's interest will be properly protected by him, or if he does not do his duty, or, pending the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal ; and the Court (if satisfied of the sufficiency of the cause assigned) may order the next friend to be removed accordingly.

If the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor.

This section applies to H. C. and P. S. C. C. The last paragraph has been added by Act VIII of 1890.

In a suit against A for himself and as guardian of B, a decree was given against both. Subsequently C petitioned, stating that she and not A was the guardian, and asked that the decree might be set aside as regards B. This was refused and C appealed, and the Appellate Court set aside the decree against B, although the respondent asked that C should be appointed next friend and the suit remanded: *Held*, that the Judge should have acceded to the respondent's request—*Sheoburrut Singh* vs. *Lalljee*, 13 W. R., 202.

Retirement of next friend.

447. Unless otherwise ordered by the Court, a next friend shall not retire at his own request without first procuring a fit person to be put in his place, and giving security for the costs already incurred.

Application for appointment of new next friend.

The application for the appointment of a new next friend shall be supported by affidavit showing the fitness of the person proposed, and also that he has no interest adverse to the minor.

This section applies to H. C. and P. S. C. C.

An application to substitute a next friend must be made with notice to the defendants; such is the English procedure.

An affidavit is necessary, although the application is not opposed by the defendants —*Harrison* vs. *Harrison*, 5 Beav., 31.

Stay of proceedings on death or removal of next friend.

448. On the death or removal of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

This section applies to H. C. and P. S. C. C.

On the death or removal of a next friend, it is the duty of the solicitor or pleader for the plaintiff to apply to the Court for an order, appointing a new next friend in his stead—*Westby* vs. *Westby*, 2 Coop. *temp.*, Cott., 211.

In England, when a next friend dies, the paternal relations of the minor are first consulted as regards his successor—*Talbot* vs. *Talbot*, L. R., 17 Eq., 347 ; *Woolf* vs. *Pemberton*, 6 C. D., 19.

No person can be appointed next friend without his consent, and before making such an appointment the Judge should be satisfied of his willingness to act.

Application for appointment of new next friend.

449. If the pleader of such minor omits, within reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or the matter at issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

This section applies to H. C. and P. S. C. C.
If a next friend be not appointed, and the suit is dismissed, defendant cannot get his costs from the minor—*Turner* vs. *Turner*, 1 Stra., 708.

Quære.—Whether a minor, who having been a party to a suit was served with summons, afterwards, on attaining majority carried on the suit as transferree of the estate from the widow, previous owner, was not bound as a party?—*Partab Narain* vs. *Trilokenath*, 11 Ind. App., 197.

Course to be followed by minor plaintiff or applicant on coming of age.

450. A minor plaintiff, or a minor not a party to a suit on whose behalf an application is pending, on coming of age must elect whether he will proceed with the suit or application.

This section applies to H. C. and P. S. C. C.

Where he elects to proceed.

451. If he elects to proceed with it, he shall apply for an order discharging the next friend, and for leave to proceed in his own name.

The title of the suit or application shall in such case be corrected so as to read thenceforth thus :—

"A. B., late a minor, by C. D., his next friend, but now of full age."

This section applies to H. C. and P. S. C. C.

Where he elects to abandon.

452. If he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or respondent, or which may have been paid by his next friend.

Costs.

This section applies to H. C. and P. S. C. C.
If he abandons it as unreasonable or improper—see section 455.

Making and proving applications under sections 451, 452.

453. Any application under section 451 or section 452 may be made *ex-parte;* and it must be proved by affidavit that the late minor has attained his full age.

This section applies to H. C. and P. S. C. C.

454. A minor co-plaintiff on coming of age and desiring to repudiate the suit must apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

When minor co-plaintiff coming of age desires to repudiate suit.

Notice of the application shall be served on the next friend, as well as on the defendant; and it must be proved by affidavit that the late minor has attained his full age. The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

Costs.

If the late minor be a necessary party to the suit, the Court may direct him to be made a defendant.

This section applies to H. C. and P. S. C. C.

If a minor, sole plaintiff, elects to abandon the suit, his application must be to dismiss the suit; if he desires as co-plaintiff to repudiate it, the form of his application must be not to dismiss the suit, but to have his name struck out as co-plaintiff.

In England, if the next friend requires it, the late minor will be made a co-defendant —*Bicknell* vs. *Bicknell*, 32 Beav., 381.

455. If any minor on attaining majority can prove to the satisfaction of the Court that a suit instituted in his name by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply to have the suit dismissed.

When suit unreasonable or improper.

Notice of the application shall be served on all the parties concerned: and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application, and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit.

Costs.

This section applies to H. C. and P. S. C. C.

A minor, on attaining his majority, cannot get a bill filed on his behalf dismissed with costs to be paid by his next friend, unless he can prove to the satisfaction of the Court that the suit was unreasonable or improper, otherwise he must pay all costs—*Anon.* 4 Mad., 461. A filed a bill as next friend of B, whom he alleged to be of unsound mind. B's sanity was established: *Held*, on application by B, to have the bill taken off the file, that he was entitled to an indemnity against all the consequences of the suit having been instituted in his name, and that A must pay B's costs, as between solicitor and client, of the application, and the defendant's costs of the suit, as between party and party including the costs of the application in the lowest Court and on appeal—*Palmer* vs. *Walesby*, 3 Ch. App., 732.

456. An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. Such application must be supported by an affidavit verifying the fact that the proposed

Petition for appointment of guardian *ad litem*.

guardian has no interest in the matters in question in the suit adverse to that of the minor, and that he is a fit person to be so appointed.

Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian:

Provided that he has no interest adverse to that of the minor.

This section applies to H. C. and P. S. C. C.

See section 443.

An affidavit is necessary, although the plaintiff does not oppose the application.

The natural guardian should not be passed over when he has no adverse interest and there is no personal imputation against him. A person nominated by certain executors commenced an administration suit against them as next friend of certain infant children. The father of the infant did not become aware that his children were plaintiffs until the decree had been passed, and then applied to be substituted as next friend · *Held*, that as he had no interest adverse to the minor and was otherwise eligible, his name should be substituted—*Woolf* vs. *Pemberton*, 6 C. D., 19.

A person cannot be appointed guardian *ad litem* against his will—*Jadow Mulji* vs. *Chhagan*, I. L. R., 5 Bom., 306; but once appointed his appointment lasts for the whole of the litigation, or until it is revoked by the Court—*Jwala* vs. *Pirbhu*, I. L. R., 14 Alla., 35.

Revision —A Civil Court has no power to refuse to admit a person who has obtained a certificate to defend a suit connected with the minor's estate, but an order refusing is apparently not liable to revision under section 622, *post*—*Baldeo Das* vs. *Gobind*, I. L. R., 7 Alla., 914. Compare section 446, *ante*.

Who may be guardian *ad litem*.

457. A co-defendant of sound mind and of full age may be appointed guardian for the suit, if he has no interest adverse to that of the minor; but neither a plaintiff, nor a married woman, can be so appointed.

This section applies to H. C. and P. S. C. C.

Under the old Procedure a woman might be appointed—*In the matter of Danapa* bin *Sobrao*, 1 Bom., 134, possibly a widow is still eligible. A married woman is not—*Gara Pershad* vs. *Gossain*, I. L. R., 11 Cal., 733; and see *Asirun* vs. *Sharip*, I. L. R., 17 Cal., 488.

Guardian neglecting his duty may be removed.

Costs.

458. If the guardian for the suit of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the Court may remove him, and may order him to pay such costs as may have been occasioned to any party by his breach of duty.

This section applies to H. C. and P. S. C. C.

Costs can be recovered from a person acting as guardian if he has acted improperly —*Goolam Hossein* vs. *Fatmebai*, I. L. R., 5 Bom., 391, unless has been appointed without his consent—*Jadow Mulji* vs. *Chhagan*, I. L. R., 5 Bom., 306.

Appointment in place of guardian dying *pendente lite*.

459. If the guardian for the suit dies pending such suit, or is removed by the Court, the Court shall appoint a new guardian in his place.

This section applies to H. C. and P. S. C. C.

Ordinarily, when the next friend of an infant dies, his nearest paternal relations are entitled to nominate the new next friend—*Talbot* vs. *Talbot*, L. R., 17 Eq., 347; *Woolf* vs. *Pemberton*, 6 C. D., 19.

Guardian *ad litem* of minor representative of deceased judgment-debtor.

460. When the enforcement of a decree is applied for against the heir or representative, being a minor, of a deceased party, a guardian for the suit of such minor shall be appointed by the Court, and the decree-holder shall serve on such guardian notice of such application.

This section applies to H. C. and P. S. C. C.

Before decree, next friend or guardian *ad litem* not to receive money without leave of Court and giving security.

461. *No sum of money or other thing shall be received or taken by a next friend or guardian for the suit on behalf of a minor, at any time before decree or order, unless he has first obtained the leave of the Court and given security to its satisfaction that such money or other thing shall be duly accounted for to, and held for the benefit of, such minor.*

The following section has been substituted by Act VIII of 1890.

Receipt by next friend or guardian *ad litem* of property under decree for minor.

461. "(1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor, either—

(*a*) by way of compromise before decree or order, or

(*b*) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its per application."

This section applies to H. C. and P. S. C. C.

The duty of a next friend or guardian for the suit is to control the Receiver and see that the moneys are properly applied, and he cannot be allowed to hold an appointment incompatible with his relation to the minor—See *Garland* vs. *Garland*, 2 Ves., 137.

Next friend or guardian *ad litem* not to compromise without leave of Court.

462. No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian.

Compromise without leave voidable.

Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor.

This section applies to H. C. and P. S. C. C.

Does not Apply.—An agreement by the guardian that an issue should be determined by the oath of the plaintiff does not require sanction—*Chengal* vs. *Venkata*, I. L. R., 12 Mad., 483; nor does it apply to the case of a guardian withdrawing objections under the advice of counsel—*Mirali* vs. *Rehmoobhoy*, I. L. R., 15 Bom., 594.

Sanction. The sanction must be express, not implied—*Raja Gopal* vs. *Muttu Palem*, I. L. R., 3 Mad., 103; *Shorut Chunder* vs. *Kartick Chunder*, 12 C. L. R., 453; I. L. R., 9 Cal., 810; and if it is given under a misrepresentation of a material fact, due either to fraud or culpable and wilful ignorance, it is not binding—*Bibee Solomon* vs. *Abdool Azeez*, I. L. R., 6 Cal., 687.

If the guardian cannot do anything for the minor's benefit, he ought to leave the matter to the Court—*Court of Wards* vs. *Rajcoomar Deo Nundun Sing*, 16 W. R., 143. Thus he cannot waive a right to compensation for land taken under Act X of 1870—*Lachmeswar Singh* vs. *Chairman of Durbhanga*, I. L. R , 18 Cal., 99; though he can contest the validity of a decree passed without sanction in execution-proceedings—*Arunachellam* vs. *Murugappa*, I. L. R., 12 Mad., 503. Parties entering into a compromise with a next friend should carry it out by proper deeds filed in Court, and instead of concealing the transactions should obtain the consent of the Court; otherwise they must, in order to clear themselves, show that the money was paid to the minor or reached him when he came of age—*Moulvi Abdool Ali* vs. *Mozuffer Hossein Chowdhry*, 16 W. R., P. C., 22.

A Court should not make a decree by consent against a minor without ascertaining that it is for the benefit of the infant that such a decree should be pronounced—*Ramchurn Raha Bukshee* vs. *Mungul Sircar*, 16 W. R., 232; and if the suit is for immoveable property, and the next friend is a person holding a certificate under Act XL of 1858, the consent of the Court granting the certificate is also necessary—*Sheonundun Singh* vs. *Kahsa Kooer*, 6 Alla., 179.

Remedy.—A minor can sue by his next friend to set aside a compromise—*Bibee Solomon* vs. *Abdool Azeez*, I. L. R., 6 Cal., 687; or he may, on majority, proceed by review or a regular suit, making his next friend or guardian a co-defendant, or apply to the Court in which the compromise was made—*Dabee Dutt Shahoo* vs. *Subodra Bibee*, 25 W. R., 449; *Eshan Chunder* vs. *Nundamoni*, I. L. R., 10 Cal., 357; *Karmalai* vs. *Rahimbhoy*, I. L. R., 13 Bom., 137; *Mirali* vs. *Rehmoobhoy*, I. L. R., 15 Bom., 594; and compare *Kissen Sett* vs. *Hurrotoll*, I. L. R., 19 Cal., 334; but the binding effect of a compromise cannot be tried in execution of the decree—*Arunachallam* vs. *Murugappo*, I. L. R., 12 Mad., 503.

Voidable.—See *Hemanta* vs. *Brojendro*, I. L. R., 17 Cal., 875; 17 Ind. App., 65.

Application of sections 440 to 462 to persons of unsound mind.

463. The provisions contained in sections 440 to 462 (both inclusive) shall, *mutatis mutandis*, apply in the case of persons of unsound mind, adjudged to be so under Act No. XXXV of 1858, or under any other law for the time being in force.

This section applies to H. C. and P. S. C. C.

A person alleged to be a lunatic, though not found so under Act XXXV of 1858, may appear either in person or by vakil—*Uma Sundari Dasi* vs. *Ramji Haldar*, I. L. R., 7 Cal., 242; *Jounagadia* vs. *Thatiparthi*, I. L. R., 6 Mad., 380; and where a suit for partition was brought by a next friend for a person not adjudged a lunatic, a subsequent adjudication was held not to save the error—*Tukaram* vs. *Vithal*, I. L. R., 13 Bom. 656; but this decision has not been followed, and it has been decided that on general principles a Court should assign a guardian *ad litem* to a defendant of unsound mind—*Venkatraviana* vs. *Timappa*, I. L. R., 16 Bom., 132; and see *ex parte Cohen*, 10 C. D., 183. See, however, *Bhoopendra Narain Roy* vs. *Gresesh Narain Roy*, I. L. R., 6 Cal., 539.

The High Court of the North-West has not by section 12 of the Charter any original jurisdiction in respect of lunatics who are natives of India—*Jaundha Koer* vs. *Court of Wards*, I. L. R., 4 Alla., 159.

Princes and Chiefs and Wards of Court.

464. *Nothing in this Chapter applies to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State or being sued, by*

direction of the Governor-General in Council or a Local Government, in the name of an agent or in any other name, and nothing in sections 442 *to* 462 *applies to any minor or person of unsound mind, for whose person or property a guardian or manager has been appointed by the Court of Wards or by the Civil Court under any local law.*

This section applies to H. C. and P. S. C. C.
The following section has been substituted by section 53, Act VIII of 1890.

Princes and Chiefs and Wards of Court.

464. Nothing in this Chapter applies to a Sovereign Prince or ruling Chief suing or being sued in the name of his State or being sued, by direction of the Governor-General in Council or a Local Government, in the name of an agent or in any other name, or shall be construed to affect, or in any way derogate from, the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

Court of Wards.—Where a suit was brought by a manager under the Court of Wards on behalf of a ward, and it was objected that he had no authority to sue, the Privy Council considered the objection merely formal and refused to hear it—*Hurdey Narain* vs. *Puntil*, L. R., 11 Ind. App., 26. See also *Beresford* vs. *Ramasubba*, I. L. R., 13 Mad., 197; *Sanku* vs. *Puttamma*, I. L. R., 14 Mad., 289; but see *Bhoopendro Narain* vs. *Baroda Prosad*, I. L. R., 18 Cal., 500; *Kumar* vs. *Kumar*, 17 Ind. App., 7; *Dinesh*, *Chunder* vs. *Golam Mostapha*, I. L. R., 16 Cal., 89.

As to where a suit on behalf of a ward has been properly instituted by sanction not obtained, see *Biseswar Roy* vs. *Shoshi Sikar*, I. L. R., 17 Cal., 688.

Local Law.—See note under section 440, *ante*—*Guru Churn* vs. *Kali Kishen*, I. L. R., 11 Cal., 402.

CHAPTER XXXII.

SUITS BY AND AGAINST MILITARY MEN.

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

465. When any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

The authority shall be in writing and shall be signed by the officer or soldier in the presence of (*a*) his commanding officer, or the next subordinate officer, if the party be himself the commanding officer, or (*b*) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this Chapter the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps, detachment or depôt to which the officer or soldier belongs.

Act VIII of 1859, section 19. This section applies to H. C. and P. S. C. C.

As to jurisdiction to try an action brought against a soldier, see *Mahomed Saib* vs. *Aggas*, I. L. R., 10 Mad., 319.

The written authority must be filed in the suit; and where the objection was taken in regular and special appeal, it was held the defect could not be cured and suit was dismissed—*Sheoram Vithal* vs. *Bhagirathebhai*, 6 Bom., 20.

Person so authorized may act personally or appoint pleader.

466. Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

Act VIII of 1859, section 20. This section applies to H. C. and P. S. C. C.

Service on person so authorized, or on his pleader, to be good service.

467. Processes served upon any person authorized by an officer or a soldier, as in section 465, or upon any pleader appointed as aforesaid by such person to act for, or on behalf of, such officer or soldier, shall be as effectual as if they had been served on the party in person or on his pleader.

Act VIII of 1859, section 20. This section applies to H. C. and P. S. C. C.

Service on officers and soldiers.

468. When an officer or a soldier is a defendant, the Court shall send a copy of the summons to his commanding officer for the purpose of being served on him.

The officer to whom such copy is sent, after causing it to be served on the person to whom it is addressed, if practicable, shall return it to the Court with the written acknowledgment of such person endorsed thereon.

If from any cause the copy cannot be so served, it shall be returned to the Court by which it was sent, with information of the cause which has prevented the service.

Act VIII of 1859, section 62. This section applies to H. C. and P. S. C. C.

A copy of a summons was sent to Secunderabad by post to the commanding officer where the defendant was stationed, and it was returned with the defendant's acknowledg-

ment endorsed on it and with a certificate that it had been duly served, but there was no affidavit of service: *Held*, that service was sufficiently proved—*Harrison* vs. *Hope*, 11 B. L. R., App. 43.

Causing it to be Served.—The commanding officer must serve—*Mahomed Saib* vs. *Aggas*, I. L. R., 10 Mad., 319.

Execution of warrant of arrest in cantonments, &c.

469. If, in the execution of a decree, a warrant of arrest or other process is to be executed within the limits of a cantonment, garrison, military station or military bazar, the officer charged with the execution of such warrant or other process shall deliver the same to the commanding officer.

The commanding officer shall back the warrant or other process with his signature, and, in the case of a warrant of arrest, if the person named therein is within the limits of his command, shall cause him to be arrested and delivered to the officer so charged.

Act VII of 1859, section 259. This section applies to H. C. and P. S. C. C.

The civil pay of a non-commissioned officer in civil employ can be made available in execution—*Cohen* vs. *McCarthy*, 14 W. R., 441.

CHAPTER XXXIII.

INTERPLEADER.

When interpleader-suit may be instituted.

470. When two or more persons claim adversely to one another the same payment or property from another person, whose only interest therein is that of a mere stakeholder and who is ready to render it to the right owner, such stakeholder may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to whom the payment or property should be made or delivered, and of obtaining indemnity for himself:

Provided that if any suit is pending in which the rights of all parties can properly be decided, the stakeholder shall not institute a suit of interpleader.

This section applies to H. C. and P. S. C. C.

A right of lien is not an interest in the property—*Attenborough* vs. *St. Katharine's Dock Company*, 3 C. P. D., 450.

An interpleader-suit may be instituted when two or more persons advance claims *bonâ fide*—*Re New Hamburg and Brazilian Railway*, W. N., 1875, p. 239; if their claims refer to the same property and to the same extent—*Hoggart* vs. *Cutts*, Cr. & P., 197 (though this case has been disapproved of in India—*The Secretary of State* vs. *Mir Muhammud*, 1 Mad., 361; *Manvel* vs. *Shanghai Bank*, I. L. R., 14 Bom., 489; see also *Attenborough* vs. *St. Katharine's Dock Company*, 3 C. P. D., 450) against a person in possession—*Burnett* vs. *Anderson*, 1 Mer., 405, who claims no interest himself, but is merely a stakeholder—*Prudential Assurance Co.* vs. *Thomas*, 3 Ch. App., 74; so that no question can arise between him and the claimants—*Bignold* vs. *Audand*, 11 Sm., 23; and who is ready to deliver it to the right owner, whether their titles have had a common origin or are independent of each other—*Tanner* vs. *The European Bank*, 1 Ex., 261;

or their claims have or have not a substantial foundation—*E. & W. India Dock Co.* vs. *Littledale*, 7 Ha., 59. It is not necessary that the stakeholder should have been sued—*Re New Hamburg and Brazilian Railway*, W. N., 1875, p. 239.

In execution of a decree against B, the bailiff A seized certain goods which were released on C paying, under protest, the sum mentioned in the warrant. A paid the money into the warrant office: *Held*, C's remedy was not by interpleading, but suing for money had and received—*Cohen* vs. *Mullick*, 1 Gasper, 139.

Parties.—See *Smith* vs. *Darlow*, 26 C. D., 605.

When a suit has been brought against a person before instituting the interpleader-suit, he should endeavour to have the other claimants made parties under section 32, *ante*, so as to have the whole question disposed of in the one suit. But see *Mahomed Badshah* vs. *Nicol*, I. L. R., 4 Cal., 355; *Naraini Kuar* vs. *Durjan*, I. L. R., 2 Alla., 738, and notes under section 32, *ante*.

Plaint in such suit.

471. In every suit of interpleader the plaint must, in addition to the other statements necessary for plaints, state—

(*a*) that the plantiff has no interest in the thing claimed otherwise than as a mere stakeholder;

(*b*) the claims made by the defendants severally; and

(*c*) that there is no collusion between the plaintiff and any of the defendants.

This section applies to H. C. and P. S. C. C.

No suit will lie if the plaintiff claims an interest in the property—*Mitchell* vs. *Hayne*, 2 S. & S., 63; or disputes the amount—*Heploch* vs. *Hammond*, 2 Sm. & G., 141; or has handed over the property to one claimant on an indemnity—*Burnett* vs. *Anderson*, 1 Mer., 405. The plaintiff must also, if possible, bring the subject of the contention into Court before any order can be passed. See next section.

Payment of thing claimed into Court.

472. When the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff must so pay or place it before he can be entitled to any order in the suit.

This section applies to H. C. and P. S. C. C.

Procedure at first hearing.

473. At the first hearing the Court may—

(*a*) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit;

or, if it thinks that justice or convenience so require,

(*b*) retain all parties until the final disposal of the suit;

and, if it finds that the admissions of the parties or other evidence enable it,

(*c*) adjudicate the title to the thing claimed: or else it may

(*d*) direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and shall adjudicate on such claims.

474. Nothing in this Chapter shall be taken to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

When agent and tenants may institute interpleader-suits.

Illustrations.

(*a*) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(*b*) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader-suit against A and C.

This section applies to H. C. and P. S. C. C.

An agent or tenant cannot ordinarily dispute the title of his principal or landlord, and hence he is not allowed to institute an interpleader-suit. But if a landlord has created a subsequent intermediate tenure, or the agent is not certain who his principal is, a suit will lie—*Clarke* vs. *Byne*, 13 Ves., 383 ; *Stuart* vs. *Welch*, 4 My. & C., 305.

475. When the suit is properly instituted, the Court may provide for the plaintiff's costs by giving him a charge on the thing claimed or in some other effectual way.

Charge of plaintiff's costs.

This section applies to H. C. and P. S. C. C.

The plaintiff is, as a rule, entitled to be paid at once his costs out of the fund in Court -*Glynn* vs. *Locke*, 3 D. & War., 11, 24 ; or to a charge upon it—(section 475) ; and the losing defendant must make good the amount -*Laing* vs. *Zeden*, 9 Ch. App., 738.

476. If any of the defendants in an interpleader-suit is actually suing the stakeholder in respect of the subject of such suit, the Court in which the suit against the stakeholder is pending shall, on being duly informed by the Court which passed the decree in the interpleader-suit in favour of the stakeholder, that such decree has been passed, stay the proceedings as against him ; and his costs in the suit so stayed may be provided for in such suit ; but if, and so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

Procedure where defendant is suing stakeholder.

Costs.

This section applies to H. C. and P. S. C. C.

Under the 30 and 31 Vict., c. 142, s. 31, the Judge has power to adjudicate in an interpleader-suit upon any special damages to which the claimant of the goods seized may be entitled, arising out of the execution, and no separate suit will lie—*Death* vs. *Harrison*, 6 Ex., 15. This is not the law in India, see *Walmrey* vs. *Cartner*, 1 Gasper, 170.

PART IV.

PROVISIONAL REMEDIES.

CHAPTER XXXIV.

OF ARREST AND ATTACHMENT BEFORE JUDGMENT.

A.—Arrest before Judgment.

When plaintiff may apply that security be taken.

477. If at any stage of any suit, other than a suit for the possession of immoveable property, the plaintiff satisfies the Court by affidavit or otherwise,

that the defendant, with intent to avoid or delay the plaintiff, or to avoid any process of the Court, or to obstruct or delay the execution of any decree that may be passed against him,—

(*a*) has absconded or left the jurisdiction of the Court, or

(*b*) is about to abscond or to leave the jurisdiction of the Court, or

(*c*) has disposed of or removed from the jurisdiction of the Court his property or any part thereof, or

that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the plaintiff may apply to the Court that security be taken for the appearance of the defendant to answer any decree that may be passed against him in the suit.

Act VIII of 1859, section 74. This section applies to H. C. and P. S. C. C.

A creditor is not entitled merely because he has a great demand against his debtor to arrest him before judgment. This procedure is intended only to secure to the creditor his rights when there is reason to believe that the debtor is about to depart from the jurisdiction of the Court as to make away with his property, and if the creditor procures the arrest of the debtor without reasonable or probable cause, he is liable to a regular suit for compensation, or to the summary process set out in section 491, *post*—*Goutiere* vs. *Charriol*, 1 Alla., 91.

This section does not enable a creditor to sue out arrest before judgment, to secure easy execution of decrees—*Kelaram Majee* vs. *Narain*, 13 W. R., 278.

An order should not issue under (*a*), (*b*), or (*c*), unless it should appear that the defendant is about to leave jurisdiction, &c., with one or other of the intentions described in the text—*Teenaram* vs. *Ram Rutton*, 2 Hyde, 181; but where a defendant is about to leave British India, it is sufficient if there is a reasonable probability that his going away may have the effect of obstructing or delaying execution of any decree that may be passed against him—*Agra and Masterman's Bank* vs. *Minto*, 1 Ind. Jur., N. S., 265; *Goutiere* vs. *Roberts*, 2 Alla., 358; though there seems to be a distinction between a person domiciled in India leaving it and a person having a domicile out of India, a mere bird of passage in India, withdrawing from jurisdiction—*Harrison* vs. *Dickson*, 1 Boulu., 33.

Master of a Ship.—*See Prosunno Chunder* vs. *Downy*, I. L. R., 14 Cal., 695.

Order to bring up defendant to show cause why he should not give security.

478. If the Court, after examining the applicant, and making such further investigation as it thinks fit, is satisfied—

that the defendant, with any such intent as aforesaid,—

(*a*) has absconded or left the jurisdiction of the Court, or

(*b*) is about to abscond or to leave the jurisdiction of the Court, or

(*c*) has disposed of or removed from the jurisdiction of the Court his property or any part thereof, or

that the defendant is about to leave British India under the circumstances last aforesaid,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance.

Act VIII of 1859, section 75. This section applies to H. C. and P. S. C. C.

No order can issue until the applicant has been examined, and such further investigation (if any) as may be deemed necessary has been made—*Kelaram Majee* vs. *Narain*, 13 W. R., 278.

Before the Court.—*Kelaram Majee* vs. *Narain*, 13 W. R., 278.

If defendant fail to show cause Court may order him to make deposit or give security.

479. If the defendant fail to show such cause, the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to give security for his appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be passed against him in the suit.

The surety shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

Act VIII of 1859, section 76. This section applies to H. C. and P. S. C. C.

Security.—The security required to be given by a defendant who is arrested before judgment, does not include security for costs. "Claim" in this section means the amount of money claimed, and has the same signification as in section 50, *ante*—*Reinhold* vs. *Holloway*, No. 655 of 1877; Nov. 26th.

Cause.—If the person has been charged with leaving India, good cause must be, either (1) that he is not going to leave India or not for so long a time as will obstruct, or is likely to obstruct, the plaintiff should he succeed; or that (2) the suit is not a *bonâ fide* one; or that (3), even if it is, the institution of it has been vexatiously delayed till the defendant is about to depart from India in order to embarrass or coerce him—*Spence's Hotel Company* vs. *Anderson*, 1 Ind. Jur., N. S., 294.

A defendant should not be committed unless he cannot show good cause, or cannot deposit sufficient to meet the demand, or is unable to give security, not for the demand, but for his appearance—*Kelaram Majee* vs. *Narain*, 13 W. R., 278.

Procedure in case of application by surety to be discharged.

480. The surety for the appearance of the defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

On such application being made, the Court shall summon the defendant to appear, or, if it thinks fit, may issue a warrant for his arrest in the first instance.

On the appearance of the defendant pursuant to the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Act XXIII of 1861, section 24. This section applies to H. C. and P. S. C. C.

The Court can secure the defendant's appearance by a warrant to the jailor—*Kelaram Majee* vs. *Narain*, 13 W. R., 278.

Procedure where defendant fails to give security or find fresh security.

481. If the defendant fail to comply with any order under section 479 or section 480, the Court may commit him to jail until the decision of the suit, or, if judgment be given against the defendant, until the execution of the decree:

Provided that no person shall be imprisoned under this section in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees:

Provided that no person shall be detained in prison under this section after he has complied with such order.

Act VIII of 1859, section 78. This section applies to H. C. and P. S. C. C.

It is only in the event of a defendant neither furnishing security nor offering a sufficient deposit that he can be committed to custody—*Kelaram Majee* vs. *Narain*, 13 W. R., 278.

Where a person is arrested and required to give security to answer a claim against him, and he satisfies the claim, he cannot be made to give security for costs—*Reinhold* vs. *Holloway*, No. 655 of 1877, November 26th.

Where a person is arrested under this section, and a decree is afterwards obtained against him, the decree-holder, if he wishes to send the defendant to prison, must have him brought before the Court and his subsistence money fixed in the same way as if he had been arrested in execution of the decree; and if he fails to do so, the defendant is entitled to his discharge—*In the matter of Kallah Chand Dass*, 1 Ind. Jur., N. S., 328; Bourke, 425. And in calculating the six months under section 342, *ante*, the period of imprisonment suffered after decree must be taken into account—*Ghanaohamdass* vs. *Johavimull*, I. L. R., 7 Bom., 431.

Subsistence of defendants arrested.

482. The provisions of section 339 as to allowances payable for the subsistence of judgment-debtor shall apply to all defendants arrested under this Chapter.

This section applies to H. C. and P. S. C. C.

See note under section 339, *ante*.

B.—*Attachment before Judgment.*

Application before judgment for security from defendant to satisfy decree, and in default, for attachment of property.

483. If at any stage of any suit the plaintiff satisfies the Court by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(*a*) is about to dispose of the whole or any part of his property, or to remove the same from the jurisdiction of the Court in which the suit is pending, or

(*b*) has quitted the jurisdiction of the Court, leaving therein property belonging to him,

the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may be passed against him in such suit and, on his failing to give such security, to direct that any portion of his property within the jurisdiction of the Court shall be attached until the further order of the Court.

Contents of application.

The application shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

Act VIII of 1859, section 81. This section applies to H. C. and P. S. C. C.

A Court of Small Causes could not attach immoveable property under section 81, Act VIII of 1859—*Marthamma* vs. *Kittu*, 6 Mad., 91.

Dispose of His Property.—Before issuing process under this section, the Judge, must be satisfied that the removal or disposition of the property is about to be made with a view to evade or delay the execution of a decree which the defendant anticipates the plaintiff may obtain against him in the specific case.—*Ram Narain* vs. *Ezekiel Levy*, 2 Hyde, 183.

This section does not apply where the defendant has actually parted with the property—*Soorjee Coomar* vs. *Isser Chunder*, 1 Bourke, 243; or the property is beyond the jurisdiction of the Court in which the suit is pending—*Nur Muhammad* vs. *Abubakar*, 8 Bom., 29; *Balaram Mullick* vs. *Solano*, 8 B. L. R., 335; *Krishnasami* vs. *Engel*, I. L. R., 8 Mad., 20; *Kedar Nath Dutt* vs. *Seeva Veyana*, 1 C. L. R., 336, dissenting from *In re Abraham*, 6 Bom., 170; or the property is the property in the suit, which must be followed under section 492, *post*—*Joynarain Geeree* vs *Shibpershad*, 6 W. R., Mis., 1.

Effect of Attachment.—Although, under the old law, an attachment, previous to the date of the vesting order, in the execution of a decree conferred on the judgment-creditor a right prior to that of the Official Assignee—*Anand Chandra* vs. *Panchilal*, 5 B. L. R., 691; 14 W. R., 33; *Aga Mahomed* vs. *Judah*, 7 B L. R., 50; 17 W. R., 234; the law was otherwise as to attachment before judgment—*Petumber Mundle* vs. *Gocool Dass*, 1 Ind. Jur., N. S., 327; *Rampersaud* vs. *Callachand*, 1 Ind. Jur., N. S. 325, 373; *Gamble* vs. *Bholagir*, 2 Bom., 149; *Bank of Bengal* vs. *Newton*, 12 B. L. R., App., 1; *Sarkies* vs. *Bundho Baee*, 1 Alla., 172; and under the present section no priority is given to the person attaching—*Shib Kristo* vs. *Miller*, I. L. R., 10 Cal., 150; *Saday Appa* vs. *Ponnama*, I. L. R., 8 Mad., 554; *Miller* vs. *Mon Mohun Roy*, 8 C. L. R., 213.

Profits.—Attachment of property covers the profits of the property—*Ram Coomar* vs. *Gobind Nath*, 12 W. R., 391.

A plaintiff applied for attachment, but a third party intervened and claimed the property as his own: *Held*, he should not have been made a party to the suit, but that his claim should have been disposed of under section 186, Act VIII of 1859 (section 487, *post*)—*Ram Ruttun* vs. *Gobind*, 2 Agra, 141.

Wrongful Attachment.—If the goods of a person not a party to the litigation be attached, the damages are measured by the value of the property on the date of attachment—*Kissory Mohun* vs. *Hursook*, 17 Ind. App., 17; I. L. R., 17 Cal., 436.

484. If the Court, after examining the applicant and making any further investigation which it thinks fit, is satisfied that the defendant is about to dispose of or remove his property, with intent to obstruct or delay the execution of any decree that may be passed against him in the suit, or that he has with such intent quitted the jurisdiction of the Court, leaving therein property belonging to him, the Court may require him, within a time to be fixed by the Court, either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

Court may call on defendant to furnish security or show cause.

The Court may also in the order direct the conditional attachment of the whole or any portion of the property specified in the application.

Act VIII of 1859, section 83. This section applies to H. C. and P. S. C. C.

The property in dispute (if any) or property beyond jurisdiction cannot be attached under this section. See note on last section.

Cause can be shown after the security has been furnished—*Lotlikar* vs. *Lotlikar*, I. L. R., 5 Bom., 643.

There is apparently no appeal from an order under this section—section 588; *Ahmed Ali* vs. *Gladstone, Wyllie & Co.*, 7 W. R., 508.

Section 253, *ante*, applies to sureties under this section—*Ram Kishen* vs. *Hurkhoo*, 7 W. R., 329.

485. If the defendant fail to show cause why he should not furnish security, or fail to furnish the security required, within the time fixed by the Court, the Court may order that the property specified in the application, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, shall be attached.

Attachment if cause not shown or security not furnished.

If the defendant show such cause or furnish the required security, and the property specified in the application or any portion of it has been attached, the Court shall order the attachment to be withdrawn.

Withdrawal of attachment.

Act VIII of 1859, section 84. This section applies to H. C. and P. S. C. C.

Attachment cannot be ordered unless security has been demanded—Sudder Dewany Sum. Decis., June 12th, 1848, and on one or other of the grounds stated in section 483—*Bipin Behari Ghose*, Petitioner, Sudder Dewany Sum. Decis., September 27th, 1847.

An appeal lies from an order under this section—See section 588, *post*.

486. The attachment shall be made in the manner herein provided for the attachment of property in execution of a decree for money.

Mode of making attachment.

Act VIII of 1859, section 85. This section applies to H. C. and P. S. C. C.

Investigation of claims to property attached before judgment.

487. If any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for money.

Act VIII of 1859, section 86. This section applies to H. C. and P. S. C. C.

All claims to attached property should be disposed of under this section—*Ram Rutten Dass* vs. *Gobind Dass*, S. D., N. W., 1867, p. 141; and objection should be made by giving notice of the claim, and not by motion; the Court will usually give the application precedence of all other business—*Rammanick Shaw* vs. *Seebram Pantool*, 2 Hyde, 22.

Plaintiff applied for the attachment of certain property before judgment. Defendant's wife opposed, claiming an interest on the property, and the Court, making her a party to the suit, decreed the plaintiff's claim and released the property. It was held that the order releasing the property, although irregular, must be taken to have been passed under the corresponding section of Act VIII of 1859—*George* vs. *Ram Rutten*, S. D., N. W., 1868, p. 272.

Removal of attachment when security furnished or suit dismissed.

488. Where an order of attachment before judgment is passed, the Court which passed the order shall remove the attachment whenever the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

Act VIII of 1859, section 87. This section applies to H. C. and P. S. C. C.

Attachment not to affect rights of strangers, or bar decree-holder from applying for sale.

489. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Act VIII of 1859, section 89. This section applies to H. C. and P. S. C. C.

The attachment does not affect the rights of persons not parties to the suit—*Sarkies* vs. *Bundho Baee*, 1 Alla., 172, p. 185; or prevent the property being sold in execution of another decree, whether the decree has been obtained before or after the attachment—6 Mad., 135; nor does it amount to an injunction under section 15 of the Limitation Act preventing the obligee from suing—*The Collector of Etawah* vs. *Bell*, I. L. R., 14 Alla., 162.

No new attachment is necessary after decree—*Sarkies* vs. *Bundho Baee*, 1 Alla., 172; section 490, *post*; and any private alienation made subsequent to attachment before judgment is null and void—*Id.*; *Raj Chunder Roy* vs. *Isser Chunder*, Bourke, 139; *Sava Ramji* vs. *Jadavji*, 2 Bom., 142.

Property attached under Chapter not to be re-attached in execution of decree.

490. Where property is under attachment by virtue of the provisions of this Chapter, and a decree is given in favour of the plaintiff, it shall not be necessary to re-attach the property in execution of such decree.

This section applies to H. C and P. S. C. C.

C.—Compensation for Improper Arrests or Attachments.

Compensation for obtaining arrest or attachment on insufficient grounds.

491. If in any suit in which an arrest or attachment has been effected, it appears to the Court that such arrest or attachment was applied for on insufficient grounds,

or if the suit of the plaintiff fails, and it appears to the Court that there was no probable ground for instituting the suit,

the Court may, on the application of the defendant, award against the plaintiff in its decree such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the arrest or attachment:

Proviso.

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

An award under this section shall bar any suit for compensation in respect of such arrest or attachment.

Act VIII of 1859, section 88. This section applies to H. C. and P. S. C. C.

Arrest.—If a defendant is arrested he may apply under this section although he has not been summoned—*Syed Ali* vs. *Adi*, I. L. R. 15 Bom., 160.

There is no appeal from an order under this section—see section 588, *post*. See also *Huro Soondures* vs. *Bungshee Mohun*, 8 W. B., 332.

Compensation can only be granted by the Court which disposes of the cause—*Huro Soondures* vs. *Bungshee Mohun*, 3 W. R., Mis., 28; and on the recorded application of the defendant, and not of its own motion—*Ram Narain* vs. *Kurum* and *Gopaul*, S. D., N. W., 1863, p. 136. The defendant is not bound to apply for redress—*Goutiere* vs. *Charriol*, 1 Alla., 91; and by omitting to do so, he does not lose his right to bring a regular suit. *Daniel* vs. *Mohun Bibee*, 1 Agra, 104; but if he applies for compensation, any award that may be passed will bar a regular suit *Goburdhun* vs. *Banee Chunder*, 21 W. R., 375. Where a regular suit is instituted, the plaintiff must prove that the process was sued out maliciously and without reasonable and probable cause—*Goutiere* vs. *Robert*, 2 Alla., 353; *Sheoraj Singh* vs. *Dwarka Dass*, 4 Alla., 42; and the presumption is that the process issued regularly, although the original suit was dismissed—*Dhurmo Narain* vs. *Sreemutty Dossee*, 18 W. R., 440.

Compensation may be awarded for excessive attachment, notwithstanding that the plaintiff may be successful—*Shaikh Mahomed Rezaooddeen* vs. *Hossein Buksh Khan*, 6 W. R., Mis., 24.

A civil suit will lie for property which was attached, but made away with, by the plaintiff in collusion with the Court peon, without first instituting a criminal case—*Choitunno Pramanick* vs. *Zumeeroo Ideen*, 18 W. R., 27.

CHAPTER XXXV.

OF TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

A.—Temporary Injunctions.

Cases in which temporary injunction may be granted

492. If in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or is about, to remove or dispose of his property with intent to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, or refuse such injunction or other words.

Act VIII of 1859, section 92. This section applies to H. C. and P. S. C. C. It only refers to temporary injunctions, leaving perpetual injunctions to be regulated by the Specific Relief Act—*Nusserwanji* vs. *Gordon*, I. L. R., 6 Bom., 266, p. 279.

Pleading Parties.—A plaintiff should enter a claim for injunction in his plaint, when obtaining it is a substantial object of his action—*Colebourne* vs. *Colebourne*, 1 C. D., 690.

Courts of Equity will not issue an injunction against officers of Government exercising a right or alleged right to levy taxes, though they will against Municipal officers in regard to the levy of rates—*Hormasji* vs. *Pedder*, 12 Bom., 199, 203, see section 495, *post*.

As person not named in the pleadings cannot be committed, for breach of an injunction—*Sadagopachari* vs. *Krishnamachari*, I. L. R., 12 Mad. 356.

Evidence.—Evidence should be adduced to prove that the property in dispute is in danger of being wasted or dealt with in one or other of the manners described in this section—*Prosunno Moyee* vs. *Wooma Moyee*, 14 W. R., 409; *Dhundiram Santukram* vs. *Chandanabai*, 2 Bom., 98. In a suit for a specific sum of money, if the defendant expresses his intention of employing it in trade, an injunction should issue—*Goluck Chunder* vs. *Mohim Chunder*, 13 W. R., 95; but not where the suit is for real property, and the defendant admittedly has a half share in it—*Mun Mohinee* vs. *Ichamoyee*, 13 W. R., 60; or the property covered by the injunction is not the property in dispute—*Joynarain Geeree* vs. *Shibpershad*, 6 W. R., Mis., 1; or the person against whom it is asked is not a party to the suit.

A Court, in granting an *ad interim* injunction, will first see that there is a *bonâ-fide* contention between the parties, and then on which side, in the event of success, will lie the balance of inconvenience if the injunction does not issue —*Doherty* vs. *Allman*, 3 App., Cas., 709; *Nusserwanji* vs. *Gordon*, L. R., 6 Bom., 266 p. 279; *Magee* vs. *D'Arcy* L. R., Ir., 4 Q. B. D., 312; *Madras Ry. Co.* vs. *Rust*, I. L. R., 14 Mad., 18, and the cases cited.

Real Property.—Real property should always be retained, if possible in *statu quo* until the suit is decided—*Gomes* vs. *Carter*, 1 Ind. Jur., N. S. 411. Plaintiffs, in possession of a dock used for repairing vessels, on being threatened by the defendants with a suit to eject them, sued for specific performance of an alleged agreement with the defendants under which they were entitled to hold the dock until their two vessels were repaired. In support of an application for an *interim* injunction to restrain proceedings in the suit for ejectment until the latter should have been decided, plaintiffs stated that on the faith of the agreement, one of their ships had been docked and taken to pieces; that the repairs could not be finished for a considerable time; and that the vessel could not be removed from the dock without great loss and irreparable injury to them. The defendants denied the agreement, and set forth another, and which having come to an end, they were entitled to eject. They did not deny the loss that would ensue to the plaintiffs, nor allege delay in repairing: *Held*, that the plaintiffs were entitled to an *interim* injunction restraining the defendants from executing the ejectment decree until the suit had been decided—*Moran* vs. *The River Steam Navigation Co.*, 14 B. L. 352.

Where A obtained a decree against B for possession of a dwelling-house in which C was admittedly interested as a co-sharer, and C brought a suit to declare that A had obtained no title to the property, an injunction restraining A from executing the decree was allowed—*Anantnath Dey* vs. *Mackintosh*, 6 B. L. R., 571.

Official Assignee—When money due to an insolvent is deposited in Court and the Court orders payment to the creditors instead of to the Official Assignee, the remedy of the latter is to sue out an injunction to restrain the creditors and apply for an *ad-interim* injunction—*In the matter of Miller*, 12 W. R., 103.

Co-sharers—See *Watson & Co.* vs. *Ramchund Dutt*, I. L. R., 18 Cal., 11. Compare *Shadi* vs. *Anupa Singh*, I. L. R., 12 Alla., 436.

Legal Representative—Where A caused C to be improperly placed on the record as the legal representative of B, C obtained an injunction against A, restraining him from executing the decree against him—*Dhuronidhur Sen* vs. *Agra Bank*, 4 C. L. R., 434; I. L. R., 5 Cal., 86.

Libel.—An injunction will be allowed to restrain the publication of a libel injurious to the plaintiff's trade—*Therbey's Cattle Food Company* vs. *Massam*, 14 C. D., 763.

Light—As to a case of mandatory injunction in connection with an obstruction to light and air, see *Provabutty Dabee* vs. *Mohendro Lall*, I. L. R., 7 Cal., 453.

Agreement—An agreement to grant a charter-party will not support an injunction—*Haji Abdul* vs. *Haji Abdul*, I. L. R., 6 Bom., 5.

Restrain Breach of Contract.—The general principles are to be sought for in the Specific Relief Act—*Nusserwanji* vs. *Gordon*, I. L. R., 6 Bom., 266, p. 279. An injunction will be granted in case of contracts of which specific performance is refused by section 21 cl (*g*) of the Specific Relief Act, nor is it a sufficient answer to an application that the agreement provides a penalty on non-performance—*Madras Ry. Co.* vs. *Rust*, I. L. R., 14 Mad., 18.

Hindu Marriage.—An injunction will not be granted to restrain a Hindu woman from marrying her minor daughter to a third party, pending the decision of a suit for specific performance of a contract of marriage—*Gunpat Narain* vs. *Rajun Kooer*, 24 W. R., 207.

Wrongfully Sold in Execution of Decree.—If a claimant under section 278 whose claim has been disallowed, institutes a regular suit against the decree-holder, the Court has power to grant an injunction staying the sale pending the decision of the suit—*Brojendro Kumar* vs. *Rup Lall*, I. L. R., 12 Cal., 515; *Kirpa Dayal* vs. *Rani Kishori*, I. L. R., 10 Alla., 80. See "*Injunction*," section 283, *ante*. In execution of mortgage-decree against the father of a Hindu family, his right, title and interest only in ancestral property was advertised for sale: *Held*, in a suit brought by a son to protect his interest, that no injunction should be allowed—*Amolak Ram* vs. *Sahib Singh*, I. L. R., 7 Alla., 550.

Dispose of his Property—A subsequent alienation is not void—*The Delhi Bank* vs. *Ram*, I. L. R., 9 Alla., 497.

Pending Suit.—The injunction can only issue out of the Court trying the suit—*Dhundiram Santukram* vs. *Chanda Nabai*, 2 Bom., 98. The power to do so ceases when the suit comes to an end, and does not subsist pending appeal—*Shaikh Mohesdodeen* vs. *Shaikh Ahmed*, 14 W. R., 384; *Gosain Money Puree* vs. *Guru Pershad*, I. L. R., 11 Cal., 146.

Appeal.—An appeal lies from orders passed under this section—(section 588, *post*).

Injunction to restrain repetition or continuance of breach.

493. In any suit for restraining the defendant from committing a breach of contract or other injury, whether compensation be claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

The Court may by order grant such injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit, or refuse the same.

In case of disobedience, an injunction granted under this section or section 492 may be enforced by the imprisonment of the defendant for a term not exceeding six months, or the attachment of his property, or both.

No attachment under this section shall remain in force for more than one year, at the end of which time, if the defendant has not obeyed the injunction, the property attached may be sold, and out of the proceeds the Court may award to the plaintiff such compensation as it thinks fit, and may pay the balance, if any, to the defendant.

Act VIII of 1859, section 93. This section applies to H. C.

Does not Apply.—This section does not refer to persons in prison for contempt—*Martin* vs. *Lawrence*, I. L. R., 4 Cal., 655.

Before granting injunction, Court to direct notice to opposite party.

494. The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

Act VIII of 1859, section 95. This section applies to H. C.

Ex-parte—Such an injunction is a deviation from the ordinary course of justice, and nothing but the existence of great and serious danger not capable of being averted, probably, if delay be interposed, can justify its issue—*Freeman* vs. *McArthur*, 2 Tay. and Bell, 25.

Practice.—Where an injunction is granted without notice, the party aggrieved may apply either to have it discharged under section 496, or he may appeal—*Amolak Ram* vs. *Sahib Singh*, I. L. R., 7 Alla., 550.

Appeal.—No appeal lies from an order refusing to issue an injunction without issuing notice to the opposite party—*Luis* vs. *Luis*, I. L. R., 12 Mad., 186.

Injunction to Corporation binding on its members and officers.

495. An injunction directed to a Corporation or public Company is binding not only on the Corporation or Company itself, but also on all members and officers of the Corporation or Company whose personal action it seeks to restrain.

This section applies to H. C.
See note under section 492, *ante*.

Order for injunction may be discharged, varied or set aside.

496. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Act VIII of 1859, section 93. This section applies to H. C.
If an injunction is obtained *ex-parte* on facts of which a material one is false, the injunction will be dissolved, although by the affidavits filed when the motion for the dissolution is made there appear sufficient grounds for granting it—*Sohochurry Dassee* vs. *Roy*, 2 Bouln., 62; see also *Freeman* vs. *McArthur*, 2 Tay. and Bell, 10.

Compensation to defendant for issue of injunction on insufficient grounds.

497. If it appears to the Court that an injunction which it has granted was applied for on insufficient grounds, or

if, after the issue of the injunction, the suit is dismissed or judgment is given against

the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting the suit,

the Court may, on the application of the defendant, award against the plaintiff in its decree such sum, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the issue of the injunction :

Proviso.

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

An award under this section shall bar any suit for compensation in respect of the issue of the injunction.

Act VIII of 1859, section 96. This section applies to H. C.

Any person not desirous of taking advantage of the remedy given by this section may bring a regular suit—*Wilson* vs. *Kanhya*, 11 W. R., 143.

Award.—In section 96, Act VII, 1859, the words were "award of compensation," and it was held the denial of compensation under it did not bar a regular suit—*Nund Coomar* vs. *Gour Sunkur*, 13 W. R., 305; and under the present section apparently, the denial of compensation would not "be an award."

B.—Interlocutory Orders.

Power to order *interim* sale of perishable articles.

498. The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property being the subject of such suit, which is subject to speedy and natural decay.

Judicature Acts, Order 52, Rule 2. This section applies to H. C.

Power to make order for detention, &c., of subject-matter and to authorize entry, taking of samples and experiments.

499. The Court may, on the application of any party to a suit, and on such terms as it thinks fit,

(*a*) make an order for the detention, preservation or inspection of any property being the subject or such suit ;

(*b*) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit, and

(*c*) for all or any of the purposes aforesaid, authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

The provisions hereinbefore contained as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this section.

Judicature Acts, Order 52, Rule 3. This section applies to H. C.

An order under this section can only be made after summons has been served and reasonable notice has been given in writing—*Sengotha* vs. *Ramasami*, I. L. R., 7 Mad., 241.

Application for such orders to be after notice.

500. An application by the plaintiff for an order under section 498 or section 499 may be made after notice in writing to the defendant at any time after service of the summons.

An application by the defendant for a like order may be made after notice in writing to the plaintiff, and at any time after the applicant has appeared.

Judicature Acts, Order 52, Rule 4. This section applies to H. C.

Either party may apply for the order after notice; the plaintiff after service of summons, the defendant after he has appeared. If both apply, only one order should be passed on the two applications—*J. Sargant* vs. *Read*, 1 C. D., 600.

A plaintiff should enter in his plaint his claim for an injunction, when the obtaining of it is a substantial object of his suit—*Colebourne* vs. *Colebourne*, 1 C. D., 690.

When party may be put in immediate possession of land the subject of suit.

501. When land paying revenue to Government, or a tenure liable to sale, is the subject of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may upon payment of the revenue or rent due previously to the sale (and with or without security at the direction of the Court), be put in immediate possession of the land or tenure;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereupon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereupon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

Act VIII of 1859, section 91. This section applies to H. C. and P. S. C. C.

Deposit of money, &c., in Court.

502. When the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or with out security, subject to the further direction of the Court.

Section 244, N. Y. Code. This section applies to H. C. and P. S. C. C.

Where a defendant was ordered to deposit money due, but refused to do so, he was held liable to pay interest on the money from the date of the order—*Ram Dass* vs. *Prosuno Moyee*, 16 W. R., 297.

CHAPTER XXXVI.

APPOINTMENT OF RECEIVERS.

Power of Court to appoint Receivers.

503. Whenever it appears to the Court to be necessary for the realization, preservation or better custody or management of any property, moveable or immoveable, the subject of a suit, or under attachment, the Court may by order—

(*a*) appoint a Receiver of such property,

and, if need be,

(*b*) remove the person in whose possession or custody the property may be from the possession or custody thereof;

(*c*) commit the same to the custody or management of such Receiver; and

(*d*) grant to such Receiver such fee or commission on the rents and profits of the property by way of remuneration, asthe Court thinks fit, and all such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing, as the owner himself has, or such of those powers as the Court thinks fit.

Receiver's liabilities.

Every Receiver so appointed shall—

(*e*) give such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property;

(*f*) pass his accounts at such periods and in such form as the Court directs;

(*g*) pay the balance due from him thereon as the Court direct; and

(*h*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Nothing in this section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.

Act VIII of 1859, sections 95, 243. This section applies to H. C. The words after "thinks fit" in clause (*d*) have been inserted by Act VII of 1888, section 42.

Power to Appoint—The High Court in its original jurisdiction has the same powers as the superior Courts in England with regard to the appointment of Receivers—*Jaikissondas* vs. *Zenabai*, I. L. R., 14 Bom., 431.

Property the Subject of a Suit.—Where the suit is for partition of a joint estate, means the whole joint estate—*Poreshnath* vs. *Omarto Nauth*, I. L. R., 17 Cal., 614.

Where a party entitled to a share of real estate applied for a Receiver of the entire joint property, and some of the co-sharers who resisted the appointment were not subject to the jurisdiction of the Court, a Receiver was only granted for the share of the applicant—*Chowdhry* vs. *Chowdhry*, 2 Tay. and Bell, 192.

As the Owner Himself Has.—In a case of partition these words mean the whole body of owners—*Poreshnath* vs. *Omerto Nauth*, I. L. R., 17 Cal., 614.

Not Appointed.—A Court would not appoint a Receiver under section 243. Act VIII of 1859 (305) where the application was made simply to put off payment—*Oottum Singh* vs. *Ram Surun*, 23 W. R., 287, nor to realize the profits of the property attached and pay off the debtors, when it would take twenty years—*Mohinee Mohun* vs. *Ram Kant*, 15 W. R., 322, or fifteen years—*Rednun Achutaramayya* vs. *Khaja Mahomed*, 5 Mad., 272, or even one year to do so—*Fyzooddeen* vs. *Giraudh Singh*, 2 Alla., 1; though six months would not be considered unreasonable—*Mohinee Mohun* vs. *Ram Kant*, 15 W. R., 322; and where a Judge, on the death of a Receiver, finding that, under the management, the decree would not be satisfied for a long time, refused to appoint a new Receiver, and ordered execution to issue, his order was upheld—*Doorga Dutt* vs. *Bunwaree Lall*, 25 W. R., 133.

A Receiver should not be appointed for a portion of a railway—*Latimer* vs. *Aylesbury Railway Company*, 9 C. D., 385; nor in regard to property in possession of the defendant, claiming under a legal title unless a strong case is made out—*Sidheswari* vs. *Abhoyeswari*, I. L. R., 15 Cal., 818.

Where the property to be managed is not the subject of the suit, no manager can be appointed before attachment—*Bunwaree Lall* vs. *Girdharee Singh*, 16 W. R., 273; on the other hand, the appointing a manager does not release the property from attachment—*Bunwaree Lall* vs. *Mohabeer Proshad*, L. R. 1 Ind. App., 89, p. 95; *Mohabeer Pershad* vs. *The Collector of Tirhoot*, 13 W. R., 423.

Appointed.—The circumstance that a judgment-debtor has property other than that attached, is in itself no ground for refusing his application for the appointment of a Receiver, if he proposes to place all the properties under the management of the Court. The Judge should consider all the circumstances of the case—*Deb Kumari* vs. *Ram Lall*, 3 B. L. R., App., 107; see *ex-parte Jijai Amba*, I. L. R., 13 Mad., 390. A Reciever may be appointed without the consent of the decree-holder—*Thakoor Chunder*, Petitioner, Marsh., 261, even though the latter has a lien on the property as a collateral security, and he has taken a money-decree, stating that the property is liable—*Ram Rucha* vs. *Doorga Dutt*, 13 W. R., 453; but a party or his attorney should not, save in an extreme case, be appointed Receiver without the consent of the other party—*In re Lloyd*, 12 C. D., 447. The appointment of a Receiver does not date from the order of appointment, but from the date of giving the security required—*Edwards* vs. *Edwards*, 2 C. D., 291.

Dismissal.—A Receiver should not be dismissed *ex-parte* at the decree-holder's request—*Huree Sunker* vs. *Jogendro Coomar*, 19 W. R., 66.

Duties of Receiver—His duties as officer of the Court are confined to realizing, preserving, and managing the property for the collection of the moneys and money. profits due to the debtor; if he does anything beyond this, he must be looked on, not as an officer of Court, but an agent for the judgment-debtor—*Tiel & Co.* vs. *Abdool Hye*, 19 W. R., 37. He has no estate or interest in himself, and his power to manage is created simply by the order of the Court appointing him, and is binding only on the persons before the Court—*Nilmadhab Kundul* vs. *Gillander*, 2 Sev., 957; and his possession is the possession of all the parties—*Wrixon* vs. *Vise*, 3 Dr. and War., 104; *Parkissen* vs. *Lucas*, 8 Beav., 627. His powers at best are no more than those which the parties to the suit turn out to be possessed of when the case is finally decided; but if he takes possession of property under colour of his appointment, his conduct cannot be disputed by a motion to discharge or get rid of the attachment—*Bissessuree Debia*, Petitioner, 15 W. R., 347. A Receiver appointed in execution can sue for any debts attached—*Rumbutty Kooer* vs. *Kamessur*, 22 W. R., 316; *Reazut Hossein* vs. *Juggunnatha*, 21 W. R., 419; or for contribution on contract—*Sundaram* vs. *Sankaram*, I. L. R., 9 Mad., 334, or the property of the judgment-debtor—*Mirza Mahomed* vs. *The Widow of Balmakund*, L. R., 3 Ind. App., at p. 245; and any act of the debtor hostile to the creditors after attachment does not bind him—*Gopalasumi* vs. *Sankara*, I. L. R., 8 Mad., 418. See "PRACTICE," *infra*.

Where the property under attachment could not be sold, and the Court directed the tenants to pay their rents to the judgment-creditor: *Held*, the latter must be looked upon as a Receiver—*Radha Kissore* vs. *Aftab Chundra*, I. L. R., 7 Cal., 61.

Effect of Order.—And the fact of a Receiver having been appointed to realize the profits with a view to satisfy certain decrees, does not bar the Court, on the application of another creditor, from ordering a sale if the proceeds are insufficient to pay off the decretal amount in a reasonable period—*Din Dyal* vs. *Ram Rattun*, 16 W. R., 46; see also *Dinobundhoo Singh* vs. *Macnaghten*, 2 C. L. R., 185.

Practice : Power to Sue.—As to whether a Receiver can sue in his own name, see *Spunmugan* vs. *Moidin*, I. L. R., 8 Mad., 229; *Khetter Mohan* vs. *Wells*, I. L. R., 8 Cal., p. 719; *Gopolasami* vs. *Sankara*, I. L. R., 8 Mad., 418; *Drobomoyi* vs. *Davis*, I. L. R., 14 Cal., 323; *Sandavam* vs. *Sankaram*, I. L. R., 9 Mad., 334; *Hari Dass* vs. *Macgregor*, I. L. R., 18 Cal., 477.

Application.—In making an application under this section on affidavit, the affidavit should contain the facts and not merely follow the words of the Act—*In the goods of Okilmoney Dossee*, Fulton, 90; and should show special reasons for the appointment—*Gossain Dulmir* vs. *Hetnarain*, 6 C. L. R., 467; *Prosonomoyi* vs. *Bani Madhab*, I. L. R., 5 Alla., 536.

Application against Receiver.—On the Original Side of the High Court persons not parties to the suit in which a Receiver has been appointed may establish their rights by motion—*Mahomed Medhi* vs. *Zoharra*, I. L. R., 17 Cal., 285. And see *In re Dry Docks Corporation*, 39 C. D., 306, p. 314.

A person not a party to an action is not entitled to apply by motion for payment of money to him by the Receiver—*Brocklebank* vs. *East London Ry. Co.*, 12 C. D., 839.

Cost of Management—A manager under a Receiver has a preferential claim over attaching creditors to sums expended in carrying on the business, a bonus to which he is entitled by reason of summary dismissal and wages due by the Receiver, but not for wages due before that—*Short* vs. *Pickloring*, I. L. R., 6 Mad., 134.

After Decree.—A Receiver can be appointed after decree—*Shunmugam* vs. *Moidin*, I. L. R., 8 Mad., 229.

Appeal.—An appeal lies from an order passed under this section—*Birajan Koar* vs. *Ram Churan*, I. L. R., 7 Cal., 719; section 588, *post*; or when the application is refused—*Gossain Dulmir* vs. *Tekait Hetnarain*, 6 C. L. R., 467; *Venkatasami* vs. *Stridavamma*, I. L. R., 10 Mad., 179, but not a second appeal—*Boidya Nath* vs. *Mukhan Lal*, I. L. R., 17 Cal., 680. Where one of the defendants in a suit applied to have a Receiver removed from his office on the ground of mismanagement and the application was refused, an appeal was allowed on the ground that the question was one arising in execution of decree—*Methehai* vs. *Limji*, I. L. R., 5 Bom., 45.

When Collector may be appointed Receiver.

504. Where the property is land paying revenue to Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be Receiver of such property.

Act VIII of 1859, section 92. This section applies to H. C.

It has been amended by Act VII of 1888, section 43, so as to render the Collector's consent necessary.

Courts empowered under this Chapter.

505. The powers conferred by this Chapter shall be exercised only by High Courts and District Courts :

Provided that whenever the Judge of a Court subordinate to a District Court considers it expedient that a Receiver should be appointed in any suit before him, he shall nominate such person as he considers fit for such appointment, and submit such person's name, with the grounds for the nomination, to the District Court, and the District Court shall authorize such Judge to appoint the person so nominated, or pass such other order as it thinks fit.

An order made by a Subordinate Judge dismissing an application made under this section for the appointment of a Receiver, after obtaining sanction from the Judge, is

an order under section 503, and not an order under this section—*Gossain Dulmir* vs. *Hetnarain*, 6 C. L. R., 467.

The first thing the Subordinate Judge is to do, is to *nominate* the person he approves of, and send the name to the District Judge; from this proceeding there is no appeal. The Judge then approves and authorizes, the appointment, and from this order there is no appeal. The Subordinate Judge then *appoints* the Receiver, and from this order there is an appeal—*Birajan Koer* vs. *Ram Churn*, 9 C. L. R., 203; I. L. R., 7 Cal., 719.

Such other Order as he thinks Fit—That is, such other direction as he may think fit to give to the Subordinate Judge—*Birajan Koer* vs. *Ram Churn*, 9 C. L. R., 203; I. L. R., 7 Cal., 719.

Appeal.—No appeal lies from an order submitting the name of a person to the District Judge; but an appeal lies from the final order, appointing or refusing to appoint—*Birajan Koer* vs. *Ram Churn*, 9 C. L. R., 203; I. L. R., 7 Cal., 719, and the cases under "**Appeal**," section 503, *ante*.

PART V.

OF SPECIAL PROCEEDINGS.

CHAPTER XXXVII.

REFERENCE TO ARBITRATION.

Parties to suit may apply for order of reference.

506. If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any time before judgment is pronounced, apply, in person or by their respective pleaders specially authorized in writing in this behalf, to the Court for an order of Reference.

Every such application shall be in writing and shall state the particular matter sought to be referred.

Act VIII of 1859, sections 312, 313. This section applies to H. C. and P. S. C. C.

This section and section 522, *post*, are enabling sections, and are not intended to be restrictive or exclusive. Parties *sui juris* are competent before decree to make any agreement as to the settlement of the suit—*Jogessur Banerjee* vs. *Kulyanee*, 24 W. R., 41.

In Difference in the Suit.—In cases under this Chapter, a matter not in issue before the Court cannot properly become the subject of arbitration or award—*Taranath* vs. *Manick Chunder*, 14 W. R., 469.

All the Parties.—All the parties to the suit who are interested must concur in making the Reference—*Bykuntnath Chatterjee* vs. *Nuzuroodeen*, 10 W. R., 171; 1 B. L. R., S. N., xi., and in the issue to be determined—*Sheonath* vs. *Ramnath*, 10 Moore, 413 p. 427; 5 W. R., P. C., 21; It is sufficient that they do not object—*Degumber Chatterjee* vs. *Ram Prea*, Marsh., 587.

Not all Parties—But though an award, which has not been made on a Reference by all the parties, cannot be converted into final decree in the manner laid down in this Chapter so as to present an appeal—*Joy Prokash* vs. *Sheo Golam*, I. L. R., 11 Cal., 37; approved in *Bepin Behari* vs. *Annoda*, I. L. R., 18 Cal., 324; unless the persons dissenting are not necessary parties—*Bishoka* vs. *Anunto*, 4 C. L. R., 65; it is not null and void, but is evidence against the parties concerned—*Bejoy Chunder* vs. *Bhyrub Chunder*, 15 W. R., 427. In a suit in which A claimed a 6-anna share of certain property, all the defendants except one referred the matter to arbitration, and the arbitrators found that the plaintiff's right extended over 44 beegahs more than had been awarded by the Court. It was held that the plaintiff was entitled to his share in the 44 beegahs as against all the defendants except the defendant who refused to arbitrate—*Doorga Churn* vs. *Kally Das*, 10 W. R., 463; see also *Ram Soondur* vs. *Ram Shurun*, 6 W. R., 25; and where a

person was added as plaintiff while the case was pending before arbitrators, and he made objection to the arbitration, but suffered the arbitrators to give their award, he was considered as having agreed to the arbitration *ab initio* and bound by it—*Shitarnath Biswas* vs. *Kishen Mohun*, 5 W. R., 130; and where A sued B and two of his tenants for possession of certain land and the dispute between A and B was referred to arbitration, it was held that the award not affecting the rights of the tenants should be enforced between A and B—*Bishoka* vs. *Anunto*, 1 C. L. R., 65. So, where plaintiff and some of the defendants submitted to arbitration and plaintiff made no objection till the award was given, it was enforced—*Joy Prokash* vs. *Sheo Golam*, I. L. R., 11 Cal., 37.

Party not Submitting—A person not a party to the submission is not bound by the award—*Hira Sing* vs. *Gunga*, 11 Ind. App., 20; *Sheonath* vs. *Ramnath*, 5 W. R., P. C., 21; 10 Moore 413; it only binds the parties making the Reference—*Ganga Sahai* vs. *Hira Sing*, I. L. R., 2 Alla., 809, p. 816. It has been held in England, that, by acting under an agreement to refer, plaintiff was precluded from setting it aside as fraudulent—*Ormes* vs. *Beadel*, 6 Jur., N. S., 1103.

In Writing—The application must be made in writing, either by the parties in person or their pleaders specially authorized—*Moonhsee Gazee* vs. *Hameed*, 16 W. R., 160; *Gour Chunder* vs. *Joogul Chunder*, 1 W. R., 80; and pleaders cannot consent to a Reference on behalf of their clients, nor a plaintiff on behalf of his co-plaintiff, without special authority—*Moonshee Gazee* vs. *Hameed*, 16 W. R., 160; *Gour Chunder* vs. *Joogul Chunder*, 1 W. R., 80. Whether the exception to this rule, namely, where all the parties are present in Court, will still continue is doubtful—*Akber Beg* vs. *Bunda Ali*, 2 Alla., 419; *Jeyasankira Devi* vs. *Nagannada*, 1 Mad., 106; for every application must be in writing, and must state the particular matter sought to be referred; and unless the terms of the section are complied with jurisdiction possibly, may not arise—*Nusseerwanjee Pestonjee* vs. *Mynooddeen*, 6 Moore, 134 p. 155. See also *Haines* vs *East India Co.*, 6 Moore, 467, p. 485; but see *Halimbhai* vs. *Shanker*, I. L. R., 10 Bom., 381, p. 386. But where a person engaged to conduct as case assented to a Reference, and this assent was satisfied by his client, the High Court of Madras refused to set aside the arbitration under section 622, *post*—*Unniraman* vs. *Chathan*, I. L. R., 9 Mad., 451.

Revocation. An agreement to refer to arbitration cannot be revoked, unless for good cause; an arbitrary revocation is not permitted—*Pestonjee Nussurwanjee* vs. *Manockjee*, 12 Moore, 130; *Ablahee Kooer*, vs. *Oodun*, 15 W R., 331; *Nagasawmy* vs. *Rungasamy*, 8 Mad, 46; and by good cause is meant one of the causes mentioned in section 510, *infra*—*Halimbhai* vs. *Shanker*, I. L R., 10 Bom., 381; but see *Coley* vs. *Dacosta*, I. L. R. 17 Cal., 200. But where, as under this section, the Reference to arbitration is made by an order of Court, neither party can annul or revoke it—*Nil Monee Bose* vs. *Mohima Chunder*, 17 W. R., 516.

Effect of Reference—After a Reference to arbitration with the consent of parties, a plea of limitation is inadmissible—*Peharee* vs. *Unoop Singh*, S. D., N. W. 1864, p. 472.

Where parties in a suit for possession agree to arbitrate the question of title, plaintiff relinquishing his prayer for possession, the agreement contains an implied undertaking that the defendant shall give up possession if the decision be adverse to him—*Raj Narain* vs. *Nodoo Soodun*, 20 W R., 19; and a general Reference is binding in regard to every matter in dispute unless the award is set aside on the ground of fraud, mistake or misconduct—*Rani Bhagoti* vs. *Rani Chandan*, I. L. R., 11 Cal., 386.

Withdrawal of Suit.—After reference made the Court cannot allow the plaintiff to withdraw his suit on an *ex-parte* application under section 373, *ante*—*Sheoambar* vs. *Deodat*, I. L. R., 9 Alla., 168.

Interpretation of Reference.—See *Rani Bhagoti* vs. *Rani Chandan*, 12 Ind. App., 67; I. L. R., 11 Cal., 386.

Rent-Suit—This Chapter does not apply to rent-suits in Bengal—*Moonshee Gazee* vs. *Hameed*, 16 W. R., 160. But it has been held in the North West that, under the general law, parties to suits may, before issue themselves and after issue joined by the leave of the Court refer matters in dispute in a rent case to arbitration—*Goshain Giridhariji* vs. *Durga Devi*, I. L. R., 2 Alla., 119; and the Rent Law makes special provisions for arbitration—*Fahim Unnissa* vs. *Ajudhia*, I. L. R., 6 Alla., 171.

Appellate Court—An Appellate Court can act under this section—*Churanj Lall* vs. *Jamna Doss*, 7 Alla., 243; *Sangaralingam*, Petitioner, I. L. R., 3 Mad., 78; *Bhugwan Doss* vs. *Nund Lal*, I. L. R., 12 Cal., 173; *Suresh Chunder* vs. *Ambica Churn*, I. L. R., 18 Cal., 507; but not a Court to which certain issues have been referred for trial under section 566, *post*—*Nund Ram* vs. *Fakir Chand*, I. L. R., 7 Alla., 523.

Jurisdiction.—A case having gone up on appeal, the Judge referred it to the first Court to call upon the parties to the suit to refer some of the issues to arbitration, or failing their doing so, the Court itself was to appoint arbitrators: *Held*, that the order was not one made without jurisdiction, but was an irregular proceeding, which might be cured by the consent of the parties—*Punna Bibee* vs. *Khoda Buksh*, 22 W. R., 396.

507. The arbitrator shall be nominated by the parties in such manner as may be agreed upon between them.

Nominati n of arbitrator.

If the parties cannot agree with respect to such nomination, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the Court, the Court shall nominate the arbitrator.

When Court to nominate arbitrator.

Act VIII of 1859, section 314. This section applies to H. C. and P. S. C. C.

The parties must either name the arbitrators or consent to their nomination by the Court—*Sheonath* vs. *Ramnath*, 10 Moore, 413 p. 425; 5 W. R., P. C., 21; and see *Coley* vs. *Dacosta*, I. L. R., 17 Cal., 200. The Court should not nominate any person until it has ascertained whether he will accept office—*Troyluckhonath Roy* vs. *The Collector of Beerbhoom*, W. R., 1864, p. 388. Where both parties could not agree in nominating an arbitrator, and the Judge nominated one under this section, and defendant six weeks afterwards objected that he did not nominate him, it was held that, looking at the evidence, the defendant must be considered to have desired that the Judge should nominate, and that the nomination was binding—*Suroop Ram* vs. *Gobind Ram*, 7 W. R., 13, but see *Coley* vs. *Dacosta*, I. L. R,, 17 Cal., 200.

508. The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award, and specify such time in the order.

Order of Reference.

When once a matter is referred to arbitration, the Court shall not deal with it in the same suit, except as hereinafter provided.

Act VIII of 1859, section 315. This section applies to H. C. and P. S. C. C.

Fix such Time.—If no time is fixed in the order of Court, the award falls to the ground in Calcutta—*Gunga Gobind* vs. *Kalee Prosunno*, 10 W. R., 206; 1 B. L. R., S. N., xiii; *In the matter of Joy Mungul Singh*, 11 W. R., 433; *Nusseerwanjee Pestonjee* vs. *Mynooddeen*, 6 Moore, 134; but in Allahabad it does not avoid the award, and if the parties permit the reference to proceed without making any objection until the award has been delivered, such an objection will not be listened to—*Mubarick Ali* vs. *Kadir Baksh*, 7 Alla., 351; *Bar Narain* vs. *Bhagwant*, I. L. R., 10 Alla., 137. See sections 514, 521, *post*.

By an order of Court a suit was referred to two arbitrators, who were to make their award within three months. After the expiry of this period, the defendant took part in the proceedings, but finally objected to any award being made. The arbitrators took no notice of the objection and finished the Reference: It was held the that award was good—*Jagatsunderi Dasi* vs. *Sanatan*, 5 B. L. R., 357. But there was a clause in section 318 of the Act (and on this the Court relied), declaring that no award should be set aside only by reason of its not having been completed within the period allowed by the Court.

Time Elapsed.—An award after the time allowed is now apparently invalid—See "INVALID," section 521; *Bhugwan Doss* vs. *Nund Lall*, I. L. R., 12 Cal., 173. Where a suit was referred to arbitrators, who were to make their award within six months, and nothing was done within that time: *Held*, on an application by the plaintiff to have the suit restored to the file of the Court, that the suit was still pending, the arbitrators not having determined it while they had jurisdiction to do so, and it was ordered that it should be brought again before the Court—*Gopi Nath* vs. *Shib Chandra*, 6 B. L. R., App., 74. See "FURTHER TIME," section 414, *infra*; "WITHIN THE PERIOD ALLOWED," section 521, *post*.

Matter in Difference.—The order of Reference should state all the points which are referred to arbitration. It is important that this should be done carefully, since once a case is referred to arbitration it must be dealt w in accordance with the provi

sions of this Chapter, and it cannot be tried unless the Reference fails—*Haradhun* vs. *Radhanath*, 10 W. R., 398. Looking at the wording of the section, it is doubtful if a general Reference is allowable. Under Act VIII, where the issues were not definitely laid down in a general Reference of "all matters in difference in the suit," the arbitrators were held bound to ascertain the points at issue and come to a finding on them —*Luchmee Narain* vs. *Pyle*, 2 Alla., 150; and such a general Reference gave the arbitrators exclusive jurisdiction to deal with the costs of the suit—*Koylas Chunder* vs. *Muddoosoodun*, 2 Ind. Jur., N. S., 12; and with the costs of Reference and award, and interest after the date of submission—*Mohanlal* vs. *Nathuram*, 1 B. L. R., 144; and the Court could not amend the award—*Barrut Chunder Doss* vs. *Damjee*, Coryt., 150; but now it can as regards costs—section 519, *post*.

The Procedure of Arbitrators.—The arbitrators should confine themselves to the matters referred and only take such legal evidence as is necessary to decide that—*Krishna Kanta* vs. *Bidya Sundari*, 2 B. L. R., App., 25. Where an arbitrator imported into his proceeding a previous enquiry alleged to have been made by him and relied upon admissions made in former proceedings, his award was held bad—*Kanhye Chund* vs. *Ram Chunder*, 24 W. R., 81.

The decision of arbitrators in a matter not in difference between the parties, and not referred to them, is null and void—*Moshahel Singh* vs. *Konomutty*, 15 W. R., 172. Where certain matters are referred to arbitrators by the Judge and other matters by the parties, care should be taken that they should be distinctly separated and not mixed up together—*Roghoo Nundun* vs. *Bunwaree*, 3 W. R., Mis., 27. Arbitrators cannot delegate their power to others—*Surubjeet* vs. *Gouree Pershad*, 7 W. R., 269.

Court shall not Deal with It.—When a dispute has been referred to arbitration, the Court cannot deal with the matter in difference between the parties except as provided in this Chapter—*Halimbhai* vs. *Shanker*, I. L. R., 10 Bom., 381; it cannot go into the merits of the case *Salig Ram* vs. *Junna* I. L. R., 4 Alla., 546; or dispose of it otherwise than under this Chapter—*Haradhun* vs. *Radhanath*, 10 W. R., 398. Nor will the Court confirm an order passed by the arbitrators making payment of their fees a condition precedent to hearing the Reference—*Steel* vs. *Roberts*, I. L. R., 6 Cal., 809.

If not Decided.—Where matters in dispute are referred to arbitration, and it is found that one question at issue is omitted from the Reference, and that the award contains no decision thereon, the party interested should bring the omission to the notice of the Court; if he does not do so the Court is not wrong in not passing any order at all on the point.—*Raj Narain* vs. *Mookerjee*, 14 W. R. 247.

When Reference is to two or more, order to provide for difference of opinion.

509. If the Reference be to two or more arbitrators, provisions shall be made in the order for a difference of opinion among the arbitrators,—

(*a*) by the appointment of an umpire, or

(*b*) by declaring that the decision shall be with the majority, if the major part of the arbitrators agree, or

(*c*) by empowering the arbitrators to appoint an umpire, or

(*d*) otherwise, as may be agreed between the parties; or if they cannot agree, as the Court determines.

If an umpire is appointed, the Court shall fix such time as it thinks reasonable for the delivery of his award in case he is required to act.

Act VIII of 1859, section 316. This section applies to H. C. and P. S. C. C.

Difference of Opinion.—When a suit is referred to arbitration, the order of reference should provide for the appointment of an umpire in case of any difference of opinion among the arbitrators, and should declare that the decision shall be with the majority—*Haradhun* vs. *Radhanath*, 10 W. R., 398; if not, the award must be made and signed by all the arbitrators—*Junglee Ram* vs. *Ram Heet*, 19 W. R., 47; *Nem Roy* vs. *Bharut*, 22 W. R., 129. Partial disagreement of two arbitrators does not nullify their award as a whole—*Ponaoollah* vs. *Tumeezooddeen*, 2 W. R., 32. The mere absence of a clause in the order of reference to arbitration providing for a difference of opinion between

the arbitrators cannot vitiate the award, where there is no such difference of opinion—*Gour Chunder* vs. *Sodoy Chunder*, 17 W. R., 30 And in special appeal, a submission will not be sent back to the arbitrators, with a provision for a difference of opinion, where the arbitrators having given in differing awards the case was tried by the first Court, whose decision was confirmed on appeal—*Thakoor Dass* vs. *Ram Jeebun*, 14 W. R., 150. See, however, *Haradhun* vs. *Radhanath*, 2 B. L. R., S N., xiv.

If the decision lies with the majority, then their award, in the absence of the minority, provided they have had due notice, is a legal award, unless their absence is due to one or other of the causes enumerated in section 510, *post*—*Kedarnath* vs. *Mussamut Gunga Bass*, S. D., N. W., 1861, p. 541. So an award signed by two out of three arbitrators was held good, the third having first taken part in the proceedings, then avoided attendance, and finally refused to act—*Mithun Lall* vs. *Ram Chund*, *id.*, 895 [but see against this *Busunt Rai* vs. *Girdharee Singh*, 3 Agra, 93]; and an award was held good where the third arbitrator, having sat with the others throughout the enquiry, declined to record an opinion on the last day—*Gokul* vs. *Bunsee and Jhaoo*, *id.*, 1862, p. 448.

Death, incapacity, &c., of arbitrators or umpire.

510. If the arbitrator, or, where there are more arbitrators than one, any of the arbitrators, or the umpire, dies, or refuses, or neglects or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date, the Court may in its discretion either appoint a new arbitrator or umpire in the place of the person so dying or refusing or neglecting or becoming incapable to act, or leaving British India, or make an order superseding the arbitration, and in such case shall proceed with the suit.

Act VIII of 1859, section 319. This section applies to H. C. and P. S. C. C.

If the Arbitrator Refuses.—It has been held that this means, if the arbitrator accepts and afterwards refuses, and does not justify a Court in appointing new arbitrators against the wish of one of the parties, where the arbitrators first named refused from the first—*Pugardin* vs. *Moidinsa*, I. L. R., 6 Mad., 414; *Bepin Behari* vs. *Annoda*, I. L. R., 18 Cal., 324.

It is not incumbent on the Judge to appoint new arbitrators when some of those originally appointed have refused to act, unless both parties agree—*Sada Sookh* vs. *Shiva Dyal*, 1 Agra, 109; but he cannot refuse to accept the arbitrators' refusal and compel them to decide—*Shib Charan* vs. *Ratirem*, I. L. R., 7 Alla., 20; and if, generally, any of the arbitrators refuse, an award by the remainder is invalid, and the Court must either appoint new arbitrators or try the suit—*Nand Ram* vs. *Fakir Chand*, I. L. R., 7 Alla., 523; *Thammiraju* vs. *Bapiraju*. I. L. R., 12 Mad., 113. The power of the Court to appoint may be limited, and controlled by agreement. B and C submitted to arbitration in the terms that the umpire should be selected from seven persons named. The umpire first selected refused to act, and the Court appointed a new umpire, who was not one of the seven persons mentioned in the submission: *Held*, that the umpire not being one of the seven, the award was invalid—*Barracho* vs. *DeSouza*, 7 Mad., 72. See *Coley* vs. *Dacosta* I. L. R., 17 Cal., 200. The Judge has the sole power of appointing fresh arbitrators in the room of such as refuse to act—*Huronath Roy* vs. *Kasheenath*, W. R., 1864, p. 338; and he may appoint one new arbitrator in place of several old arbitrators—*Rampersad* vs. *Juggernauth*, 6 C. L. R., 1.

Retract Resignation. An arbitrator has full power to retract his resignation before it has been accepted—*Joy Mungul Singh* vs. *Mohun Ram*, 15 W. R., 38: 23 W. R., 429.

Arbitration Superseded.—When an arbitration has failed, and the record has been returned, the Court cannot dismiss the suit, but must fix a day for the hearing and give notice to the parties—*Muddun Mohun* vs. *Kanaye Dass*, 23 W. R., 21.

Consent.—Consent of all parties is not necessary to obtain an order under this section—*Rampersad* vs. *Juggernauth*, 6 C. L. R., 1.

Appointment of umpire by Court.

511. Where the arbitrators are empowered by the order of Reference to appoint an umpire and fail to do so, any of the parties may serve the arbitrators with a written notice to appoint an umpire; and

if, within seven days after such notice has been served, or such further time as the Court may in each case allow, no umpire be appointed, the Court, upon the application of the party who has served such notice as aforesaid, may appoint an umpire.

Act VIII of 1859, section 319. This section applies to H. C. and P. S. C. C.

Powers of arbitrator or umpire appointed under sections 509, 510, 511.

512. Every arbitrator or umpire appointed under section 509, section 510 or section 511 shall have the like powers as if his name had been inserted in the order of Reference.

Act VIII of 1859, section 319. This section applies to H. C. and P. S. C. C.

Summoning witnesses.

513. The Court shall issue the same processes to the parties and witnesses whom the arbitrators or umpire desire or desires to examine, as the Court may issue in suits tried before it.

Punishment for default, &c.

Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

Act VIII of 1859, section 317. This section applies to H. C. and P. S. C. C.
If the defendant does not appear, the arbitration may proceed *ex-parte*—*Gokul Chund* vs. *Girdharee Lall*, S. D., N. W., 1866, p. 83.

Extension of time for making award.

514. If from the want of the necessary evidence or information, or from any other cause, the arbitrators cannot complete the award within the period specified in the order, the Court may if it thinks fit, either grant a further time, and from time to time enlarge the period for the delivery of the award, make or an order superseding the arbitration, and in such case shall proceed with the suit.

Supersession of arbitration.

Act VIII of 1859, section 318. This section applies to H C and P. S. C. C.

Complete the Award.—This does not include filing it—*Umersey* vs. *Shamji*, I. L. R., 13 Bom., 119.

Further Time.—Under this section the Court may at its discretion enlarge the period for the delivery of an award of arbitration without the consent of, and even if opposed by, the parties—*Gobind Chunder* vs. *Ram Kishen*, 2 W. R., 297; even after the period has expired—*Har Narain* vs. *Bhagwant*, I. L. R., 10 Alla., 137; *Suppu* vs. *Govindacharyar*, I. L. R., 11 Mad., 85; unless the award has been delivered—*Har Narain* vs. *Bhagwant*, I. L. R., 13 Alla., 300; 18 Ind. App., 55; *Lakshminarasimham* vs. *Somasundaram*, I. L. R., 15 Mad., 384; *Ram Manohar* vs. *Lal Behari*, I. L. R., 14 Alla., 343. The application for extension should be made in writing, and so should the order

on it—*Monji Premji* vs. *Maliyakel*, I. L. R., 3 Mad., 59. Submission to the Court under Act VIII of 1859, section 320, was held not necessary to the completion of an award within the meaning of section 318 (the present section)—*Jagat Sunderi* vs. *Sonatan*, 5 B. L. R., 357. See "WITHIN THE PERIOD ALLOWED," section 521, *post*.

Any other Cause.—Where one of the arbitrators was ill, and the time must elapse before they could make their award, the Court superseded the arbitration and recalled the suit—*Joseph* vs. *Sreerker*, Bourke, 359.

When umpire may arbitrate in lieu of arbitrators.

515. When an umpire has been appointed, he may enter on the Reference in the place of the arbitrators—

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) when they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

Act VIII of 1859, section 318. This section applies to H. C. and P. S. C. C.

Filed in Court.—The Court can extend the period within which the umpire is to give his award—*Kupu Rau* vs. *Venkataramayyar*, I. L. R., 4 Mad., 311.

Award to be signed and filed.

516. When an award in a suit has been made the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

Act VIII of 1859, section 62. This section applies to H. C. and P. S. C. C.

Award.—The making of an award is a judicial act, and must be done by the arbitrators in the presence of one another and at the same time—*Joy Mungul Singh* vs. *Mohun Ram*, 12 W. R., 397; 23 W. R., 429; but when the case has been regularly heard by the arbitrators sitting together, and an award has been drawn up and signed by them, the mere omission to sign the award at the same time and in each other's presence does not invalidate it—*Bhabasundari Dasi* vs. *Makhunlal*, 8 B. L. R., 128. For the judicial portion of their duties is ordinarily at an end when they have come to a final conclusion, so that if all the arbitrators draw up and sign a rough draft award, the validity of the draft award cannot be impeached, because they made out a fair copy. The draft is the award—*Kulu Nagabushanam* vs. *Kulu Seshachalam*, 1 Mad., 178. Arbitrators cannot delegate their authority to others—*Surulijeet* vs. *Gouree Pershad*, 7 W. R., 269. An award under this section should be a single instrument complete in itself, and should not consist of two papers bearing different dates—*Joy Mungul Singh* vs. *Mohun Ram*, 12 W. R., 397.

Documents.—The arbitrator should not allow documents entrusted to him by the Court to be removed from the record—*Joy Mungul Singh* vs. *Mohun Ram*, 12 W. R., 397.

The Oath of Party.—Plaintiff in a suit submitted to arbitration, agreed to be bound by the oath of the defendant, and the arbitrators decided accordingly: *Held* an award —*Bhagirath* vs. *Ram Ghulam*, I. L. R., 4 Alla., 283; see also *Lekhraj Singh* vs. *Dulhma*, I. L. R., 4 Alla., 302.

Review.—After the award is made and filed the functions of the arbitrators cease—*Dutto Singh* vs. *Dosad*, I. L. R., 9 Cal., 575.

Delivery of Award and Documents.—The act of an arbitrator in handing an award to the proper officer of the Court to be filed is not an application within the meaning of the Limitation Act—*Roberts* vs. *Harrison*, 9. C. L. R., 209.

The arbitrators may deliver their award to a third person to be filed—*Jagat Sunderi* vs. *Sonatan*, 5 B. L. R., 357; and if they deliver it to a party, they should not hand over with it the proceedings, depositions and exhibits in the suit. These they must deliver to the Court. The correct procedure is to return the award and record direct—*Joy Mungul Singh* vs. *Mohun Ram*, 12 W. R., 397; if the arbitrators object to deliver the documents, the Court may compel them to do so—*Nursing* vs. *Nuffer*, I. L. R. 17 Cal., 832.

Decree.—If the award has not been filed, it is doubtful if a decree can be given—*Himutoollah* vs. *Bebee Heerun*, 13 W. R., 62.

Notice : Revision—It is a material irregularity if the Court gives judgment without issuing notice, and the judgment will be set aside on revision—*Rangasami* vs. *Muttusami*, I. L. R., 11 Mad., 144.

Arbitrators or umpire may state special case.

517. Upon any reference by an order of the Court the arbitrators or umpire may, with the consent of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court ; and the Court shall deliver its opinion thereon ; and such opinion shall be added to and form part of the award—

Act VIII of 1859, section 321. This section applies to H. C. and P. S. C. C.

The Court has no power to sanction a rule made by the arbitrators, making the payment of their fees a condition precedent to their hearing the reference—*Robarts* vs. *Steel*, 8 C. L. R., 439.

Court may on application, modify or correct award in certain cases.

518. The Court may, by order, modify or correct an award—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred, or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision.

Act VIII of 1859, section 322. This section applies to H. C. and P. S. C. C.

The arbitrators should confine their enquiry and the evidence to the matters referred —*Krishna Kanta* vs. *Bidya Sundari*, 2 B. L. R., App., 25 ; since an award on a matter not referred is null and void—*Moshaheb Singh* vs. *Konomutty*, 15 W. R., 172 ; and as regards any excess, the irregularity must be dealt with by the Court under this section, or by remitting the award under section 520, *post*, unless the parties agree to accept the award as it stands—*Dabee Dass* vs. *Sheo Buksh*, S D., N. W , 1861, p. 68. Where certain points have been referred by the Judge, and others by the parties themselves, separate awards should be given instead of mixing them all up and giving one general award—*Roghoo Nundun* vs. *Banwaree*, 3 W. R. Mis., 27.

An appeal lies from orders under this section—see section 588, *post*. As to the effect of not rectifying an error, see *Nazir Moonzoorad* vs. *Mehidi Begum* 7 C. L. R., 206.

Order as to costs of arbitration.

519. The Court may also make such order as it thinks fit respecting the costs of the arbitration, if any question arise respecting such costs and the award contain no sufficient provision concerning them.

Act VIII of 1859, section 322. This section applies to H. C. and P. S. C. C.

If the submission does not leave the question of costs to the arbitrators, they cannot enter into the question, and if they do, the Judge should refuse to file the award—*Dagdusa* vs. *Bhukan*, I. L. R., 9 Bom., 82.

No appeal lies from an order under this section, though an appeal does lie from an order under section 518. It would seem as if the question of costs was left wholly to the discretion of the Court. Where all matters in difference between the parties in the suit

were referred to arbitration under an order of Court: *Held*, that the arbitration had power to award interest after the date of the submission, and to deal with the costs of the reference and award—*Mohanlal* vs. *Nathuram*, 1 B. L. R., 144.

When award or matter referred to arbitration may be remitted.

520. The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrators or umpire, upon such terms as it thinks fit,—

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration;

(*b*) where the award is so indefinite as to be incapable of execution;

(*c*) where an objection to the legality of the award is apparent upon the face of it.

Act VIII of 1859, section 323. This section applies to H. C. and P. S. C. C.

Award: Binding—The Court cannot go behind the award, unless the Court had no power to refer—*Kalian Das* vs. *Ganga*, I. L. R., 5 Alla., 500, and give something not allowed by it—*Gopal Chunder* vs. *Brojendro Coomar*, 5 C. L. R., 338.

Construction.—The Court must construe an award by the language of the award itself, and not by the oral evidence of the arbitrators—*Juneshee* vs. *Cholay Lal*, 3 Alla., 117.

Remit.—If, on a perusal of the award and the record, the Court finds that the arbitrators have fallen into such mistakes or omissions as cannot be amended under the last section, it must return the award for reconsideration—*Mohun Kishen* vs. *Bhoobun*, 7 W. R., 406, the Court cannot decide such matters of its own motion—*Luchmee Narain* vs. *Pyle*, 2 Alla., 150. On the other hand, the Court should be careful not to remit a case unnecessarily—*Taranath Chowdhry* vs. *Manick Chunder*, 14 W. R., 469.

A suit having been referred to arbitration was dismissed by the arbitrators for default; whereupon the plaintiff objected to the award and charged the arbitrators with collusion. The Judge, finding that the charge was not made out, referred the matter back to the arbitrators for a proper award: *Held*, that the plaintiff's revocation of his consent to the Reference did not put an end to the arbitrator's power—*Ablakhee Kooer* vs. *Oodun*, 15 W. R., 331.

Undetermined.—If, under a general Reference, the arbitrators give costs but omit to state the scale—*Barrut Chunder* vs. *Damjee*, Coryt., 150; or omit to give interest, the reward should be remitted—*Phiran* vs. *Bahoran*, 7 Alla., 367.

Where the arbitrators have neglected to decide issues essential to the determination of the case, and refuse to do so when the case is remitted, the Court must try the case—*Jonardon* vs. *Sambhunath*, I. L. R., 16 Cal., 806.

Apparent Illegality—An award cannot be remitted under this section unless the illegality is apparent on the face of it—*Nanak Chand* vs. *Ram Narayan*, I. L. R., 2 Alla., 181; and though apparently inconsistent on the face of it, it should be decreed if the parties agree—*Keeree* vs. *Munsook Roy*, S. D. N. W., 1861, p. 224; but if illegal or defective on its face, it should be at once remitted—*Luchmee Narain* vs. *Pyle*, 2 Alla., 150.

Where plaintiff and one of three defendants submitted their dispute to arbitration: *Held*, the award was not void as between them, because the other defendants had not joined in submitting the case to arbitration—*Bishoka* vs. *Anunto Lall*, 4 C. L. R., 65.

Oath of a Party.—Where the plaintiff in a referred case agreed to abide by the oath of the defendant (given on an idol) and an award was made accordingly: *Held*, the award was good—*Bhagirath* vs. *Ram Ghulam*, I. L. R., 4 Alla., 283; but all the parties must join in the agreement—*Lekhraj Singh* vs. *Dulhma*, I. L. R., 4 Alla., 302.

Limitation.—An application that an award be remitted to the arbitrators in order that the proceedings, depositions and exhibits in the suit which have not been submitted with it to the Court under this section, should be so submitted, must be made within ten days after the award has been filed—*Baney Madhub* vs. *Hurry Mohun*, 2 Ind. Jur., N. S., 16.

Appeal.—When a decree has been passed on an award, an appeal does not lie on the ground that it was improperly remitted—*Abdul Rahman* vs. *Yar Muhammad*, I. L. R., 3 All., 636.

521. An award remitted under section 520 becomes void on the refusal of the arbitrators or umpire to reconsider it. But no award shall be set aside except on one of the following grounds (namely) :—

Grounds for setting aside award.

(*a*) corruption or misconduct of the arbitrator or umpire;

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit ;

and no award shall be valid unless made within the period allowed by the Court.

Act VIII of 1859, section 324. This section applies to H. C. and P. S. C. C.

An award remitted becomes void if the arbitrators or umpire refuses to reconsider it, without any proof of corruption or misconduct—*Mohun Kishen* vs. *Bhoobun*, 7 W. R., 406; *Deb Narain* vs. *Rajmonee*, 3 W. R., 168.

Corruption or Misconduct.—Corruption or misconduct of the arbitrator or umpire is necessary, and when any such charge is made, the Court should look carefully over the record—*Pureshnath* vs. *Nobin Chunder*, 12 W. R., 93; doubted in *Bykunt Nath* vs. *Prionath*, 22 W. R., 447; and make a full enquiry—*Senuk Kaches* vs. *Oree*, 2 Alla., 241. Apparent partiality on the ground that one of the arbitrators is a relative of one side—*Bykunt Nath* vs. *Prionath*, 22 W. R. 447; *Nainsukh* vs. *Umadai*, I. L. R., 7 Alla., 273, [but see case at 12 W. R., 93]; that they had tendered their resignation, if they had withdrawn it before it was accepted—*Joy Mungul Singh* vs. *Mohun Ram*, 23 W. R., 429; *Har Narain* vs. *Bhagwant*, I. L. R., 10 Alla., 137, or that though they had awarded damages to plaintiff, they made him pay costs—*Mohendronath Bose* vs. *Nussee*, 1 Ind. Jur., N. S., 224; or that their award is erroneous—*Nuser Ali* vs. *Tinoo Dossia*, 6 W. R., 95; or that they decided the case against the written statement of the defendant—*Goroo Churn* vs. *Ram Dhun*, 7 W. R., 28; or that they received and decided the case on what was not legal evidence—*Howard* vs. *Wilson*, I. L. R., 4 Cal., 231; *Suppu* vs. *Govindacharyar*, I. L. R., 11 Mad., 85; or that the arbitrators awarded plaintiff damages, and yet made him pay all the costs—*Mohendronath Bose* vs. *Nussee*, 1 Ind. Jur., N. S., 224; or the mere circumstance that the arbitrators had some interest in the subject matter of the suit—*Senuk Kaches* vs. *Oree*, 2 Alla., 241, or that one of the parties, through the fault of his agent, had no knowledge of the proceedings—*Mackenzie* vs. *Hume*, 1 Tay. and Bell, 41, is insufficient to set aside an award.

But an award will be set aside for anything known as misconduct in English Law—*Ganga Sahai* vs. *Lekhraj Singh*, I. L. R., 9 Alla., 253. The Code implies that they shall all be present at such meetings as are essential to the validity of the award—*Nand Ram* vs. *Fakir Chand*, I. L. R., 7 Alla., 523; and when two out of three arbitrators examined witnesses in the absence of the third the award was set aside—*Thammiraju* vs. *Baptraju*, I. L. R., 12 Mad., 113. So, where one of the arbitrators who never attended or took any interest in the proceedings signed the award—*Ram Gutlee* vs. *Thakoor Dass*, 22 W. R., 418; *Sreenath Ghose* vs. *Raj Chunder*, 8 W. R., 171, and where the arbitrators improperly added another to their number—*Phiram* vs. *Bahoran*, 7 Alla., 367, or refused to hear witnesses produced by either party—*Rughoobur Dyal* vs. *Maina Koer*, 12 C. L. R., 364; the awards were set aside.

It is the duty of all the arbitrators to attend every meeting which takes place, and they ought all to act together in every stage of the proceedings — *Sreenath* vs. *Rajchunder*, 8 W. R., 171.

If a person is in a fit condition to manage his affairs down to the time when the proceedings before the arbitrator concluded, the award is not invalid, because he became insane before its publication—*Gouresnath* vs. *The Collector of Monghyr*, 7 W. R., 5.

An award has no effect so long as there is a judicial order setting it aside—*Fitzpatrick* vs. *Macnaghten*, 21 W. R., 261.

See as to misconduct *Adams* vs. *Great Scotland Ry.*, App. Cas., 1891, p. 41.

Within the Period Allowed.—An award after the time allowed is invalid—*Har Narain* vs. *Bhagwant*, 18 Ind. App., 55; *Ram Manohar* vs. *Lal Behari*, I. L. R., 14 Alla., 343; *Lakshminarasimham* vs. *Somasundaram*, I. L. R., 15 Mad., 384; *Gansi Shankar* vs. *Babban*, I. L. R., 14 Alla., 347; *Bhagwan Dass* vs. *Nundlall*, I. L. R., 12 Cal.

173; *Simson* vs. *Venkata Gopalam*, I. L. R., 9 Mad., 475; but the Court has the fullest powers to enlarge the time before the awarded is completed—*Lakshminarasimham* vs. *Somasundaram*, I. L. R., 15 Mad., 384. This means that it must be made and delivered within the period—*Behari Das* vs. *Kalian*, I. L. R., 8 Alla., 543. See, however, *Har Narain* vs. *Bhagwant*, I. L. R., 10 Alla., 137; *Umersey* vs. *Shamji*, I. L. R., 13 Bom., 119; *Har Narain* vs. *Bhagwant*, I. L. R., 13 Alla., 300. See "FURTHER TIME," section 514, *ante*.

Appeal.—No appeal lies under section 588, *post*, from an order setting aside an award; but where a Judge refused to give judgment on an award, it was held that the refusal was a judgment on the subject-matter of the suit and appealable—*Howard* vs. *Wilson*, I. L. R., 4 Cal., 231, dissented from in *Ambika Dasia* vs. *Nadyar Chand*, I. L. R., 11 Cal., 172; and if a Court, having set aside an award, hears the case on the merits, it is open to any party appealing from the decree to impugn the order—*Mothooranath Tewaree* vs. *Brindabun*, 14 W. R., 327; *Abdul Rahmun* vs. *Yar Muhammad*, I. L. R., 3 Alla., 636.

If the award is confirmed and judgment given according to it, no appeal lies—*Sreenath* vs. *Rajchunder*, 8 W. R., 171.

Revision.—An order setting aside an award on the ground of misconduct of one of the arbitrators is not subject to revision—*Chattar Singh* vs. *Ganga*, 5 Alla., 293.

Judgment to be according to award.

522. If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application,

the Court shall, after the time for making such application has expired, proceed to give judgment according to the award,

or, if the award has been submitted to it in the form of a special case, according to its own opinion of such case.

Decree to follow.

Upon the judgment so given a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

Act VIII of 1859, section 325. This section applies to H. C. and P. S. C. C.

Sees no Cause.—See *Atty.-Genl.* vs. *Emerson*, 10 Q. B. D., 191, p. 206. *In re Sir John Moore Gold Co.*, 12 Q. B. D., 325.

Award.—The word "award" as used in the last sentence, means the award given by the arbitrators—*Jawahir Singh* vs *Mul Raj*, I. L.R., 8 Alla., 449.

Limitation.—The period of limitation for an application under this section is ten days—Act XV of 1877, Sched. II, art. 158; and judgment should not be delivered until the ten days have expired—*Gunga Narain* vs. *Ram Chund*, 20 W. R., 311; unless the parties expressly consent—*Sunt Lall* vs. *Baboojee*, S. D., N. W., 1863, p. 42. Under Act VIII an appeal lay from such a judgment—*Misser Deo Kishun* vs. *Misser Bhugwan*, 3 Agra, 199; *Phiran* vs. *Bahoran*, 7 Alla., 367; *Gunga Narain*, *supra*, but possibly the expiration of the ten days might be looked on as a condition precedent to exercising jurisdiction, so as to render the Judge's action subject to be controlled under the Charter Act. See *Joy Mungul Singh*, 12 W. R., 397.

Impugning Award.—A party impugning an award and seeking to set it aside is not bound to contest the proceedings step by step, and appeal against every interlocutory order. He may advance all his objections when the award is delivered—*Sheonath* vs. *Ramnath*, 5 W. R., P. C., 21. But he should be careful to bring to the notice of the Court within the ten days any objection he may have to urge or any defect he may perceive—*Baney Madhub* vs. *Hurry Mohun*, 2 Ind. Jur., N. S., 16; otherwise the Court may enter judgment in terms of the award, and if so it will be final—*Sashti Charn* vs. *Tarrack Chunder*, 8 B. L. R., 315; 15 W. R., 9; and no appeal will lie except in regard to the genuineness of the award or the consent of the party—*Protab Chunder* vs. *Haro*

Mones, 24 W. R., 188; 15 W R., F. B., 9; and see *Joy Mungul Singh* vs. *Mohun Ram*, 23 W. R., 429; even though the arbitrators have been guilty of misconduct—*Ramonoogra Chobey* vs. *Putmoorta*, 7 W. R., 205; *Sreenath* vs. *Rajchunder*, 8 W. R., 171; or the award is clearly defective and illegal—*In the matter of the petition of Ilahi Bux*, 5 B. L. R., App., 75; or even though the judgment does not embody a suggestion of the majority of the arbitrators which was mere surplusage—*Surboree Kant* vs. *Anadya Kant*, 20 W. R., 226; and the matter cannot be remanded to the arbitrators—*Pokhkar Pershad* vs. *Punchum*, 2 Alla., 235. But where a party did not object in the first Court that the award was invalid having been made after the time allowed, it was held that as it did not appear, he knew of the defect in the first Court, he could urge in the Court of Appeal that there was no award—*Chuha Mal* vs. *Hari Ram*, I. L. R., 8 Alla., 548; on the other hand, it has been held that an appeal does not lie where the parties, instead of ten days, were only allowed a few hours to object to an award on which a decree was given and the proper remedy was by review—*Mouji* vs. *Maliyakel*, I. L. R., 3 Mad., 59.

As to whether a person who does not impugn an award within ten days can afterwards on appeal raise any objection mentioned in section 521, *ante*, see *Muhammad Abid* vs. *Muhammad*, I. L. R., 8 Alla., 64.

Appeal.—The finality follows the award, so there must be a valid award—*Joy Prokash* vs. *Sheo Golam*, I. L. R., 11 Cal., 37; *Debendranath* vs. *Aubhoy*, I. L. R., 9 Cal., 905; made within the period allowed by the Court—*Chuha Mal* vs. *Hari Ram*, I. L. R., 8 Alla., 548; and though a trifling addition may not affect the decree—*Huro Soondaree Debee* vs. *Sreedhur Bhuttacharjee*, 17 W. R., 352; the general rule is that a decree which does not strictly follow the award is appealable—*Jawahir Singh* vs. *Mul Raj*, I. L. R., 8 Alla., 449; and an appeal will lie if the decree is in excess of the award, not in accordance with it, or there is no valid award or the Court has no jurisdiction to hear the suit—*Bindessuri* vs. *Jankee*, I. L. R., 16 Cal., 483. So that if some of the parties have not joined in the reference—*Joy Prokash* vs. *Sheo Golam*, I. L. R., 11 Cal., 37; or the matter is not in issue—*Ram Bhunjun* vs. *Sreekishen*, 11 W. R., 140; or there is no final award—*Lalla Ishuree Pershad* vs. *Har Bhunjun*, 15 W. R., F. B., 9; *Boonjad Mathor* vs. *Nathoo*, I. L. R., 8 Cal., 375; *Lachman Das* vs. *Brijpal*, I. L. R., 6 Alla., 174; in fact or in law—*Suppu* vs. *Govindacharyar*, I. L. R., 11 Mad., 85 (compare *Venkayya* vs. *Venkatappayya*, I. L. R., 15 Mad., 384); or an award with suggestions, and the decree does not follow the award exclusive of the surplusage suggestion- *Surboree Kant* vs. *Anadya Kant*, 20 W. R., 226; or has been passed on a special case under para. 3—*Ram Bhunjun* vs. *Sreekishen*, 2 B. L. R., 260; 11 W. R., 140 (but see section 517); or if it give interest which the arbitrators have not awarded—*Mohun Lall* vs. *Joy Narain*, 23 W. R., 105; an appeal will lie. And where the Munsiff before the expiration of ten days discussed the evidence and delivered a judgment on the merits which coincided with the award: *Held*, that the judgment was not according to the award, and that an appeal lay—*Gunga Narain* vs. *Ram Chand*, 20 W. R., 311; 12 B. L. R., 48. See for an explanation of this case *Wazir Mahton* vs. *Lutit Singh*, I. L. R., 7 Cal., 166.

First Court.—Ith as been held that the finality allowed to a decree passed under Act VIII only refers to the decree of the first Court, and where a Judge improperly admits an appeal from an order refusing to uphold or a decree upholding an award, a special appeal lies to the High Court—*Pureshnath* vs. *Nobin Chunder*, 12 W. R., 93; *Debendranath* vs. *Obhoy Charn*, 12 C. L. R, 525; *Rughoobur Dyal* vs. *Maina Koer*, 12 C. L. R., 564; not followed in the case of *Nawrang Singh* vs. *Sadapal*, I. L. R., 10 Alla., 8, and though no appeal will lie from a judgment passed according to the award, an appeal will lie from orders passed in execution under section 244, *ante*—*Himutoollah* vs. *Bibi Heerun*, 13 W. R., 62.

Revision.—If the Court has not jurisdiction to hear the case in which an award has been given—*Vydinatha* vs. *Subramanya*, I. L. R., 8 Mad., 235; or has appointed arbitrators without jurisdiction, the decree on the award is subject to revision—*Pugardin* vs. *Moidinsa*, I. L. R., 6 Mad., 414.

Private Alienation.—A decree given in accordance with this section is not a private alienation—*Qurban Ali* vs. *Ashraf Ali*, I. L. R., 4 Alla., 219, p. 225.

Agreement to refer to arbitration may be filed in Court.

523. When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants.

Application to be numbered and registered.

On such application being made the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

Notice to show cause against filing.

If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator when he is not named therein and the parties cannot agree as to the nomination.

Act VIII of 1859, section 326. This section applies to H. C.

Persons Agree.—An agreement to refer an existing dispute to arbitration is binding and capable of enforcement like any other lawful agreement by the parties to it and by and against them only—*Hira Sing* vs. *Ganga Sahai*, I. L. R., 6 Alla., 322; submission once made is not revocable without just cause—*Nagasawmy* vs. *Rungasamy*, 8 Mad., 46; *Pestonjee Nusserwanjee* vs. *Manickjee*, 3 Mad., 183; 12 Moore, 112. As to "good cause," see the case of *Coley* vs. *Dacosta*, I. L. R., 17 Cal., 200.

Where in a Reference made, the arbitrators were empowered to make a partition a power to sale was omitted: *Held*, on the award being made a rule of Court, that the Court had no power to order the sale of certain property which the arbitrators could not divide and recommended to be sold—*Chunimony Dossee* vs. *Nistarinee*, 3 C. L. R., 357.

Agreement to Refer.—As to the distinction between a Reference and an agreement to refer, see *Adhibai* vs. *Cursandas*, I. L. R., 11 Bom., 199, pp. 210, 212, 214; *Tahal* vs. *Biseshar*, I. L. R., 8 Alla., 57; *In re Smith & Service &c.*, 25 C. D., 545.

When Court will not Order Agreements to be Filed.—Where parties had executed a deed agreeing to refer all matters in dispute to the arbitration of three persons, and one of the arbitrators refused to continue to act and the other two consequently refused to proceed with the Reference, the Court refused to order the agreement to be filed in Court—*Brooke* vs. *Surdyal*, 12 B. L. R., App., 13; and when parties to a suit as well as those not engaged in the litigation agree to refer all their dispute to arbitration, the award should be filed, although the litigation is pending—*Harivalabdas* vs. *Utmachand*, I. L. R., 4 Bom., 1.

As to an agreement to refer future dispute to an arbitrator, see *Re Wilcox and Stotkey*, L. R., I. C. P., 671.

An order disallowing the agreement to be filed is not open to appeal—*Bhugwan* vs. *Purmeshree*, 5 Alla., 179; *Bhola* vs. *Gobind Dayal*, I. L. R., 6 Alla., 186; *Pestonjee Nusserwanjee* vs. *Manickjee*, 3 Mad., 183; *Daya Nand* vs. *Bakhtawar*, I. L. R., 5 Alla., 333; but if the Court has no jurisdiction and files the award, the procedure is subject to revision—*Bindessuree* vs. *Jankee*, I. L. R., 16 Cal., 482.

As to an agreement to refer to a foreign tribunal, see *Law* vs. *Garrett*, 8 C. D., 26.

May also Nominate.—Where the arbitrators are named, but there is no provision for appointing an umpire, the Court cannot nominate one—*Muhammed Abid* vs. *Muhammed*, I. L. R., 8 Alla., 64.

Declining to Act.—If an arbitrator declines to act, the parties should be heard in regard to the appointment of his successor by the Court—*Coley* vs. *Dacosta*, I. L. R., 17 Cal., 200.

Remand.—A Court to which matter has been referred for trial under section 566, *post*, cannot act under this section—*Nand Ram* vs. *Fakir Chand*, I. L. R., 7 Alla., 523. See note under section 508, *ante*.

524. The foregoing provisions of this Chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of Reference made by the Court under section 523, and to the award of arbitration and to the enforcement of the decree founded thereupon.

Provisions of Chapter applicable to proceedings under order of reference.

Act VIII of 1859, section 326. This section applies to H. C.

So far as they may be consistent with any Agreement.—These words do not prevent a Court setting aside an award for misconduct of the arbitrators, though there is a clause in the submission, that the award should be accepted as final—*Burla Ranga* vs. *Kalapalli*, I. L. R., 6 Mad., 368.

525. When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates that the award be filed in Court.

Filing award in matter referred to arbitration without intervention of Court.

The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

Application to be numbered and registered.

The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

Notice to parties to arbitration.

Act VIII of 1859, section 327. This section applies to H. C. It is not superseded by section 47 of the Dekhan Agriculturists' Relief Act—*Gangadhur* vs. *Mahadu*, I. L. R., 8 Bom., 20.

Referred—The natural guardian of a Hindu minor can refer—*Romon Kissen* vs. *Hurrololl*, I. L. R., 19 Cal. 334.

May Apply.—In order to set the Court in motion, there must have been a Reference to arbitration and an award made—*Lalla Ishuree* vs. *Hur Bhunjun*, 15 W. R. (F. B.), 9; and when this is so, not merely a party to the award, but any person interested in it, can apply [within 6 months from the date of the award—art. 176, Sched. II, Act XV, 1877—not the date written in it, but the date it was handed over to the parties—*Sreenath Chatterjee* vs. *Kylash Chunder*, 21 W. R., 248; *Dutto Singh* vs. *Dosad*, I. L. R., 9 Cal., 575] by a petition duly verified, and issue notice calling on the parties to the arbitration to show cause why the award should not be filed. See *Jones* vs. *Ledgard*, I. L. R., Alla., 340.

The arbitration award should be filed with the application—*Himutoollah* vs. *Heerun*, 13 W. R., 62; otherwise the Court cannot act—*Gopi* vs. *Mahanandi*, I. L. R., 12 Mad., 331; but secondary evidence of its contents is admissible if the award has been lost—*Gopi Reddi* vs. *Mahanandi*, I. L. R., 15 Mad., 99. If the agreement to arbitrate provides that the award may be delivered bit by bit, each portion decided may be dealt with as a separate award under this section—*Shoshemukhi* vs. *Nobin Chunder*, 4 C.L.R., 92, the application may be made without any valuation of suit—*Khoda Buksh* vs. *Mowla*, 14 W. R., 255.

Jurisdiction.—The Court in which the application is made must have jurisdiction over the whole matter of the award, and if the value of the subject-matter is greater than the money limit of the Court's jurisdiction—*Gangappa* vs. *Kapnappa*, 5 Mad., 128; *Ex parte Balkrishna Bhashgar*, 2 Bom., 91, or is from its nature not a matter of which the Court can take cognizance, the application should be returned—*Altaf Hossein* vs. *Grish Chunder*, 15 W. R., 556.

A and B entered into partnership for the purpose of carrying on a tea garden at Darjeeling. The partnership-deed was executed in Calcutta; but both parties resided out of jurisdiction. The deed contained provisions for reference to arbitration in case of dispute in matters relating to the partnership. Disputes having arisen, arbitrators were appointed in accordance with the terms of the deed, and they subsequently made their award in Calcutta to the following effect: that B's share in the partnership property should stand charged with the payment of a certain sum found to be due by him to the plaintiff A; that B should execute mortgage to him as security for payment, and that the tea garden should be sold in Calcutta. In an application under section 327, Act VIII of 1859, to file the award: *Held*, that the High Court at Calcutta had jurisdiction; that the award might be filed in any Court in which a suit in respect of the subject-matter of the award might be instituted, and as, by reason of the execution of the deed of partnership, part of the cause of action arose in Calcutta, such a suit could be instituted with the leave of the Court—*Kellie* vs. *Fraser*, I. L. R., 2 Cal., 445.

Parties may submit matters pending in a suit, with other matters, for arbitration and determination under the section—*Thackoordass Roy* vs. *Harrydass Roy*, W. R., 1864, Mis., 21; *Harivalabdas* vs. *Utamchand*, I. L. R., 4 Bom., 1.

A Subordinate Judge invested with the jurisdiction of a Court of Small Causes can file an award—*Balkrishna* vs. *Lukshman*, I. L. R., 3 Bom., 291.

Award.—A document merely recommending a solution of the matters in dispute is not an award—*Nundolall Mookerjee* vs. *Chunder Kant*, I. L. R., 11 Cal., 356.

Review.—After an award has been made and handed to the parties, the functions of the arbitrators cease—*Dutto Singh* vs. *Dosad*, I. L. R., 9 Cal., 575.

Enforcing Award.—Although an award declaring that the parties should have separate possession of certain portions of an estate, that their names should be separately recorded, and that each should pay the revenue on the portions allotted to him, is not enforceable as regards the registration of names in the revenue records or the payment of the Government revenue, yet the Court may enforce it as between the parties, and give them separate possession, leaving them to make their own application to the Revenue Authorities in respect of the other matters involved—*Kashi Ram* vs. *Dhun Singh*, S. D., N. W., 1856, p. 519.

Civil Courts have no jurisdiction to enforce an arbitration award concerning a claim for moneys collected by defendant as tehsildar. Such a claim is cognizable under section 24, Act X of 1859—*Shoshee Mohun* vs. *Ahcer Sircar*, 5 W. R., Act X, 13.

A Magistrate directed parties in a criminal case to submit the matter in dispute to arbitration, and they did so. It was held that his action was recommendatory, not judicial, and the award could be enforced under this section—*Sheo Nund Rai* vs. *Mahanund*, 2 Agra, F. B., 45.

Suit.—This section is not imperative upon a person who seeks to enforce his award. He may do so in a regular suit—*Palaniappa Chetty* vs. *Rayappa*, 4 Mad., 119; or he may sue on the alternative or the original state of facts—*Narasayya* vs. *Ramabadra*, L. R., 15 Mad., 474.

Show Cause.—The Court must proceed on affidavit or verified petition—*Ichamoyee* vs. *Prosunno*, I. L. R., 9 Cal., 557, and confine its inquiry within the limits of sections 520 and 521—*Bijadhur* v. *Monohur*, I. L. R., 10 Cal., 11; *Hurronath* vs. *Nistarini*, I. L. R., 10 Cal., 74.

In *Sreeram Chowdhry* vs. *Denobundhoo*, 9 C. L. R., 147, Pontifex, J., intimated an opinion "that it was not intended that an award should be filed under section 525, if either of the parties to the reference showed cause against it by affidavit or verified petition, within the provisions of sections 520 and 521. In such cases, I think, it would be the duty of the Court, without inquiring into the validity of the cause so shewn, to refuse the application to file the award, and to leave the applicant to his remedy by suit, having regard to the fact that the Court has no power to deal with the award under section 518, or to take action by remitting the award under section 520; and see *Jehamoye* vs. *Prosunno*, I. L. R., 9 Cal., 557. "But in the case of *Dandekar* vs. *Dandekars*, I. L. R., 6 Bom., 663, the High Court of Bombay refused to follow this expression of opinion. This decision of the Bombay Court has been followed by Divisional Benches of the Calcutta Court—*Dutto Singh* vs. *Dosad*, I. L. R., 9 Cal., 575; *Rung Lal* vs. *Hem Narain*, I. L. R., 11 Cal., 166; but see *Bindessuri* vs. *Jankee*, I. L. R., 16 Cal., 482, and of the Allahabad High Court—*Jones* vs. *Ledgard*, I. L. R., 8 Alla., 340.

The existence of a difficult or doubtful question might be sufficient cause—*Muhammed Yusaf* vs. *George*, I. L. R., 4 Mad., 385; see also *ex-parte Sheard*, 16 C. D., 108.

Practice.—An affidavit used on the Original Side of the High Court to oppose or show cause against a motion is under the rules, filed in time if filed on or before the sitting of the Court on the day on which cause is in fact shown—*In re Hurruck Chand Golicka*, I. L. R., 5 Cal., 605.

Consent.—If good cause is shewn, the application should be dismissed, leaving the losing party to bring a regular suit—*Palut Bhagut* vs. *Monohur*, 13 C. L. R., 171;

Muhammad Newaz vs. *Alam Khan*, I. L. R., 18 Cal., 414, but if both parties consent to have the enforcement of the award tried on application like a regular suit, neither of them can afterwards object to the jurisdiction of the Court—*Hurronath* vs. *Nistarini*, I. L. R., 10 Cal., 74.

Stamp.—The stamp required is not that on a suit but on application—*Palut Bhagut* vs. *Monohur*, 13 C. L. R., 171; *Khoda Buksh* vs. *Mowla*, 14 W. R., 255; *Bijadhur* vs. *Monohur*, I. L. R., 10 Cal., 11.

526. If no ground such as is mentioned or referred to in section 520 or section 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this Chapter.

Filing and enforcement of such award.

Act VIII of 1859, section 327. This section applies to H. C.

Section 327 of Act VIII was not incorporated with the earlier sections of Chapter VI, and awards were not filed if there was any substantial objection which appeared on the face of the award, or was founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceeding, or any other ground fatal to an award according to English Law—*Chowdhri Murtaza* vs. *Bechunnissa*, 3 Ind. App., 213. And under the present section, the Court cannot file an award if it be necessary to try any question as to whether the Reference has been really made or the award is a sham, or any objection not falling within sections 520, 521—*Samal Nathu* vs. *Jaishankar*, I. L. R., 9 Bom., 254; *Jones* vs. *Ledgard*, I. L. R., 8 Alla., 340; *Hurronath* vs. *Nistarini*, I. L. R., 10 Cal., 74. But see *Bindessuri* vs. *Jankee*, I. L. R., 16 Cal., 482.

The Court has no power to remit an award to private arbitrators over whose proceedings it has no control; but must ordinarly file the award, unless it acts on one or other of the grounds referred to in sections 520, 521—*Dagdusa* vs. *Bhukan*, I. L. R., 9 Bom., 82.

A person cannot revoke a submission to arbitration without just and sufficient cause —*Nagaswamy* vs. *Rungasamy*, 8 Mad., 46. Mere revocation does not bar the filing of an award—*Santaiya* vs. *Ramaraya*, 7 Mad., 257; but if the agreement to submit does not define the powers of the arbitrators—*Bindessuri* vs. *Jankee*, I. L. R., 16 Cal., 482; or the whole award is not tendered—*Raj Chunder* vs. *Brojendro Coomar*, 21 W. R., 182; *Gopi* vs. *Mahanandi*, I. L. R., 12 Mad., 331; or the arbitrators have been guilty of misconduct —*Noder Ali* vs. *Majoo*, 21 W. R., 377; or have gone beyond the deed of submission—*Dagdusa* vs. *Bhukan*, I. L. R., 9 Bom., 82, the award should not be filed. If the award is filed, the Court should then proceed to pass judgement according to the award and draw up a decree—*Himutoollah* vs. *Heerun*, 13 W. R., 62; if the award be rejected it is not null and void and the applicant can sue to enforce it in a regular suit—*Kota Seetamma* vs. *Kolepurla*, 8 Mad., 81; *Nursing Gariwan* vs. *Puttboo*, 20 W. R., 420.

Representation.—Proceedings under this section are of the nature of a suit, and a minor must be perfectly represented—*Vasudeb* vs. *Narayan*, 9 Bom., 289.

Succession: Certificate Act.—See *Ramchundra* vs. *Bapee*, I. L. R., 16 Bom., 240.

Limitation.—An application to pass judgment in terms of the award is not an application within the Limitation Act—*Ishwardas* vs. *Dosibai*, I. L. R., 7 Bom., 316.

Appeal does not Lie.—No appeal lies from an order refusing to file an award—*Ram Chowdhry* vs. *Denobundhoo*, 9 C. L. R., 847; I. L. R., 7 Cal., 490; *Chintamun Singh*, vs *Uma Kunwar*, B. L. R., F. B. R., 505; *Bhola* vs. *Gobind Deoyal*, I. L. R., 6 Alla., 186, otherwise if made in the course of a suit—*Howard* vs. *Wilson*, I. L. R., 4 Cal., 231 [not followed—*Ambica Dasia* vs. *Nadyar*, I. L. R., 11 Cal., 172] even though the order awards costs—*Preonath Chowdhry* vs. *Ramdhun*, 11 W. R., 104; but see *Raj Chunder Roy* vs. *Brojendro Coomar*, 21 W. R., 182; and no appeal is given by the Code from an order directing an award to be filed—*Bindessuri* vs. *Jankee*, I L. R., 16 Cal., 482; *Ramadhin* vs. *Mahesh*, I. L. R., 2 Alla., 441; *Bijadhur* vs. *Monohur*, I. L. R., 10 Cal., 11; the party should, however, ask the Court to give judgment according to the award and decree to follow it—*Ramadhin* vs. *Ganesh*, I. L. R., 4 Alla., 239; *Ishwardas* vs. *Dosibai*, I. L. R., 7 Bom., 316; and the decree passed is final—section 522; *Sreenath Chatterjee* vs. *Koylash Chunder*, 21 W. R., 248; *Wazir Mahton* vs. *Lulit Sing*, I. L. R., 7 Cal., 166; *Vishnu Bhau* vs. *Ravji*, I. L. R., 3 Bom., 18; *Venkayya* vs. *Venkatappayya*, I. L. R., 15 Mad., 348.

Appeal Lies—A party may appeal on the ground that the decree is in excess of, or not in accordance with, the award—section 522, and a decree in general terms is not sufficient—*Ummi Fazl* vs. *Rahim Unissa*, I. L. R., 13 Alla., 366; or on the ground that no award has been made—*Sashti Churn* vs. *Tarak Chandra*, 8 B. L. R., 315; 15 W. R.

(F. B.), 9; *Bunyad Mahton* vs. *Nathoo*, 1 C. L. R., 435; *Lachman Das* vs. *Brijpal*, I. L. R., 6 Alla., 174; or that the award is partly beyond the terms of the submission —*Mana Vikrama* vs. *Mallicherry*, I. L. R., 3 Mad., 18; *Sadik* vs. *Imdad*, I. L. R., 3 Alla., 286; *Bindessuri* vs. *Jankee*, I. L. R., 16 Cal., 482; but apparently, not on the ground that there has been no submission—*Micharaya* vs. *Sadasiva*, I. L. R., 4 Mad., 319; and see *Samal* vs. *Jaishankar*, I. L. R., 9 Bom., 254; and it will lie on the ground that the proceedings are so irregular that no judgment could be passed under this section —*Boonjad Mathoor* vs. *Nathoo*, I. L. R., 3 Cal., 376; *Wazir Mahton* vs. *Lulit Singh*, I. L. R., 7 Cal., 166; (compare *Venkayya* vs. *Venkatappya*, I. L. R., 15 Mad., 348) or on the ground that the judgment decided a question of fact not determined by the award —*Ram Bhunjun* vs. *Sreekishen*, 2 B. L. R., 260; 11 W. R., 140; and if for any reason the decision is not final, and an appeal is allowed, all the Appellate Court can do is to remand the case for disposal on the merits—*Wazir Mahton* vs. *Lulit Singh*, I. L. R., 7 Cal., 166; but the mere fact that one of the parties had not time to show cause against the award is not sufficient to support an appeal—*Monji Premji* vs. *Maliyakel*, I. L. R., 3 Mad., 59.

Under Act VIII, an appeal was formerly allowed where want of consent was alleged —*Hulodhur Sungiree* vs. *Gunesh*, 6 W. R., 60, [remarks on this case in 15 W. R. (F. B.), pp. 15-16], and on the question of costs—*Khoda Buksh* vs. *Mowla*, 14 W. R., 255.

Execution.—Appeals lie from decisions passed in execution of the decree in the usual manner—*Himutoollah* vs. *Heerun*, 13 W. R., 62; on a full stamp—*Wolee Alum* vs. *Bebee Misrun*, 12 W. R., 50.

Revision.—If an objection raised is not of the kind referred to in sections 520 and 521, the Court should reject the application to file and leave the parties to a regular suit; and if the Judge inquires into its rejects it and files the award, his order will be set aside on revision—*Bijdhur* vs. *Monohur*, I. L. R., 10 Cal., 11; *Samal* vs. *Jaishankar*, I. L. R., 9 Bom., 254; and so if he refuses to file an award, his order is subject to revision—*Mana* vs. *Mallicherry*, I. L. R., 3 Mad., 68; *Dagdusa* vs. *Bhukan*, I. L. R., 9 Bom., 82; *Bindessuri* vs. *Jankee*, I. L. R., 16 Cal., 482.

CHAPTER XXXVIII.

OF PROCEEDINGS ON AGREEMENT OF PARTIES.

Power to state case for Court's opinion.

527. Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and proving that, upon the finding of the Court with respect to such question,—

(*a*) a sum of money fixed by the parties or to be determined by the Court, shall be paid by one of the parties to the other of them; or

(*b*) some property, moveable or immoveable, specified in the agreement shall be delivered by one of the parties to the other of them; or

(*c*) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

Every case stated under this section shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the question raised thereby.

Act VIII of 1859, section 328. This section applies to H. C. and P. S. C. C.

528. If the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

When value of subject-matter must be stated.

Act VIII of 1859, section 328. This section applies to H. C. and P. S. C. C.

529. The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

Agreement to be filed and numbered as suit.

The agreement when so filed, shall be numbered and registered as a between one or more of the parties claiming to be interested, as plaintiff or plaintiffs, and the other or others of them as defendant or defendants ; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

Act VIII of 1859, section 329. This section applies to H. C. and P. S. C. C.

530. When the agreement has been filed the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

Parties to be subject to Court's jurisdiction.

Act VIII of 1859, section 330. This section applies to H. C. and P. S. C. C.

No amendment can be made for the purpose of raising fresh points, or adding to or altering the facts, except with consent—*Mersey Dock Trustees* vs. *Jones*, 8 C. B., N. S., 124; 29 L. J., C. P., 239.

531. The case shall be set down for hearing as a suit instituted under Chapter V, the provisions of which shall apply to such suit so far as the same are applicable.

Hearing and disposal of case.

If the Court is satisfied, after an examination of the parties, or after taking such evidence as it thinks fit,—

(*a*) that the agreement was duly executed by them, and

(*b*) that they have a *bonâ-fide* interest in the question stated therein, and

(*c*) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so given

a decree shall follow and shall be enforced in the manner provided in this Code for the execution of decrees.

Act VIII of 1859, section 331. This section applies to H. C. and P. S. C. C.

The facts required to be proved under this section may be proved by affidavit—*Kraal* vs. *Whymper*, I. L. R., 17 Cal., 786.

The Court will not proceed if it appears that there is no matter really in controversy between the parties—*Deo* vs. *Dunrze*, 6 C. B., 100.

CHAPTER XXXIX.

OF SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

Institution of summary suits upon bills of exchange, &c.

532. In any Court to which this section applies all suits upon bills of exchange, hundis or promissory-notes may, in case the plaintiff desires to proceed under this Chapter, be instituted by presenting a plaint in the form prescribed by this Code; but the summons shall be in the form contained in the fourth schedule hereto annexed, No. 172, or in such other form as the High Court may from time to time prescribe.

In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the suit unless he obtains leave from a judge as hereinafter mentioned so to appear and defend;

and, in default of his obtaining such leave or of appearance and defence in pursuance thereof, the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by a rule of the High Court, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be enforced forthwith.

Payment into Court of sum mentioned in summons.

The defendant shall not be required to pay into Court the sum mentioned in the summons, or to give security therefor, unless the Court thinks his defence not to be *primâ facie* sustainable, or feels reasonable doubt as to its good faith.

Explanation.—This section is not confined to cases in which the bill, hundi or note sued upon, together with mere lapse of time, is sufficient to establish a *primâ facie* right to recover.

Act V of 1866, section 2. This section applies to the Courts mentioned in section 538.

Suits under this Chapter must be brought within six months from the time the instrument sued on becomes due and payable—Act XV, 1877, Sched. II, art. 3; and the

acceptor, drawer and endorser may be sued in one suit—*Bank of Bengal* vs. *Kartick Chunder*, I. L. R., 16 Cal., 804.

It applies to defendants not residing within jurisdiction—*Chandrakant Roy* vs. *Pogose*, 3 B. L. R. (O. C.), 83. In Calcutta the sums must be beyond the cognizance of the Small Cause Court (section 538)—See *Duff* vs. *Fisher*, 8 B. L. R., App., 10.

The summons is in the form contained in No. 172, or in such form as the High Court may prescribe. The form in No. 172 compels the defendants to show cause within ten days. It has been held that the High Court can extend this time, and 28 days have been allowed in a summons issued for service in Peshawar—*Groom* vs. *Wilson*, I. L. R., 3 Cal., 539. If the defendant is at such a distance as we make it impossible for him to appear in ten days, the Court will stay execution for a time long enough to enable him to appear under section 534, *post*—*Chandrakant Roy* vs. *Pogose*, 3 B. L. R. (O. C.), 83; but see *Govt.* vs. *Palmer*, 1 Ind. Jur., N. S., 395.

Plaintiff is entitled to claim by his summons and obtained by his decree whatever sum, principal and interest, is legally demandable on the instrument—*DeSouza* vs. *Rangalan*, 6 Mad., 257. Under Act V care was taken not to admit a suit under the summary procedure unless it was clearly within the Act. Thus, where a plaint and note were presented under section 2 and the note was endorsed "received for the Chartered Mercantile Bank, James Reid, Agent," and the endorsement was struck out, the Court refused to admit the plaint, as under the summary procedure no evidence could be taken, and the plaint could not be admitted unless it was proved how the endorsement had been struck out—*The Chartered Mercantile Bank* vs. *Seconde*, 3 B. L. R., App., 146. See also *Remfry* vs. *Shillingford*, I. L. R., 1 Cal., 130. Such evidence would be admissible now. See the explanation to the section.

A hoondi which contains a direction on sufficient consideration to the drawee and accepted by him is within the Act—*The East Indian Bank* vs. *Vallie Goolwany*, 1 Ind. Jur., N. S., 247.

By section 13, Act V, 1866, a protest of a bill of exchange, inland or foreign, when purporting to be made by a notary public is *primâ facie* evidence that the bill has been dishonoured.

Defendant showing defence on merits to have leave to appear.

533. The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon the defendant paying into Court the sum mentioned in the summons, or upon affidavits satisfactory to the Court, which disclose a defence or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application, and on such terms as to security, framing and recording issues, or otherwise, as the Court thinks fit.

Act V of 1866, section 3. This section applies to the Courts mentioned in section 538.

After the usual return of service, and the expiration of the period mentioned in the summons, an order of the Court for a decree should be obtained—*Shiller* vs. *Marker*, 1 Ind. Jur., N. S., 283.

Discloses a Defence.—If the defendant appears and discloses any defence, legal or equitable, he will be allowed to appear and defend—*Casella* vs. *Darton*, L. R., 8 C. P., 100; but where there is reason to doubt its *bona fides*, the condition of paying the money into Court, or bringing in security will be imposed—*Agra Masterman's Bank* vs. *Leighton*, L. R., 2 Ex., 53; *Ramlal* vs. *Haran Chandra*, 3 B. L. R., 130; and where a conditional order is passed, but the condition is not performed, the order is a nullity and subsequent steps to set it aside are unnecessary—*Gourdas Mistry* vs. *Hewitt*, 12 W. R., 9; Fulton, 18. Leave to appear may be granted *ex-parte;* but the plaintiff can show by affidavit that the leave ought not to have been granted, or, if, granted at all, granted on more stringent terms—*Vonlintzgy* vs. *Narayan Singh*, 6 B. R., App., 64.

In giving leave to defend, the Court has a discretion to order security for costs not only where there is a doubt as to the *bona fides* of the defence, but also where it appears unnecessary, though allowable—*Vonlintzgy* vs. *Narayan Singh*, 6 B. L. R., App., 64.

Power to set aside decree.

534. After decree the Court may, under special circumstances, set aside the decree, and if necessary, stay or set aside execution, and may

give leave to appear to the summons and to defend the suit, if it seem reasonable to the Court so to do, and on such terms as the Court thinks fits.

Act V of 1866, section 4. This section applies to the Courts mentioned in section 538. Irregular service of summons on two out of three defendants to an action brought on a joint-promissory note, does not give the defendant properly served any ground to question the decree passed against him—*Ewing & Co.* vs. *Gosaidas*, 2 B. L. R., App , 7.

Form of Decree —See *Bank of Bengal* vs. *Kartick Chunder*, I. L. R., 16 Cal., 804.

Appeal.—An appeal lies from an order refusing to set aside an *ex-parte* decree—*Luckmidas* vs. *Ebrahim*, I. L. R., 2 Bom., 544.

Power to order bill, &c., to be deposited with officer of Court.

535. In any proceeding under this Chapter the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

Act V of 1866, section 5. This section applies to the Courts mentioned in section 535.

Recovery of cost of noting non-acceptance of dishonoured bill or note.

536. The holder of every dishonoured bill of exchange or promissory-note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Chapter for the recovery of the amount of such bill or note.

Act V of 1866, section 6. This section applies to the Courts mentioned in section 538. Noting is a minute made on the bill by a notary at the time of refusal of acceptance or payment. It consists of his initials, the month, the day, the year, and his charges for minuting—Byles, 9th Ed., 251. As to the word "otherwise," see Lush's Practice, p. 1031.

Procedure in suits under this Chapter.

537. Except as provided by sections 532 to 536 (both inclusive), the procedure in suits under this Chapter shall be the same as the procedure in suits instituted under Chapter V.

Application of Chapter.

538. Sections 532 to 537 (both inclusive) apply only to—

(*a*) the High Courts of Judicature at Fort William, Madras and Bombay ;

(*b*) the Court of the Recorder of Rangoon ;

(*c*) the Courts of Small Causes in Calcutta, Madras and Bombay ;

(*d*) the Court of the Judge of Karáchi ; and

(*e*) any other Court having ordinary original civil jurisdiction to which the Local Government may, by notification in the official Gazette, apply them.

In case of such application the Local Government may direct by whom any of the powers and duties incident to the provisions so applied shall be exercised and performed, and make any rules which it thinks requisite for carrying into operation the provisions so applied.

Within one month after such notification has been published such provisions shall apply accordingly, and the rules so made shall have the force of law.

The Local Government may, from time to time, alter or cancel any such notification.

Act V of 1866, section 8.

Further and other Relief—See *Raghubar Dial* vs. *Kesho*, I. L R., 11 Alla., 18; *Narashima* vs. *Ayyan*, I. L. R., 12 Mad., 157.

CHAPTER XL.

OF SUITS RELATING TO PUBLIC CHARITIES.

When suits relating to public charities may be brought.

539. In case of any alleged breach of any express or constructive trusts created for public charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex-officio*, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

(*a*) appointing new trustees under the trust;

(*b*) vesting any property in the trustees under the trust;

(*c*) declaring the proportions in which its objects are entitled;

(*d*) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged;

(*e*) settling a scheme for its management;

or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Repeal.

Act No. X of 1840, section 2, is hereby repealed.

This section applies to H. C.

As to the difference between this section and section 539, Act X of 1877, see *Karuppa* vs. *Asamuga*, I. L. R., 5 Mad., 383; *Giyana* vs. *Kandasami*, I. L. R., 10 Mad., 375, p. 506.

As to section 42, Specific Relief Act, see I. L. R., 8 Alla., 31.

Consent in Writing.—A suit by one trustee of a public charity against another for breach of trust requires sanction—*Tricumdas* vs. *Khimji*, I. L. R., 16 Bom., 626; but see *Augustine* vs. *Medlycott*, I. L. R., 16 Mad., 241. The suit sanctioned must be the suit brought—*Srinivasa* vs. *Venkata*, I. L. R., 11 Mad., 148. A suit was instituted by A, who had obtained consent. B's name was added, and afterwards he got the consent of the Collector: *Held*, the consent related back and was good—*Ramayyangar* vs. *Krishnayyangar*, I. L. R., 10 Mad., 185.

Sanction by the Court.—There is a difference between the Courts of Allahabad and Calcutta in regard to the nature of the cases requiring sanction under section 30, *ante*. See *Lutufunnisa* vs. *Nazirun*, I. L. R., 11 Cal., 33; *Jan Ali* vs. *Ram Nath*, I. L. R., 8 Cal., 32, and compare them with *Zafaryab* vs. *Bukhtawar*, I. L. R., 5 Alla., 497; *Jawahra* vs. *Akbar Husain*, I. L. R., 7 Alla., 178; *Raghubar Dial* vs. *Kesho*, I. L. R., 11 Alla., 18. See also *Kalidas* vs. *Gor Parjaram*, I. L. R., 15 Bom., 309.

Public Purposes.—Where neither the general public nor any section of the people have any interest either in the erection and maintenance of a temple or in the performance of the prescribed duties, so that the original grantor and grantee and their descendants are alone to be benefitted, the endowment does not become public if persons are fed at Gurupuja and a water pandal is maintained during the hot season—*Sathappayyar* vs. *Periasami*, I. L. R., 14 Mad., 1 p. 7.

Appoint a New Trustee—A suit to appoint Dharmakartas falls within this section—*Rayava* vs. *Rajaratnam*, I. L. R., 14 Mad., 57. It has been doubted if a suit to remove a trustee can be brought under this section—*Narasima* vs. *Ayyan Chetti*, I. L. R., 12 Mad., 157. Compare section 32 of the Trustee Act of 1850 and *In re Bignold's Settlement Trusts*, L. R., 7 Ch. App., 223. See, also *Bishen Chand* vs. *Nadir Hussein*, 15 Ind. App., 1, p. 10, and the prayer and decree in *Manohar Ganesh* vs. *Lakhmiram*, I. L. R., 12 Bom., 247 and *Subbayya* vs. *Krishna*, I. L. R., 14 Mad., 186; and *Chintaman* vs. *Dhondo*, I. L. R., 15 Bom., 612, p, 617; *Tricumdass* vs. *Khimji*, I. L. R., 16 Bom., 626.

Persons having an Interest—The words "a direct" before "interest" were repealed by Act VII of 1888, section 44.

Mahomedans living in a village where there is a mosque and in the habit of attending prayers read in it have not a direct interest in the endowment—*Jan Ali* vs. *Ram Nath*, I. L. R., 8 Cal., 32; 9 C. L. R., 433, and following this it has been held that where the father of the first plaintiff and uncle of the second had been joint manager of a Hindu temple with defendant's predecessor, and he and the other plaintiff had a right to interfere in the management and take a portion of the *prasad*, their interest was not sufficient under the Code of 1877—*Narasimha* vs. *Ayyan Chetti*, I. L. R., 12 Mad., 157; (compare *Subayya* vs. *Krishna*, I. L. R., 14 Mad., 186) but in another case it was decided that persons residing in the village, whose duty was to conduct pilgrims to the Shrine and perform the worship of the idol in their behalf had a sufficient interest to sue under Act of 1877—*Manohar Ganesh* vs. *Lakhmiram*, I. L R., 12 Bom., 247; and so has any one of the persons carrying out a charity under the present Code—*Subbayya* vs. *Krishna*, I. L. R., 14 Mad., 186 and in *Jawahra* vs. *Akbar Husain*, I. L. R., 7 Alla., 178; and *Zafaryab* vs. *Bukhtawar*, I. L. R., 5 Alla., 497 the decision in Jan Ali's case so far as it referred to Mahomedans was dissented from.

This section is mandatory—*Tricumdass* vs. *Khimji*, I. L. R., 16 Bom., 626; *Jan Ali* vs. *Ram Nath*, I. L. R., 8 Cal., 32; *Lutufunnissa* vs. *Nazirun*, I. L. R, 11 Cal., 33, and does not affect those special cases connected with religious uses in which the right of a private individual to sue has not been repealed by the Code, and any person interested in the proper observance of a religious endowment such as the worshippers or devotees of an idol, can sue in his own right to have the trust properly administered, or any breach of trust that may have occurred rectified—*Thackersey* vs. *Hurbhum*, I. L. R., 8 Bom., 433; *Chintaman* vs. *Dhondo*, I. L. R., 15 Bom., 612, p. 623, *Zafaryab* vs. *Bukhtawar*, I. L. R., 5 Alla., 497; but see *Jan Ali* vs. *Ram Nath*, I. L. R., 8 Cal., 32; *Lutufunnissa* vs. *Nazirun*, I. L. R., 11 Cal., 33; *Tricumdass* vs. *Khimji*, I. L. R., 16 Bom., 626, and so can any representative of the person endowing the property—*Brojomohun Dass* vs. *Hurrolall*, I. L. R., 5 Cal., 700; *Gajapati* vs. *Bhagaran*, I. L. R., 15 Mad., 44, and the Advocate-General need not be made a party—*Laksman Dass* vs. *Ganpatrao*, I. L. R., 8 Bom., 365. So a worshipper can sue out a declaration of his right to use a mosque for devotional purposes—*Jawahra* vs. *Akbar Husain*, I. L. R., 7 Alla., 179, or a temple—*Venkata* vs. *Subbarayadu*, I. L. R., 13 Mad., 293, but cannot follow

property in the hands of a trespasser—*Raghubar Dial* vs. *Kesho*, I. L. R., 11 All., 18; *Syed Amin* vs. *Ibram*, 4 Mad., 112; *Sathappayyar* vs. *Periasami*, I. L. R., 14 Mad., 1, p. 14. It does not apply to persons seeking to follow trust property as managers—*Vishvanath* vs. *Rambhat*, I. L. R., 15 Bom., 148; *Augustine* vs. *Medlycott*, I. L. R., 15 Mad., 241, but see *Tricumdass* vs. *Khimji*, I. L. R., 16 Bom., 626.

DECREE.—As to the claim of persons not a party on the record to execute a decree passed under this section, see *Ragava* vs. *Rajaratnam*, I. L. R., 14 Mad., 57.

As to the previous practice in suits relating to charities within the jurisdiction of the Supreme Court, see, as to Bombay, *The Wardens of Nossa Senora da Salvarao* vs *Hartmann*, Perry's O. Cases, 338; *Doe Do Howard* vs. *Pestonji Manickji*, *id.*, 535; *The Advocate-General* vs. *Damochar*, *id.*, 526; and as to Madras, *The Advocate-General* vs. *Brodie*, 4 Moore, 190; as to Calcutta, *Punch Cowrie Mull* vs. *Chunnoo Lall*, 2 C. L. R., 121; *Buldeo Dass* vs. *Oodyram*, 2 Tay. & Bell, 56. As to present practice, see *Parmanandas* vs. *Venayek*, I. L. R., 7 Bom., 19; 12 C. L. R., 92; *Sorandass* vs. *Dayabhai*, I. L. R., 9 Bom., 22; *The Advocate-General* vs. *David Haim*, I. L. R., 11 Bom., 185; *Tricumdass* vs. *Khimji*, I. L. R., 16 Bom., 626.

By sections 14, 15, 18, Act XX, 1863, any person interested in a religious establishment may, after sanction, sue the officers connected with it for breach of trust—*Lutufunnissa* vs. *Nazirun*, I. L. R., 11 Cal., 33; see also *Bulwant Rao* vs. *Pooran Mal*, I L. R., 6 Alla., 1; 10 Ind. App., 90. But that Act only applies to special officers while filling their offices—*Sebapothi* vs. *Sabraya*, I. L. R., 2 Mad., 58, in such endowments as had been or might have been under the management of Government by virtue of Reg. XIX of 1810—*Kali Churn* vs. *Golabi*, 2 C. L. R, 128; *Dhurrum Singh* vs. *Kisen Singh*, I. L. R. 7 Cal., 767; *Jan Ali* vs. *Ram Nath*, I. L R., 8 Cal, 32; and see *Sathappayyar* vs *Periasami*, I. L. R., 14 Mad. 7; *Protap Chandra* vs. *Brojonath*, I. L. R., 19 Cal., 275. On the one hand the scope of the Act is not limited to cases in which the office is not hereditary—*Natisa* vs. *Ganapati*, I. L. R., 14 Mad., 103; on the other it does not apply to a suit instituted by the managing committee against their manager—*Padmalev Roy* vs. *Ram Gopal*, 11 C. L. R., 333, or a suit by the members of a "Punch" to have certain dedicated property ascertained—*Punch Cowrie Mull* vs. *Chunnoo Lall*, 2 C. L. R., 121; nor to a suit by an officer of a religious establishment for wrongful dismissal—*Syed Amin* vs. *Ibram*, 4 Mad., 112; nor where all the persons interested sue—*Sathappayyar* vs. *Periasami*, I. L. R., 14 Mad., 1; nor to compel the heir of a late manager to make good out of the property inherited by him a sum misappropriated by his father—*Jeyangaru Lavaroo* vs. *Durma Dossi*, 4 Mad., 2; nor to recover the property of a temple from an ex-trustee—*Verasami Nayudu* vs. *Subba*, I. L. R., 6 Mad., 54, and is limited in its scope to suits charging misfeasance, malversation, or neglect of duty—*Agni Sharma Embrandri* vs. *Vishnu Embrandri*, 3 Mad., 198; *Mahalinga Rau* vs. *Venkata*, I. L. R., 4 Mad., 157; and see *Natisa* vs. *Ganapati*, I. L. R., 14 Mad., 103; otherwise if the suit is really one to be appointed manager—*Lutufunnissa* vs. *Nazirun*, I. L. R, 11 Cal, 33.

Quære.—If "public charitable purposes" apply to the *devastan* of a temple or idol dedicated merely for the purposes of the temple or idol—*Radhabai* vs *Chunnaji*, I. L. R., 3 Bom., 27. See also *Ganesh Dharnidhar* vs. *Kesharrav*, I. L. R., 15 Bom., 635.

As to the procedure to be followed in suits in regard to endowments other than the kind referred to in this section and Act XX of 1863, see *Rup Narain Singh* vs. *Sunko Bye*, 3 C. L. R., 112; *Punch Cowrie Mull* vs. *Chunnoo Lall*, I. L. R., 3 Cal., 563; 2 C. L. R., 121; *Kali Churn* vs. *Golabi*, 2 C. L. R., 128.

Costs—The Advocate-General's costs come, as a rule, out of the trust fund—*Parmanandas* vs. *Venayek*, I. L. R., 7 Bom., 19.

Stamp—A suit to remove a manager in possession must be valued under section 7 of the Court-Fees' Act—*Sonachala* vs. *Manika*, I. L. R., 8 Cal., 516.

Limitation.—In a suit to follow money in the hands of a Dharmakarta, section 10 of the Limitation Act applies—*Sethu* vs. *Subramanya*, I. L. R., 11 Mad., 274; in a suit to oust a Shebaet, article 120 applies—*Jagan Nath* vs. *Birbhadra*, I. L. R., 19 Cal., 776.

Jurisdiction—Compare *Protap Chandra* vs. *Brojonath*, I. L. R., 19 Cal., 275 and *Augustine* vs. *Medlycott*, I. L. R., 15 Mad., 241.

PART VI.

OF APPEALS.

CHAPTER XLI.

OF APPEALS FROM ORIGINAL DECREES.

Appeal to lie from all original decrees, except when expressly prohibited.

540. Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts.

An appeal may lie under this section from an original decree passed *ex-parte*.

Act XXIII of 1861, section 23. This section applies to H. C. in ordinary civil suits and also in its Vice-Admiralty Jurisdiction.—*In the matter of the Ship "Champion,"* I. L. R., 17 Cal., 66; *In the matter of the Ship "Fannie Skolfield,"* I. L. R., 17 Cal., 337. The last clause has been added by Act VII of 1888, section 45.

Under the Code the directions of the law as to appeals from orders and from decrees are distinct.

Appeals must be given by Statute or some equivalent authority—*Meenakshi* vs. *Subramaniya*, 14 Ind. App., 160; I. L. R., 11 Mad., 26; *Ladli* vs. *Raje*, I. L. R., 13 Bom., 650; they lie only from the decrees or any part of them and not from the decisions of Courts of original jurisdiction—*Koylas Chunder* vs. *Ram Lall*, I. L. R., 6 Cal., 206; *Anusayabai* vs. *Sakharam*, I. L. R., 7 Bom., 464; and if a party wishes to appeal from a particular issue, he must have it embodied in the decree—*Naimut Khan* vs. *Phada Buldia*, I. L. R., 6 Cal., 319, by a petition under section 206, *ante*—*Jamailunnissa* vs. *Lutfunnissa*, I. L. R., 7 Alla., 606. In a suit to recover certain lands by setting aside a *zur-i-bashgi* lease, the Judge dismissed the suit, although he found that part of the consideration of the lease was borrowed for necessary purposes. It was held that defendant could not appeal against the finding—*Pan Kooer* vs. *Bhugwunt*, 6 Alla., 19. So where plaintiff sued for a kaboolyat at enhanced rates, and the first Court held defendants were not protected from enhancement but dismissed the suit, the defendants was not allowed to appeal on the question of the right to enhance—*Shama Soondures* vs. *Digumburse*, 13 W. R., 1. M sued B his tenant holding over, for possession of certain lands. B pleaded a right of occupancy. N and R intervened, claiming adversely to both M and B, and were made parties to the suit. The Court dismissed the suit, because it accepted the title of the intervenors: *Held* that B. could not appeal—*Noubat Rai* vs. *Bagrangi Lal*, 6 Alla., 412. See also *Muttukumarappa* vs. *Arumuga*, I. L. R., 7 Mad., 145; *Magundeo* vs. *Mahadeo*, I. L. R., 18 Cal., 647.

No appeal lies from the order of a District Judge filling up a vacancy in the committee of temple under Act XX of 1863—*Menakshi* vs. *Seeb Ramaniya*, 14 Ind. App., 160, or from an order passed under section 5 of the Court-Fees Act—*Balkaran* vs. *Gobind Nath*, I. L. R., 12 Alla., 129, or from decrees or orders made under sections 53, 54 and 55 of Act XX of 1866—*Sributlav* vs. *Baburam*, I. L. R., 12 Cal., 511; or from an order refusing sanction to sue under section 18 Act XX of 1863; or from an order refusing to remove a guardian under section 84, of the Bengal Tenancy Act—*Peari Mohun* vs. *Baroda*, I. L. R., 19 Cal., 485; or from an order under 93 of the Bengal Tenancy Act—*Hussain* vs. *Matookdharee*, I. L. R., 14 Cal., 312, or from the order of a Collector under section 102, Act XIX of 1873—*Tola Ram* vs. *Ishur*, I. L. R., 9 All., 445, see also *Imtiaz* vs. *Lutafat-unnissa*, I. L. R., 11 All., 328.

Decree.—The word "decree" means the formal expression of an adjudication of any right, claim or defence set up in a Civil Court when such adjudication decides the suit or appeal; and when there is no civil suit there is not a decree, and a right to appeal is not given by this section—*Meenakshi* vs. *Subramaniya*, 14 Ind. App. 160; *Balkaran* vs. *Gobind Nath*, I. L.R., 12 Alla., 129, p. 156; and if it exists must be given by some law, *id.*; *Raja* vs. *Strinivasa*, I. L. R., 11 Mad., 319. See section 2, *ante*.

Expressly Provided—Section 49 of the Burma Courts Act precludes an appeal if the suit is not one which has an amount or value capable of being estimated in money—*Golam Rahman* vs. *Fatima*, I. L. R., 13 Cal., 232; *Mulla Adjim, Petitioner*, I. L. R., 14 Cal., 351; *Mowla Newaz* vs. *Sajidunnissa*, I. L. R., 18 Cal., 378.

Conduct of Judge.—If a party wishes to make the conduct of the Judge a ground of appeal, he should draw the Judge's attention to the matter by presenting a petition or otherwise—*Ram Koomar* vs. *Sonatun*, 3 C. L. R., 23; see, however, *Jardine* vs. *Tarini Mohan Sen*, 8. B. L. R., App., 44.

To what Court an Appeal Lies.—See section 21, Act XII of 1887.

Value.—The Court to which the appeal lies depends on the actual value of the subject-matter in dispute in the original case out of which the contest may have arisen—*In the matter of Duli Chand*, 9 B. L. R., 190; 18 W. R., 261; Act XII of 1887, section, 21; *Boidya Nath* vs. *Makhan*, I. L. R., 17 Cal., 680; *Rayasynji Shibsanji* vs. *Gulam Rasul*, 9 Bom., 286; *Aukhil Chunder* vs. *Mohini Mohun*, 4. C. L R., 491; as assigned by the plaintiff—*Mahabir Singh* vs. *Behari*, I. L. R., 13 Alla., 320. So also in Madras the appeal is governed, not by the value of the proximate subject-matter in dispute, but by the value of the subject-matter in the original suit—*Muthusami Pillai* vs. *Muthu Chidambara Chetti*, 7 Mad., 356; Act III, 1873, section 13. See "COURT OF THE LOWEST GRADE," section 15, *ante*.

For valuation in a suit for partition, see *Rajendrolall* vs. *Shama Churn*, 4 C. L. R., 417; *Kirtu Chunder* vs. *Annath*, 11 C. L. R., 8 Cal., 757; *Boidya Nath* vs. *Makhan*, I. L. R., 17 Cal., 680; *Hikmat Ali* vs. *Walaunnissa*, I. L. R., 12 Alla. 506; *Ramayya* vs. *Subbarayadu*, I. L. R., 13 Mad., 25; in a suit for account and balance found, see *Khusal Chandu* vs. *Nagin Dass*, I. L. R., 12 Bom., 675; and in case of set-off, see *Ramjewan* vs. *Chand*, I. L. R., 10 Alla., 587.

In a Redemption Suit.—See *Umar Khan* vs. *Mahomed Khan*, 1. L. R., 10 Bom., 41; *Pirbhu Narain* vs. *Sita Ram*, I. L. R., 13 Alla., 94; Reference, I. L. R., 14 Mad., 480.

Appeals from the Recorder of Rangoon lie to the High Court in Calcutta—*Aga Mahomed* vs. *Cohen*, I. L. R., 13 Cal., 221.

The decision of the first Court, on the question of valuation, is not final for the purpose of determining jurisdiction—*Brojo Coomar* vs. *Ishan Chunder*, 3 C. L. R., 79.

Where an appeal is preferred on the ground that if the suit had been properly valued the first Court would not have had jurisdiction to try it, the Appellate Court must follow section 11, Act VII of 1887.

Who may Appeal.—See "Who may or may not Appeal," section 584, *post*.

Parties.—No person can appeal unless he is party to the suit—*Caemmerer* vs. *Birch*, 1 Mad., 8, when decree is passed—*Gokool Pershad* vs. *Brojo Monee*, 24 W. R., 259; and a decree has been given against him—*Ram Doss Lushkur* vs. *Hureshur*, 23 W. R., 86, and he has been injuriously affected by it—*Seshaggar* vs. *Pappuvara Dayyangar*, I. L. R., 6 Mad., 185; *Muhamdee* vs. *Nazirun*, I. L. R., 6 Cal., 19; *Muttukumarappa* vs. *Arumuga*, I. L. R., 7 Mad., 145; and if a suit is brought by A on behalf of himself and others, one of the class cannot appeal—*Watson* vs. *Cave*, 17 C. D., 19.

Transferree.—The assignee of a party cannot appeal without an order of Court allowing his name to be entered on the record. See "Representative," section 244, *ante*. So it was held under Act VIII, 1859, that the name of a purchaser of the rights of a plaintiff in a suit could not be substituted for that of the plaintiff, nor upon the application of a party so substituted could the suit be allowed to be withdrawn; but that such an order, if made, was not open to appeal, but might be brought before the High Court in the exercise of its special powers of superintendence under its Charter—*Judooputtee Chatterjee* vs. *Chunder Kant*, 9 W. R., 309.

Limitation of Right.—The power to appeal is limited by the relations between the different parties. Thus, a defendant, whether interested or *pro forma* only, cannot appeal against a co-defendant—*Guladhur Banerjee* vs. *Mun Mohinee*, 7 W. R., 366; but if he does, and the decree is against him, he is stopped—*Kashee Chunder Roy* vs. *Doorga*, 11 W R., 410; and if a decree is passed party in favour of, and partly against, plaintiff, and one defendant appeals against the decree in favour of plaintiff making the co-defendant a respondent, the latter need not appear, and plaintiff cannot be allowed at the hearing to raise objection to the portion of the suit dismissed against him and in favour of the other defendant—*Goonomonee Dossia* vs. *Parbutty*, 10 W. R , 326.

Agreement not to Appeal.—If appellant agrees not to appeal, no appeal will lie—*Munshi Amir Ali* vs. *Inderjeet Singh*, 14 Moore, 203; *Protab Chunder* vs. *Arathoon*, 10 C. L. R., 443; I. L. R., 8 Cal., 455; and if he carries on the appeal contrary to the contract, a suit for damages will lie—*Jati Ram* vs. *Dass Ram*, 3 C. L. R., 574. See also *Royober Dyal* vs. *East India Company*, Fulton, 146.

Remand.—A person who was wrongly made a party under Act VIII, section 73, appealed against the decree. The suit was remanded for trial after expunging his name. The defendant was held not debarred from appealing against the decree, after remand, although he had left the first appeal to the intervenor—*Bucha Singh* vs. *Mirza Mashook*, 15 W. R., 572. Where, however, a decree was obtained against A and others, and A

not appealing, the decree was set aside, and the case remanded on the appeal of the co-defendants, but re-affirmed by the first Court: *Held*, A could not appeal from the last decree—*Nund Kishore Singh* vs. *Balmokund*, 1 Shome, 12.

Respondent.—A cannot appeal so as to affect B's rights under the decree unless he makes B a respondent—*In the matter of Ram Mohun Dey*, 20 W. R., 149.

Stamp.—An Appellate Court has no power to receive an instrument, on payment of the proper stamp and penalty unless they were tendered in the lower Court—*Champabutty* vs. *Jibun*, I. L. R., 4 Cal., 213.

High Court, Calcutta.—A petitioner in regular appeal should not be called upon by the department Registrar to deposit the costs of translating, &c., any papers of which he has not furnished a list with a view to their inclusion in the paper-book. The party or his pleader must determine the papers necessary for his case, and the Deputy Registrar must prepare his estimate and demand payment accordingly—*Lalla Bhoop Narain* vs. *Abassee Begam*, 23 W. R., 458.

Form of appeal.

What to accompany memorandum.

541. The appeal shall be made in the form of a memorandum in writing presented by the appellant, and shall be accompanied by a copy of the decree appealed against and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

Contents of memorandum.

Such memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed against, without any argument or narrative; and such grounds shall be numbered consecutively.

Act VIII of 1859, sections 333, 335. This section applies to H. C.

"**Where there has been an Appeal,**"—These words in art. 179, Schedule II, of the Limitation Act mean when a memorandum of appeal has been presented in Court—*Akshoy Kumar* vs. *Chunder Mohun*, I. L. R., 16 Cal., 250.

Where the judgment in the case governs other cases, the filing of that judgment is a substantial compliance with the section—*Muthoor Nath* vs. *Kissen Mohun*, W. R., Mis., 1864, p. 9; *Bhyrub Nath* vs. *Huro Soondures*, W. R., 1864, Mis., 28.

The memorandum of appeal should be presented to the Judge, and not the *Moonserim*, Placing it on the table when the Judge is not present, is not a presentation to him—*Taj Uldeen Khan* vs. *Gafoorulnissa* 3 Alla., 341.

Certificate.—If presented by a pleader, the grounds must have been drawn up by a pleader, who shall certify that he has examined the record, and that the grounds set forth are good. Examining copies of the record is sufficient—*Noor Ahmed*, 17 W. R., 338. If presented by a party or his recognised agent, no pleader will be allowed to appear in support of it unless he certifies that the grounds of appeal set forth are good—Cal. Civ. Cir. O. No. 17, 1873. See note under section 542, *post*.

Stamp.—The memorandum must bear a stamp according to the law in force for the time being—5 Mad., xliv. The stamp-value may be made up by several stamps, though the petition is written on the sheet—*Tarinee Churn* vs. *Taranath Gooho*, 12 W. R., 449. If excess stamps have been filed, the excess should be returned—*In the matter of Mr. G. H. Grant*, 14 W. R., 47; and if the stamps are inadequate, the Court should give the appellant an opportunity of making up the deficiency before rejecting the appeal—*Nussurat Ali* vs. *Mahomed Kanoo*, 11 W. R., 541, unless the valuation affects jurisdiction—*Subah Roy* vs. *Buldeo Singh*, 24 W. R., 225; and where an appeal is tried, relief cannot be limited to the portion covered by the stamps—*Bulo Ram* vs. *Ram Narain*, 10 W. R., 242.

Limtation.—See "LIMITATION," section 584, *post*. An appeal to the Court of the District Judge must be filed within thirty days from the date of the decree appealed against—Art. 152, Sched. II, Act XV, 1877.

But it may be admitted after the prescribed period when the appellant satisfies the Court that he has had sufficient cause for not presenting it within the period—section 5 Act XV, 1877; but if the Court does not think the cause sufficient, the order of refusal, is a decree and subject to appeal—*Ranchodji* vs. *Lallu*, I. L. R., 6 Bom., 304; *Gulab Rai* vs. *Mangli Lal*, I. L. R., 7 Alla., 42; *Gunga Dass* vs. *Ramjoy*, I. L. R., 12 Cal., 30; see also *Cusack* vs. *London and N.-W. Ry. Co.*, 1. Q. B. (1891), 347; if, on the other hand,

it admits the appeal, the decision can be contested in an appeal from the decree—*Mouree Lewa* vs. *Soorendarnath Roy*, 10 W. R., 78; *Surbhai Dayalji* vs. *Raghunathji*, 10 Bom., 397. See "SPECIAL APPEAL," sections 584 and 591, *post*.

Time requisite for obtaining a Copy of the Decree—Section 12, Act XV of 1877. See *Bani Madhub* vs. *Matungini*, I. L. R., 13 Cal., 104; *Bechi* vs. *Ahsanullah*, I. L. R., 12 Alla, 460.

Not Sufficient Cause.—Miscalculation of the period is not a sufficient cause—*Zaibulnissa* vs. *Kulsam*, I. L. R., 1 Alla., 251; and where an appellant withdrew his appeal, and thus prevented a cross-appeal by the respondent, it was held that this did not constitute a sufficient reason for admitting the latter to appeal after time—*Surbhai Dayalji* vs. *Raghunathji*, 10 Bom., 397; see also *Gour Hari* vs. *Prem Nath*, I. L. R., 9 Cal., 739; *Degamber Mozumdar* vs. *Kally Nath*, I. L. R., 7 Cal., 654; see also, *The Corporation of Calcutta* vs. *Anderson*, I. L. R., 10 Cal., 445, p. 472; *Chudasama* vs. *Ishwargar*, I. L. R., 16 Bom., 249. So also where a person merely pleaded illness, his application was rejected—*Masoom Ali Khan* vs. *Panchoo Bibi*, 9 W. R., Mis., 29. Nor is poverty a sufficient excuse—*Husaini* vs. *The Collector of Murzaffarnagur*, I. L. R., 9 Alla., 655; nor is a mistake of law—*Bechi* vs. *Ahsanullah*, I. L. R., 12 Alla., 461; *Ramjiwan* vs. *Chand Mal*, I. L. R., 10 Alla., 587; but see *Krishna* vs. *Chathappan*, I. L. R., 13 Mad., 269; nor is a pending review if the grounds are bad—*Govindo* vs. *Bhandari*, I. L. R., 14 Mad. 81. And where two suits were brought by executors, one against the heir and another against mortgagees, and there was no agreement that the decision of one suit should decide the other, it was held the executors were bound by one of the decrees not appealed against in time—*Thucker Vussonji* vs. *Canji*, I. L. R., 14 Bom., 365.

Compare *in re Manchester Economic Society*, 24 C. D., p. 499; *Munns* vs. *Burn*, 34, C. D., 664.

Sufficient Cause.—The illness of a mookhtar—*Anund Moyee Dossee* vs. *Poorno Chunder Roy*, 9 Moore, 26; or the fact that there is a review pending—*Kuller Singh* vs. *Jewan Singh*, 22 W. R., 79; see B. L. R., F. B. R., 349, 728; *Gulam Husen* vs. *Musa Miya*, I. L. R., 8 Bom., 260, if the grounds of review are reasonable—*Ahsanullah* vs. *The Collector of Dacca*, I. L. R., 15 Cal., 242; *Raman* vs. *Hassan*, I. L. R., 9 Mad, 247 is enough. If the applicant has been unable to obtain a copy of the judgment—section 541—*Jagarnath* vs. *Shworatan*, 15 B L. R., 272; or has been misled by the practice of the Court in deducting the time required to obtain a copy of the decree—*Nobin Chunder* vs. *Brojendro*, 12 C L. R., 541; or apparently if he mistakes the Court to which he should appeal—*Huro Chunder Roy* vs. *Surnamoyi*, I. L. R., 13 Cal., 266—*contra*, *Bechi* vs. *Ahsanullah*, I. L. R., 12 Cal., 461, it is sufficient. For previous practice, see *Horil Pattack* vs. *Bhowanee Ram*, 21 W. R., 308.

Pauper.—The doctrine of sufficient cause does not apply to an appeal in *formâ pauperis*—*Bechi* vs, *Ahsanullah*, I. L R., 12 Alla., 461, p. 489

Ex-parte.—An *ex-parte* order admitting an appeal after time may be afterwards set aside for sufficient cause—*Venkatrayudu* vs. *Nagadu*, I. L. R, 9 Mad., 450; *Nobin Chunder* vs. *Brojendro*, 12 C. L R., 541, and if an appeal is transferred for hearing to a Subordinate Judge, he can decide the question of limitation — *Mulna* vs. *Krishnaji*, I. L. R., 14 Bom., 594.

Copy of the Judgment.—Under the rules of practice adopted by the Allahabad High Court, copies of judgments are not required in appeals under clause 10 of the Letters Patent, and no deduction will be made from the period fixed for appealing on account of the time necessary to obtain copies of them—*Fazal Mahomed* vs. *Phul Kuar*, I. L. R., 2 Alla., 192.

Second Appeal.—The Code does not require the appellant in second appeal to file a copy of the decree of the original Court with the memorandum of appeal—*Pirathi Singh* vs. *Vencatramanayyan*, I. L. R., 4 Mad., 419.

Appellant confined to grounds set out.

542. The appellant shall not, without the leave of the Court, urge or be heard in support of any other grounds of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant:

Provided that the Court shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of contesting the case on that ground.

This section applies to H. C.

It is a condition precedent to an advocate or vakil being heard that some duly certified ground or grounds of appeal should have been filed. When appellant filed the grounds of appeal himself, and did not appear in person, but through a vakil, who declined to certify to the grounds of appeal, the appeal was dismissed—*Kishen Chunder* vs. *Hurish Chunder*, 3 W. R., 216, See note on section 557, *post*. But if any ground has been properly filed, the Court is not confined to it, and may take into its consideration anything in the case which either affects the regularity of the proceedings of the Court below, or relates to the correctness of the decision upon the merits—*Shamachurn Chuckerbutty* vs. *Bindabun Chunder Roy*, B. L. R., F. B. R., 900; *Muhammad Ismail* vs. *Chattar Singh*, I. L. R., 4 Alla., 69; but the appellant cannot claim this as of right— *Bansidhar* vs. *Sita Ram*, I. L. R., 13 Alla., 381.

If the decree appears on the face of it illegal, it may, as a rule, be impugned at the time of argument—*Poran Sookh* vs. *Parbutty*, I. L. R., 3 Cal., 612; *Lachman Prasad* vs. *Bahadur Singh*, I. L. R., 2 Alla, 884; provided the respondent has had a sufficient opportunity of meeting the case on that ground, and the Court does not go beyond the subject-matter of the appeal laid before it; but see *Bansidhar* vs. *Sita Ram*, I. L. R., 13 Alla., 381. A sued B for possession of property belonging to C, and got a decree for one-half C's property *minus* X. A appealed as regards X only, and it was held that the Judge had no power to award her the whole of C's property instead of the one-half—*Sharoda Soonduree* vs. *Gobind Monee*, 24 W. R., 179.

In a suit for rent one of the defendants appealed on part, but, with the leave of the Court, argued against the whole decree, on the ground that a co-proprietor had not been made a defendant, and the suit was dismissed. The High Court set aside the judgment on the ground that the Judge could not entertain such an objection upon the appeal only of one of the defendants as to a small portion of the decree—*Nakur Chunder* vs. *Judoo Nath*, 24 W. R., 389.

Fact.—In a suit to set aside the alienation of a palayan, the property was described as ancestral in the plaint. Defendants did not deny this, but pleaded justification. On appeal, the Court was asked to inquire if the palayan was self-acquired: *Held*, as the petition of appeal did not contain such a ground, the application should not have been allowed—*Narayana* vs. *Chengalamma*, I. L. R., 10. Mad., 1.

Statute Law.—A suit was referred to arbitration, and apparently the award was not made in time. No objection on this ground was raised in appeal or before the first Court but the Privy Council held the Court was bound to take judicial notice of the Statute Law and set aside the award—*Har Narain* vs. *Bhagwant*, I. L. R., 13 Alla., 300. But see *Gourmoni* vs. *Juput Chunder*, I. L. R., 17 Cal., 57.

Notes of Counsel.—Notes of counsel may be referred to in appeal—*Earl De La Warr* vs. *Miles*, 19 C. D. 80.

Rejection or amendment of memorandum.

543. If the memorandum of appeal be not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

When the Court rejects under this section any memorandum it shall record the reasons for such rejection.

When a memorandum of appeal is amended under this section the Judge, or such officer as he appoints in this behalf, shall attest the amendment by his signature.

Act VIII of 1859, section 336. This section applies to H. C.

Memorandum of Appeal.—See "Grounds of Appeal," section 584, *post*. It is the memorandum of appeal which gives the Judge jurisdiction to interfere with the decree. He cannot of his own motion deal with a decree or portion of a decree against which no appeal has been made—*Cheda Lal* vs. *Badullah*, I. L. R., 11 Alla., 35, p. 38.

In drawing up grounds of appeal, it should be remembered that no subsequent event or devolution of interest can affect the decision of a question as it stood at the time the decision was pronounced. To give effect to these, some supplementary proceeding and not an appeal, is necessary—*Anund Mayee* vs. *Sheeb Chunder*, 2 W. R., P. C., 19. A party cannot appeal on account of an irregularity committed at his instance or with his consent—*Koowur Baboo Mistrasur Singh* vs. *Nund Loll*, 8 Moore, 199; and the grounds must be such as arise from the pleadings and evidence, and are necessary for the decision of the case—*Sidhee Nusur Ali* vs. *Ojoondhyaram Khan*, 10 Moore, 540, p. 553. Thus,

in a suit by a Hindu widow for possession and declaration of title, a defendant cannot urge for the first time in appeal that by a family custom females could not inherit—*Terkait Doorga* vs. *Doorga Koonwaree*, 13 W. R., 10.

A petition for leave to appeal to their Lordships of the Privy Council stating that the proceedings of the lower Court are irregular and contrary to law is too general and vague—*Goree Monee* vs. *Juggut Indro*, 11 Moore, 1.

Returned.—When a memorandum is returned, a time should be fixed by the Court for its return—*Sheo Partab* vs. *Sheo Golam*, I. L. R., 2 Alla., 875.

Rejected.—If the memorandum is scandalous or irrelevant—*In re Clive Durant*, I. L. R., 15 Bom., 488; or taken up with argument and narrative, it should be rejected, leaving the appellant to bring a new appeal on a fresh stamp—*Bussunt Singh* vs. *Lalan Singh*, W. R., 1864, p. 386; but it should not be rejected as insufficiently stamped without requiring the appellant to supply the additional stamp—*Anund Mohun* vs. *Doorga Dass*, W. R., Mis., 1864, p. 3.

When an appeal is rejected, a judicial order and the reasons for it should be recorded —*Lalla* vs. *Kasseenath*, 1 Ind. Jur., O. S., 121.

Appeal.—An appeal lies from an order rejecting on appeal as barred by limitation—*Gulab Rai* vs. *Mangli Lal*, I. L. R., 7 Alla., 42; *Ragunath* vs. *Nilu*, I. L. R., 9 Bom., 452.

Limitation.—There is no limitation as to the time a memorandum of appeal may be rejected or amended—*Damodar Dass* vs. *Gokul Chand*, I. L. R., 7 All., 85.

Ordinarily the time for rejecting an appeal would be when the appeal is presented and not after it has been admitted—*Gopee Bullub* vs. *Goluck Proshad*, W. R., 1864, p. 135, but though an appeal has been admitted, it must be rejected on the ground that it was not preferred within the prescribed time.—Illus. 6, Act XV, 1877, section 4, opposing—*Bharuti Chunder* vs. *Issur Chunder*, 8 W. R., 141; unless it has been admitted on sufficient cause being shown, and if it were shown that the appellant had obtained leave for the admission on any misrepresentation, or suppression of fact, or if the respondent could show that there was no sufficient cause of any sort or kind, or if he showed that the Appellate Court had made any mistake in admitting the appeal, though the appellant had not been guilty of fraud, probably the Court would feel itself at liberty to set aside its own order and remove the case from the file—*The Secretary of State for India in Council* vs. *Mutu Sawmy*, 4 B. L. R., App., 85; 13 W. R., 245; *Syed Jafer Hossein* vs. *Mahomed Amir*, 4 B. L. R., App., 103. In any case the order is open to revision in special appeal—*Mowri Bewa* vs. *Surendra Nath*, 2 B. L. R., 184.

One of several plaintiffs or defendants may obtain reversal of whole decree if it proceeds on ground common to all.

544. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal against the whole decree, and thereupon the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants, as the case may be.

Act VIII of 1859, section 337. This section applies to H. C.

The general rule is, that a judgment should be reversed as to the appellant without affecting the judgment as to those parties who do not appeal, when a several judgment could have been properly made in the first Court—*Koolada Pershad* vs. *Gouree Chand*, 17 W. R., 353. Thus, where A sued B and C for possession, the one as patnidar, the other as mokararidar, and the first Court gave a decree against B, the patnidar only, the second Court was considered wrong in giving a decree against C on the appeal of B—*Greesh Chunder Sing* vs. *Gour Mohun*, 7 W. R., 49; *Womesh Chunder* vs. *Matugminee*, 2 W. R., 170. This section declares that where the appellant appeals against the whole decree—*Ram Chunder* vs. *Omora Churn*, 18 W. R., 28; *Chunder Monee* vs. *Modhoo Dey*, 23 W. R., 166 and the decree of the lower Court, whether *ex parte* or not—*Sreenath Chowdhry* vs. *Grey*, 13 W. R., 114, has proceeded upon some ground common to all, and in such cases only—*Mashiatunnissa* vs. *Rani*, I. L. R., 13 Alla., 1, p. 13; *Rangayya* vs. *Kadiyalla*, I. L. R., 13 Mad., 249; *Dev Gopal* vs. *Vasudev*, I. L. R., 12 Bom., 371; the Appellate Court may reverse the whole decree on the appeal of only one of the parties—*Khermukuree Dassee* vs. *Nilambur*, 2 W. R., 227; and it has been held that it only applies to decrees affecting in the same manner the whole of the plaintiffs or defendants, that is to say, a decree incapable of division, and upon which it would be impossible for a Court to find in one sense for some of the plaintiffs or defendants,

and in the opposite sense for the other plaintiffs or defendants; for instance, where the suit relates to property in which all the plaintiffs or all the defendants are co-sharers or joint-owners—*Sreeram Ghuttack* vs. *Brojo Mohun*, 11 W. R., 449; *Babaji* vs. *The Collector of Salt Revenue*, I. L. R., 11 Bom., 596; thus, where A and B were sued on a joint contract, and a decree was passed against both, though A never appeared; it was held that the Appellate Court was competent to dismiss the suit on the appeal of B, on the ground that there was no joint liability, but that B occupied a separate estate at a separate rent—*Lukhy Kant* vs. *Ramdoyal*, Marsh., 281.

Cases within the Section—A sued B and C for rent. They admitted holding the land, but denied the rate. The suit was decreed in the lower Court, but was set aside on the appeal of B—*Sreestee Dhur Chuckerbutty* vs. *Sreenath*, 18 W. R., 332; and so where the suit was on a mortgage-bond (joint) which was held collusive, the case was dismissed on the appeal of one of the defendants—*Ram Lochun* vs. *Nittya Kalee*, 12 W. R., 211; *Sufur Ali Soudagar* vs. *Busserolla*, 6 W. R., 323. A sued B, C and D for rent on a contract of partnership. The claim was decreed, but set aside at the appeal of B for want of jurisdiction—*Sreemunjuree Dossee* vs. *Poorusuttun*, 9 W. R., 499. A sued B and a minor C for debts due by them as partners, and the claim was decreed to be realized out of the property of the father of B, C, only appealed: *Held*, an ordinary decree for account of partnership property binding all the parties could be passed—*Joy Kristo Cowar* vs. *Nittyanund*, I. L. R., 3 Cal., 738. In a suit for rent B intervened, asserting that he was entitled to the rents, and was made a co-defendant, the suit was decreed. The intervenor alone appealed against the whole decree, and it was set aside as against both—*Doyal Chunder* vs. *Nobin Chunder*, 16 W. R., 235; *Kanhye Roy* vs. *Shaikh Hyder*, 25 W. R., 29; and where parties who had been made co-defendants, as co-sharers did not appear, and the case was decided against them under section 116, Act VIII, the case was set aside on the appeal of the first defendant—*Doorga Churn* vs. *Shamanund Gossain*, 12 W. R., 376. Two parties claiming different interests in a certain share sued separately to set aside a sale of the share. Both suits were dismissed; one suit was appealed and on appeal the sale was set aside as to the whole of the share and not merely as to the interest of the party appealing—*Shaik Nagar* vs. *Shurintoollah*, 20 W. R., 77. A, as purchaser of D's rights, sued B and C for possession, asserting that they were mere benamedars for D, holding under a colourable purchase. There was no allegation, they held in shares. On the appeal of B, the decision of the first Court in favour of A was set aside—*Katyanee Chowdrain* vs. *Madhub Narain*, 4 W. R., 68. And where A sued B, C, and D for possession of land on the strength of a mortgage-bond executed by B and C, who denied execution, and D claimed under them by purchase, the case was dismissed against them all on the appeal of D, on the ground that the bond was false—*Jadumani Dasi* vs. *Fudu Bibee*, 7 B. L. R., App., 28. Where the first Court dismissed the suit as barred by limitation, this section was held to apply—*Mohunt Rang Lall* vs. *Gouree Mundul*, 10 W. R., 286. And generally if the main ground of the whole decision affects all the defendants in common, this section will apply. N sued S for partition of their joint property and mesne profits from their tenants in possession and obtained a decree. The tenants appealed, and the decree for mesne profits was set aside as the Court had no jurisdiction to make the partition—*Nagamma* vs. *Subba*, I. L. R., 11 Mad., 197. A sued B on a mortgage-bond; C, who claimed the property under mortgage executed by B, was admitted as a defendant at his own application, but was afterwards excluded from the suit and ordered to pay his own costs. On the appeal of B only, A's mortgage-bond was set aside, and he was directed to pay C's costs—*Yerrabalu Viraragava* vs. *Abdul Khadir*, 4 Mad., 26. Where A, claiming land as mokararidar, sued B and C, who both denied A's title, and C held as lessee from B, and the first Court decided that A had a good title, against B and C, the decision was set aside on the appeal of B—*Shaikh Mahomed* vs. *Shaikh Anwar*, 21 W. R., 112. And in a suit under section 9, Act VI (B. C.), 1862, to measure the lands of several ryots who all denied the plaintiff's title, where the suit was decreed on the ground that plaintiff's vendor was proprietor, and had received the rents up to the date of sale, the decree was set aside in favour of all on the appeal of some—*Doorga Chunder* vs. *Mahomed Abbas*, 14 W. R., 121. See also *Chunder Kula* vs. *Jotendro Mohun*, 6 W. R., 104.

Where a widow granted a patni of lands in which she had only a life-estate, and the reversioners sued for immediate possession on the ground of waste, it was held that the patnidar was entitled to appeal on the whole case, and on his appeal the suit was dismissed—*Loll Soonder* vs. *Hurry Kishen*, Marsh., 113.

Cases not within the Section.—A, as purchaser from B, sued B and C, members of a Hindu family, for certain lands. B and C denied the sale, and C added that he was no party to the deed, and as the property was joint, B had no power to sell. The first Court held that the purchase-deed was genuine, that the property was self-acquired, and decreed the suit. C alone appealed against the whole decree, and the first Appellate Court, finding that the property was joint and the deed had not been executed by B, dismissed the suit against both. In appeal this was set aside as far as the execution of the deed by B was concerned. Bayley, J., said:—"I would say on the first point that, under section 337 of Act VIII of 1859, I think the lower Court could

decide as it has done on the appeal of the co-sharers, because the 'ground' of the title 'common to both' was that which was found by the lower Appellate Court to exist,—viz., the *co-parcenary of the appellants in the property sold*, and the non-execution and invalidity of the deed of sale by which the property of the appellant *co-sharers was purported to be conveyed to plaintiff*, and which deed was plaintiff's sole ground of title." Phear, J., held an opposite opinion. He said :—"Again, it appears to me that section 337 applies only to those cases where the Court below has made a decree against several persons, whether plaintiff or defendant, upon a finding of law or fact which applies to all persons alike. In such a case the section enables the Court of Appeal, on the application of any one or more of the persons decreed against, to affirm, modify, or reverse the whole decree, as well with regard to its force against those who did not appeal as against those who did. The case before us was a suit to obtain possession of land which the plaintiff alleged was conveyed to her by the first defendant Bonomalee. Bonomalee denied that he ever executed such a conveyance. The other defendants joined in the plea, and further alleging that the land in dispute was the joint property of themselves and Bonomalee, pleaded that, as they were not parties to the conveyance, it could not be operative against them. The Sudder Ameen decreed in favour of the plaintiff, adversely, no doubt, to all the defendants alike; but as against the two sets of defendants respectively the decree was based on widely different grounds. As against Bonomalee, it was based on the ground that he had executed the conveyance. This of itself would not have supported a decree against the other defendants, although no doubt (as was ably urged before us) an opposite finding on this point would certainly have decided the suit in their favour. It is not enough, however, that the suit might have been determined by a decision of the Court upon some one issue common to all the parties decided against; still less that it was capable of being so reversed, or actually was so reversed, in the Appellate Court. The question is—Was it so determined in the Court below? And in this case it must be in the negative. The finding, which was the sole ground of decision against Bonomalee, did not touch the main defence of his co-defendants, as against them something quite independent of it was necessary, and accordingly, the Sudder Ameen, before he could decree against them, was obliged to find that he had no interest in the land." Trevor, J., said :—"In the present case, the judgment of the lower Court was passed against Bonomalee on the ground of the execution by him of a deed of sale, and against the others on the ground that they opposed the plaintiff's enjoyment of his purchase wrongfully. The ground on which the decision was given was not common to all, and therefore section 337 does not apply"—*Kherumkuree Dossee* vs. *Nilambur*, 2 W. R., 227.

In the case of *Boydonath Surmah* vs. *Ojan*, 11 W. R., 238, A sued five persons, not co-sharers, for possession, asserting a distinct title and ouster by the defendants jointly. Defendants pleaded limitation, and denied the plaintiff's title. The first Court decreed the suit, and on the appeal of one defendant the first Appellate Court found that plaintiff had no title, that the suit was barred, and dismissed it against all; but the High Court set the decree aside. Hobhouse, J., said :—"There is no doubt that, on the question of limitation and on the question of the dakhilee tenure, the Court of first instance delivered a judgment which proceeded on grounds common to each of the defendants; but on the real merits of the case, that is, on the question of title, the grounds which had hitherto been in one sense common to all the defendants became at once distinct for each of these defendants." But see *Nagamma* vs. *Subba*, I. L. R., 11 Mad., 197.

Revision—Where a party did not appeal to the first Court and the Judge decided the case on a ground common to all, but refused to disturb the decree against the party who had not appealed on the ground that he had no prower to do so *Held*, the decree was subject to revision—*Seshadri* vs. *Kreshnaee*, I. L. R., 8 Mad., 192.

Of staying and executing Decrees under Appeal.

Execution of decree not stayed solely by reason of appeal.

545. Execution of a decree shall not be stayed by reason only of an appeal having been preferred against the decree; but the Appellate Court may for sufficient cause order the execution to be stayed.

Stay of execution of appealable decree before time for appealing has expired.

If an application be made for stay of execution of an appealable decree before the expiry of the time allowed for appealing therefrom, the Court which passed the decree may for sufficient cause order the execution to be stayed:

Provided that no order shall be made under this section unless the Court making it is satisfied—

(*a*) that substantial loss may result to the party applying for stay of execution unless the order is made ;

(*b*) that the application has been made without unreasonable delay ; and

(*c*) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

Act VIII of 1859, section 338. This section applies to H. C.

Stay Execution This section does not apply where the decree has been executed—*Dharam Sing* vs. *Kishen Sing* 12 C. L. R., 532. When an action is dismissed, no order can be made under this section except in regard to costs—*Otto* vs. *Lindford*, 18 C. D., 394 ; but the Court of Appeal can in a proper case grant an injunction to restrain parties from parting with the property till the hearing of the appeal—*Wilson* vs. *Church*, 11 C. D., 576.

This section applies to decrees for moveable and immoveable property—*In the matter of Ranee Ismaid Kooer*, 9 W. R., 448 ; which are not pending appeal to the Privy Council—*Muttealaummal* vs. *Chellayamal*, 5 Mad., 98 ; or are not final and non appealable—*Amir Hasan* vs. *Ahmad*, I. L. R., 9 Alla., 36.

An order of a Civil Court directing criminal proceedings to be taken against parties or witnesses, is not decree, should not be incorporated in the decree disposing of the suit, and cannot be stayed in execution—*Ram Churn*, S. D., N. W., 1863, p. 367.

Before making an application under this section, a pleader should verify that the statements made to him were made by the proper parties—*In the case of Sreenath Roy*, Pleader, 17 W. R., 405.

Notice.—A final order staying execution should not be made without notice. The application should be supported by affidavit—*Mullanchand* vs. *Khan Saheb*, I. L. R., 15 Bom., 536.

Grounds of Application—The winning party is not prohibited from executing his decree on the ground that the period for appealing has not expired—*The Deputy Collector of Sonthal Pergunnahs* vs. *Binode Ram*, 5 W. R., Mis., 53. But the Appellate Court, after an appeal has been filed, or the Court of first instance, if the application is made before the period of appeal has expired and an appeal lies, but no other Court—*Barlow* vs. *Abdool Haye*, 17 W. R., 341, may, in its discretion—*Wise* vs. *Rajkrishna Roy*, B. L. R., F. B. R., 550, stay execution if sufficient cause is shown—*In the matter Ranee Ismaid Kooer*, 9 W. R., 488, by a party and a party only—*Khiluck Chunder* vs. *Prosunomones*, Marsh., 478 ; but only on condition that the applicant will give security—*Sagore Chunder* vs. *Sheeboneme*, Bourke, 103 ; has not been guilty of great delay —*In the matter of Leslie*, Petitioner, 17 W. R., 160 ; and will suffer great injury unless the application is granted—*Sidhee Nazar Ali Khan* vs. *Oloodhyaram*, 1 Ind. Jur., N S., 185 ; *Wilson* vs. *Church*, 12 C. D., 454. The statement of defendant that he has brought another suit for the purpose of getting his right to possession declared, is not a sufficient reason for staying execution in a decree for ejectment—*Mahomed Hossein* vs. *Lootf Ali*, 20 W. R., 393 ; nor is it sufficient that the day fixed for sale in execution is near the latest safe day for the payment of revenue, and the petitioner might thereby suffer material injury—*In the matter of Ahmed Reza*, Petitioner, 13 W. R., 281.

Enquiry into Security—When proceedings are ordered to be stayed on giving security, the judgment-debtor must be allowed a reasonable opportunity to show that the security offered is sufficient—*Bahooria Doohma* vs. *Lal Jumahir*, 20 W. R., 52. Where a defendant gave a security-bond under this section to account for mesne profits, and execution was stayed, he was held to be estopped from subsequently asserting that execution could not issue for the mesne profits, or that plaintiff should seek his remedy in regular suit—*Sadasiva Pillai* vs. *Ramalinga*, L R., 2 Ind. App., 219.

Security-Bond—The nature and extent of the liability depends on the words of the bond. In a suit in which security was given under Act VIII of 1859, that if the appeal were dismissed the surety would pay, and the decree was reversed on appeal by a Division Bench : it was held that the liability of the surety ceased, although an appeal had been preferred to a Full Bench—*In the matter of Moonshee Amir Ali*, 13 W. R., 403 ; but where the bond was to obey and fulfil all orders and decrees passed in appeal, it was held that the obligation extended to the *final* decree passed after remand by the High

Court in special appeal—*Shivlal* vs. *Appaji*, I. L. R., 2 Bom., 654; I. L. R., 3 Bom., 204; compare *Suleman* vs. *Shivram*, I. L. R., 12 Bom., 71.

If the decree is upheld, then the creditor may realise the amount due even after more than three years from the date of any proceedings taken in execution—*Sheo Golam Sahoo* vs. *Rahut Hossein*, I. L. R., 4 Cal., 6.

As to the difference between security given under this section and section 484, *ante*, see the case of *Suleman* vs. *Shivram*, I. L. R , 12 Bom., 71.

Review.—The Court making an order under this section can cancel or modify it at any time—*In the matter of Moonshee Amir Ali*, 13 W. R., 403; *Amir Hasan* vs. *Ahmad*, I. L. R., 9 Alla., 36.

Not Stayed—A Civil Court cannot stay execution in cases in which an appeal has been made to the Privy Council against a decree of the High Court—*Muttealaunmal* vs. *Chellayamal*, 5 Mad., 98; nor release a surety from security taken from him by the High Court to enable a decree-holder to excute his decree—*Abedoonnissa* vs. *Ameeroonnissa*, 17 W. R., 464.

The plaintiff obtained a decree which was set aside on appeal, and the Judge ordered execution of his own decree to be stayed pending a special appeal: *Held*, that this was an improper order, and it was set aside in the exercise of the extraordinary jurisdiction of the High Court which remarked :—"The defendant was entitled, as soon as the decree against him ceased to exist, to have his property released from attachment, and to be restored to his original position. The plaintiff, having lost his decree, is in no better position, until his appeal is decided, than a plaintiff before judgment. He would not be entitled to have the defendant's property attached before judgment, unless he were able to satisfy the Court that the defendant is about to dispose of or remove his property, in order to obstruct or delay execution of any decree that might be passed against him; and even then he would not be entitled to such relief unless the defendant should fail to furnish security. But the effect of the Judge's order is to give to the plaintiff an attachment before judgment without any proof having been offered that the defendant has a dishonest intention, and without any option having been offered to the defendant of furnishing security, and retaining possession of his own property"—*Kavasji Brimji* vs. *Dhondiraj*, 10 Bom., 411.

Section 283—When regular suit has been brought to contest an order passed under section 283, *ante*, and a decree has been obtained declaring the subject-matter of the suit liable to sale. the property can be sold, pending appeal from the decree, unless execution is stayed under this section—*Syed Fathula* vs. *Munyappa*, I. L. R., 6 Mad., 98.

Appeal.—An order staying or refusing to stay execution is appealable under section 244, *ante*—*Ghazidin* vs. *Fakir Buksh*, I. L. R., 7 Alla., 73; *Udeyadeta Deb* vs. *Gregson*, I. L. R., 12 Cal., 624; *Musaji* vs *Damodar*, I. L. R., 12 Bom., 279; *Ishwargar* vs. *Chudasama*, I. L. R., 12 Bom., 30; and compare *Monk* vs. *Bartram*, 1 Q. B. (1891), 364.

Security in case of order for execution of decree appealed against.

546. If an order is made for the execution of a decree against which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court,

or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

And when an order has been passed for the sale of immoveable property in execution of a decree for money, and an appeal is pending against such decree, the sale shall on the application of the judgment-debtor be stayed until the appeal is disposed of, on such terms as to giving security or otherwise as the Court which passed the decree thinks fit.

Act XXIII of 1861, section 36. This section applies to H. C.

Appeal is Pending—No action can be taken under this section unless an appeal is pending—*Petition of Bhugwan Chunder Ghose*, 6 W. R., Mis., 15; *Amir Hasan* vs. *Ahmad*, I. L. R., 9 Alla., 36. See the case of *Otto* vs. *Lindford*, 18 C. D., 394, and of *Wilson* vs. *Church*, 11 C. D., 576, referred to under section 545, *ante*.

If the application is made before execution has been taken out, the applicant must start his case by showing there is some probability that, if the decree-holder receives the property, he will be unable to recover it or its value back from him—*Sukkee Monee* vs. *Brojoraj*, 17 W. R., 69. If the decree has been executed before the appeal has been filed, special cause must be shewn, such as that the property was being wasted or improperly dealt with—compare *Jairutool Butool* vs. *Hosseinee Begum*, 10 Moore, 196; *Mansukhram Parshotam* vs. *Javarevohu*, 7 Bom., 122; *Juggo Lall* vs. *Jankee*, 17 W. R., 521.

Security taken under this section is not confined in its operation to the first Appellate Court; it includes whatever order may be passed on appeal, whether on the first appeal, or by the High Court on special appeal—*Naryan Dev* vs. *Gajanan*, 10 Bom., 1; compare *Shivlal* vs. *Appaji*, I. L. R., 2 Bom., 654; 3 Bom., 204, and the cases cited under "SECURITY-BOND," last section.

In section 36, Act XXIII, 1861, the words were "it shall be lawful for the Court which pronounced the decree," &c., thus leaving it within the discretion of the first Court to act or not—*Wise* vs. *Rajkrishna Roy*, B. L. R. (F.B.), 541, p., 550; now no such discretion is allowed to it, but only to the Appellate Court.

Money-Decree.—Generally where a decree orders payment of money, execution should be stayed if the losing party deposits the amount in Court; but if the winning party gives security for repayment execution should issue—*Dhunjibhoy* vs. *Lisboa*, I. L. R., 13 Bom., 241.

Does not Apply.—This section does not apply to cases in appeal from the High Court to the Privy Council, but when the lower Court is informed that there has been an appeal to the Privy Council from the decree, it should exercise a discretion and allow time to the parties to apply to the High Court to stay execution or to require security from the party in possession, before issuing execution, unless there should be some danger that the property would be made away with in the interval—*Wise* vs. *Rajkrishna Roy*, B. L. R. (F. B.), 541. Nor does it justify a Court in staying execution of a decree unless it is the Court which passed the decree in which the proceedings are pending—*Gossain Money* vs. *Gour Pershad*, I. L. R., 11 Cal., 146, p 149. See also *Ghazidin* vs. *Fakir Buksh*, I. L. R., 7 Alla., 73, p. 76.

Restitution.—When a decree is reversed, the lower Court is bound to restore the defendants to the property out of which they had been turned in execution, whether the appellate decree expressly directed it or not—*In the matter of Rajkissen Singh*, B. L. R. (F. B.), 605; 6. W. R., Miss., 111; *Latikooer* vs. *Sahodrakober*, 2 C. L. R., 75; and where a Judge refused to realise an amount paid in execution, and directed the defendant to bring a regular suit, the High Court compelled him under the Charter Act to enforce restitution, and execute that part of the appellate decree giving costs—*In the matter of Gobind Coomer Chowdhry*, B. L. R. (F. B.), 714. A refund carries interest—*Wooma Soondures* vs. *Gooro Pershad*, 15 W. R., 74; but not interest on costs—*Rodgers* vs. *The Comptoir d'Escompte de Paris*, L. R., 3 P. C., 665, unless the propriety of paying such interest has been submitted to the Court—*Forester* vs. *The Secretary of State for India* L. R., 4 Ind. App., 137.

Appellate Court.—An application to the Appellate Court is not by way of appeal from an order in the Court below, see *Cropper* vs *Smith*, 24, C. D., 305.

Appeal—An order requiring security is appealable—*Luchmeeput Sing* vs. *Sita Nath*, I. L. R., 8 Cal., 477; *Ghazidin* vs. *Fakir Buksh*, I. L. R., 7 Alla., 73.

Enforcement of Bond.—See *Venkapa* vs. *Baslingapa*, I. L. R., 12 Bom., 411, and note to section 253, *ante*, and as to appeals from such orders, *Suleman* vs. *Shivram*, I. L. R., 12 Bom., 71, *Thirumalai* vs. *Ramayyar*, I. L. R., 13 Mad., 1. See in regard to what it is necessary to show in an application to the Court of Appeal, after refusal by the Court of first instance, *Monk* vs. *Bartram*, 1. Q. B. (1891), 346.

No such security to be required from Government or public officers.

547. No such security as is mentioned in sections 545 and 546 shall be required from The Secretary of State for India in Council, or (when Government has undertaken the defence of the suit) from any public officer sued in respect of an act alleged to be done by him in his official capacity.

This section applies to H. C.

Of Procedure in Appeal from Decrees.

548. When a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal.

Such book shall be called the Register of Appeals.

Register of appeals.

This section applies to H. C.

Appeals from the decision of a single Judge exercising Vice-Admiralty jurisdiction are governed by this Code—*In the matter of the Ship "Champion,"* I. L. R., 17 Cal., 66.

An appellant has no power to withdraw an appeal which has been regularly registered, without the permission of the Court—*Karem Bee* vs. *Begam Bee*, 3 Mad., 368.

549. The Appellate Court may at its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both :

Appellate Court may require appellant to give security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India and is not possessed of any sufficient immoveable property within British India independent of the property (if any) to which the appeal relates.

When appellant resides out of British India.

If such security be not furnished within such time as the Court orders, the Court shall reject the appeal.

If such security be furnished, any costs for which a surety may have rendered himself liable may be recovered from him in execution of the decree of the Appellate Court in the same manner as if he were the appellant.

This section applies to H. C. The last clause has been added by Act VII of 1888, section 40.

Application of Section.—This section does not apply to appeals from orders of a Judge sitting as a Commissioner of the Insolvent Court—*In the matter of Ramsebak Misser*, 5 B. L. R., 179, but apparently it does to appeals from interlocutory orders—*Ahmad* vs. *Shaik Essa*, I. L. R., 13 Bom., 458.

Practice.—The Court can act only on an application of the respondent, but once the application has been filed, the Court (and for this purpose a single Judge of the High Court is empowered—*Monohur Doss* vs. *Khodrum Begum*, Bourke, 110) may demand security under the first paragraph, and is bound to do so under the second, at any time before the hearing of the appeal, setting aside *In the matter of Jogendro Deb*, 18 W. R., 102 ; for the costs in either or both Courts, overruling *In the petition of the Calcutta and South-Eastern Railway Company*, 8 W. R., 217. At the same time a respondent should be careful to object if security has not been given when appearing to oppose the appeal, or else it might be urged that he had waived his right—*Wise* vs. *Jugobundoo Bose*, 7 Moore, 431 ; *Thakur Dass* vs. *Kishori Lal*, I L. R, 9 Alla., 164.

In Bombay it is not the practice to require security commensurate with the estimated costs of the appeal. Rupees 500 is, speaking generally, the rule in all cases—*Ahmad* vs. *Shaik Essa*, I. L. R., 13 Bom., 458.

If neither party appears on the day fixed for hearing the rule and it is discharged, it can be restored if a sufficient reason for the non-appearance of the applicant is shown —*Lakhmi Chand* vs. *Gatto*, I. L. R., 7 Alla., 542.

The usual procedure is for the respondent to obtain a *rule nisi* of affidavits as to the fact; on the day fixed for hearing the appellant shows cause and the respondent then replies—*Bamasundari Dassee* vs. *Ramnarayan*, 7 B. L. R., App., 59; *Sirajulhaq* vs. *Khadim*, I. L. R., 5 Alla., 380.

A was ordered to give security, and, failing, respondent's solicitor, without writing to appellant's solicitors gave notice of motion to dismiss the appeal for want of prosecution. The motion came on for hearing the day after the security was given: *Held*, the appeal would not be heard until A paid the costs of the motion—*In re Baum*, 10 C. D., 1.

Appeal.—An order dismissing suit under this section is a decree—*Sirajulhaq* vs. *Khadim*, I. L. R., 5 Alla., 380 and a special appeal lies from such an order on the usual grounds.—*Gopal Khundee Rao* vs. *Deokee Bundun*, 6 Alla., 173.

A relator can be compelled to give security—*Mozhur Hossein* vs. *Dino Bundoo*, Bourke, 40.

If the appellant has appealed in *formâ pauperis*, this section will not apply—*Nussooruddeen Biswas* vs. *Ujjal Biswas*, 17, W. R., 68; (not followed *Seshayyangar* vs. *Jainalavadin*, I. L. R., 3 Mad., 66,) and the mere fact of the poverty of the appellant by itself is not a sufficient ground for demanding security—*Liwan Ali* vs. *Bava Mal*, I. L. R., 8 Alla., 203, *Ahmed* vs. *Shaik Essa*, I. L. R., 13 Bom., 458; *Rhodes* vs. *Dawson* 16 Q. B. D., 548. See, however, *Seshayyangar* vs. *Jainalavadin*, I. L. R., 3 Mad., 66; *Harlock* vs. *Ashberry*, 19 C. D., 84; *Ivory*, 10 C. D., 372; but where the appellant, though admittedly a pauper, is a mere tool in the hands of others who are able to give security—*Jogendro Deb* vs. *Funindro Deb*, 18 W. R., 102; *Seshayyangar* vs. *Jainalavadin*, I. L. R., 3 Mad., 66, (but see *Manekji Sunji* vs. *Goolbai*, I. L. R., 3 Bom., 241); or the merits of the case appear to be in favor of the respondent—*Mozhur Hossein* vs. *Dino Bundoo*, Bourke, 119; *Waddell* vs. *Blockey*, 10 C. D., 416; or the appellant is the assignee of an insolvent debtor—*Heeralall Seal* vs. *Carapiet*, 13 W. R., 431; or his conduct in not paying the costs given against him in the first Court is vexatious—*Ahmad* vs. *Shaik Essa*, I. L. R., 13 Bom., 458, or the parties have so agreed—*Elias* vs. *Chuckerbutty*, 1 Ind. Jur., N. S., 223, security should be demanded. But where the respondent is admittedly the heir, he should not be required to give security—*Bhugobutty Churn* vs. *Issur Chunder*, 16 W. R., 311.

Bond.—A party allowed two months to furnish security, tendered by petition a darpatni on the last day, and on the next day put in an unregistered security-bond. The Judge rejected the bond, but his order was set aside, and he was directed to inquire into the sufficiency of the security, on the ground that it was not necessary to register the bond until the security had been accepted—*Dunne* vs. *Amseroonnissa Khutoon*, 13 W. R., 41. See note under section 545, *ante*.

A sued B, and was compelled to deposit security for costs, as he resided out of British territory. He got a decree; B appealed. It was held that B could not ask that the deposit should be retained in Court to meet the costs of the appeal—*Fleming* vs. *Shearman*, 4 B. L. R. (O. J.), 93.

Enforcement—A bond given as security for costs may be enforced in a summary way by process of execution.—*Abdul Wahed* vs. *Faresdoonissa*, I. L. R., 16 Cal., 323.

Such Time.—The Court may extend the time either before its expiry, or afterwards —*Budri Narain* vs. *Sheo Koer*, 17 Ind. App., 1, I. L. R., 17 Cal., 512. As to sufficient reason for extending the time, see *Mohunt Modhusudan* vs. *Prapanna*, I. L. R., 17 Cal., 516; 17 Ind. App., 9; *Rajab Ali* vs. *Amir Hossein*, I. L. R., 17 Cal., 1.

Shall Reject.—The appeal cannot be rejected if the order demanding security has been made without notice to the other side—*Sirajulhaq* vs. *Khadim*, I. L. R., 5 Alla., 380; notice of a rule to show cause is not sufficient—*Timmu* vs. *Deva Rai*, I. L. R. 5 Mad., 265. See also *In re Soorjmukhi Koer*, I. L. R., 2 Cal., 272.

No separate application to dismiss the suit is necessary—*Mahimmadbhai* vs. *Bhanji Topan*, 3 Bom., 64; but where an order to give security was passed, and the respondent on the case being called on, asked that it should be dismissed, his application was refused on the grounds that the amount of the security had not been ascertained, and the Court was not the same which had made the order—*Thakur Dass* vs. *Kishori Lal*, I. L. R., 9 Alla., 164.

Restore.—An appeal can be restored on the appellant giving proper security—*Balwunt Singh* vs. *Daulut Sing*, I. L. R., 8 Alla., 315; L. R., 13 Ind. App., 57.

Appellate Court to give notice to Court whose decree appealed against.

550. When the memorandum of appeal is registered, the Appellate Court shall send notice of the appeal to the Court against whose decree the appeal is made.

Transmission of papers to Appellate Court.

If the appeal be from a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Copies of exhibits in Court whose decree is appealed against.

Either party may apply in writing to the Court against whose decree the appeal is made, specifying any of such papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of the applicant, and shall be deposited accordingly.

This section applies to H. C.

If there is any part of the record not sent up which the appellant wishes to bring before the Appellate Court, it is his duty to ask the Court to send for it before the day of trial—*Buksh Ali Sowdagar* vs. *Joyanut*, 11 W. R., 248.

Power to dismiss appeal without sending notice to Lower Court.

551. (1) The Appellate Court, if it thinks fit, may, after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, dismiss the appeal without sending notice of the appeal to the Court against whose decree the appeal is made and without serving notice on the respondent or his pleader.

(2) If on the day fixed under sub-section (1) or any other day to which the hearing may be adjourned the appellant does not attend in person or by his pleader, the appeal shall be dismissed for default.

(3) The dismissal of an appeal under this section shall be notified to the Court against whose decree the appeal is made.

This section has been substituted by Act VII of 1888, section 47.

This section applies to H. C.

A proceeding under this section is to all intents and purposes a trial—*Thakur* vs. *The Widows of Thakur of Nandwara*, I. L. R., 2 Alla., 819; and a judgment and decree should be drawn upon the usual manner—*Royal Reddi* vs. *Linga*, I. L. R., 3 Mad., 1.

Stamp.—As to dismissal on the ground that the plaint has not been properly stamped, see *Kammathe* vs. *Kunhamed*, I. L. R., 15 Mad., 288.

Day for hearing appeal.

552. Unless the Appellate Court dismisses the appeal under the last foregoing section, it shall fix a day for hearing the appeal.

Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

Act VIII of 1859, section 344. This section applies to H. C. The first paragraph has been substituted by Act VII of 1888, section 47.

553. Notice of the day so fixed shall be stuck up in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court against whose decree the appeal is made, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided in Chapter VI for the service on a defendant of summons to appear and answer; and all rules applicable to such summons and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Publication and service of notice of day for hearing appeal.

Instead of sending the notice to the Court against whose decree the appeal is made, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the rules above referred to.

Appellate Court may itself cause notice to be served.

Act VIII of 1859, section 345. This section applies to H. C.

The appellant is not bound to pay tullubana for the issue of the notice on the respondent under this section: service on the respondent's pleader to conduct the case is sufficient—*Ishur Dutt* vs. *Shib Pershad*, 15 W. R., 290.

When a respondent resides at Chundernagore outside British territory, notice of appeal should be forwarded to him by post under a registered cover; and if he does not appear, a verified statement should be put in to show that he is at present, or has recently been, residing there—*Sonatan Bukshee* vs. *Gopal Chunder*, 15 W. R., 31; a person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents —*Lootf Ali Meah* vs. *Pearee Mohun Roy*, 16 W. R., 223.

If a respondent cannot be served properly, the notice should be returned to the Court, and the appellant should apply for an order for substituted service—*Gopal Doss* vs. *Greedharee*, 6 W. R., 13; *Bedhoo Koolanee* vs. *Bonomalee*, 11 W. R., 496.

When a notice of appeal is transmitted to the lower Court for service with instructions to make a return within a specified time, the appellant is entitled to the whole time allowed, and may deposit his tullubana and ask for service any time within the period allowed—*Rungo Debee* vs. *Huree Narain*, 11 W. R., 138.

North-West—On receipt of the orders calling for any case passed by the High Court, the Judges should at once submit the record before the return of notice to the respondent, or report their inability to do so—2 Civ. Cir. O., N. W., 1867; and attached to it should be forwarded a report signed by the record-keeper and attested by the Judge certifying that the papers were found to correspond with the list—1 Civ. Cir. O., N. W., 1873.

554. The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex-parte*

Contents of notice.

This section applies to H. C.

Procedure on Hearing.

555. On the day so fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal. The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

Right to begin.

This section is new. It applies to H. C.

The irregularity of deciding an appeal before the day fixed will not be interfered within special appeal if the pleaders were present and argued the case—*Hukeemunnissa* vs. *Muckdoonum*, 1 W. R., 246.

If it appears that the rules of Court relating to appeals have not been complied with, and no adequate excuse is offered, the appeal should be dismissed—*Bhimji Girdha* vs. *Morgan*, 3 Bom., 63.

556. If on the day so fixed, or any other day to which the hearing may be adjourned, the appellant does not attend in person or by his pleader, the appeal shall be dismissed for default.

Dismissal of appeal for applicant's default.

If the appellant attends and the respondent does not attend, the appeal shall be heard *ex-parte* in his absence.

Hearing appeal *ex-parte*.

This section applies to H. C.

In the absence of the appellant the case must be dismissed—*Munickram* vs. *Roopnarain Singh*, Marsh., 5; provided the case is tried on the day to which the hearing may have been adjourned or on a day of which the appellant had notice—*Shib Chunder* vs. *Allad Monee*, 5 W. R., Mis., 22. And this should appear in the order—*Huro Chunder* vs. *Ram Coomar*, 2 W. R., 254. And if a Judge, instead of dismissing the suit for default, goes into the merits of the case and gives judgment against the appellant, the appeal must be considered as dismissed for default, and an application for re-admission and re-hearing cannot be treated as one for review, but must be entertained under section 558, *post*—*Mohesh Chunder* vs. *Thakoor Dass*, 20 W. R., 425; *Zainab Begum* vs. *Manawar*, I. L. R., 8 Alla., 277.

Default—If a pleader who has signed the memorandum of appeal refuses to argue the case on the grounds that he is unable and unprepared—*Buldeo Misser* vs. *Ahmed Hossein*, 15 W. R., 143; *Surrendra Narain* vs. *Kena Ram*, I. L. R., 12 Cal., 605, (compare *Ram Chandra* vs. *Madhav*, I. L. R., 16 Bom., 23), or if the appellant files the appeal in person and subsequently appears by pleader who refuses to certify the memorandum of appeal—*Kishen Chunder* vs. *Hurish Chunder*, 3 W. R., 216; the case should be dismissed for default.

Not Default.—When a decree is passed, partly in favour of and partly against a plaintiff, and one of the defendants alone appeals, making the co-defendant respondent, the latter need not appear or interest himself in the result—*Goonomonee Dossia* vs. *Parbutty*, 10 W. R., 326.

Thus, where two appeals were tried together and the plaintiff was called upon attend in one of these cases, and fails to attend, judgment cannot be given against him in the other case—*Arunachella* vs. *Vencatachella*, 5 Mad., 269.

Where a Court after eleven months' delay and without fixing any day for the disposal of the appeal dismissed it for default, the High Court set aside the order as erroneous, on the ground that the law only applied to cases of voluntary failure to comply with the Court's order—*Soodhamonee Dossee* vs. *Gooroopersad Dutt*, W. R., 1864, p. 176. So where a case was appointed to be heard before the Durga Poojah holidays, but was not, and after the holidays it was decided without appointing a day for hearing, the case was remanded for re-hearing—*Jeebun Monee* vs. *Tarinee Churn*, 3 W. R., Act X, 164.

Remanded Cases—In a remanded case the appellant took no steps to carry on the litigation, and while the Judge was writing his decision, his pleader appeared and said he had no instructions: *Held*, that the case was properly dismissed for default—*Triloke Chunder* vs. *Aukhil Chunder*, 21 W. R., 65. A suit dismissed for the non-appearance of the parties after it had been remanded on appeal, can be re-instituted if not barred by limitation—*Rughoonath Singh* vs. *Ram Coomar*, 14 W. R., 81; 5 B. L. R., App., 64.

Paper Book.—Under para. 467 of the Rules framed for the Original Side, if the appellant does not file his paper book, the appeal may be dismissed—*Kabul* vs. *Bhuli*, I. L. R., 17 Cal., 289.

Appeal—An appeal lies from a decree passed under this section—*Medalatha*, I. L. R., 2 Mad., 75; see section 584, *post*, see also note under section 558, *post*.

Letters Patent.—No appeal lies from an order dismissing an appeal for default—*Pohkar Singh* vs. *Gopal*, I. L. R., 14 Alla., 361; it is a decree and subject to appeal—*Ram Chandra* vs. *Madhav*, I. L. R., 16 Bom., 23.

557. If on the day so fixed, or any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed by the Court, the sum required to defray the cost of issuing the notice, the Court may order that the appeal be dismissed :

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit cost.

Provided that no such order shall be passed, although the notice has not been served upon the respondent, if on the day fixed for hearing the appeal the respondent appears in person or by a pleader, or by a duly authorized agent.

Proviso.

Act XXIII of 1861, section 5. This section applies to H. C.

Within the Period Fixed by the Court.—Act XXIII of 1861, section 2, contained similar words, and it was held that, unless a time was fixed within which process-fees should be paid into Court, the suit could not be dismissed on the ground of failure to deposit—*Purshadee Lall* vs. *Umbica Pershad*, 11 W. R., 290.

May order that the Appeal be Dismissed.—As to an appeal against such an order—section 584, *post*.

558. If an appeal be dismissed under section 551, sub-section (2), section 556 or section 557, the appellant may apply to the Appellate Court for the re-admission of the appeal ; and if it be proved that he was prevented by any sufficient cause from attending when the appeal was called on for hearing or from depositing the sum so required, the Court may re-admit the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him.

Re-admission of appeal dismissed for default.

This section applies to H. C. It has been amended by Act VII of 1888, section 47.

Jurisdiction.—The application must be made to the Court dismissing the appeal, and a District Judge has no power to admit a case disposed of by a Subordinate Judge—*Kisto Persad Dutt* vs. *Cowie*, W. R., 1864, p. 315.

Case Referred.—In Bombay if a Judge refers an appeal for trial to an Assistant Judge an application under this section must be made to the latter officer only—*Sakharam* vs. *Govind Joti*, I. L. R., 15 Bom., 107.

Scope of Section.—To bring a case under this section, the appeal must have been dismissed within the sections mentioned in it; it does not apply to cases decided *ex-parte*, and which the respondent wishes to have re-heard. In these the remedy is under section 560, or by special appeal—*Tara Chand Ghose* vs. *Anund Chunder*, 10 W. R., 450. See note under section 556, *ante*.

Review.—*Quære.*—If an application under this section is the same as a review—*Hirdhamun* vs. *Jinghoor*, I. L. R., 5 Cal., 711. See *ex-parte*, section 623, *post*, and note under section 108, *ante*.

Any Sufficient Cause.—Such as being unaware that the case had been transferred from the file of one Judge to that of another—*Narain Singh* vs. *Bheurab Churn*, 8 C L. R., 350.

An appeal having been struck off, the Judge refused an application under this section, because the appellants had not conformed to a rule of Court that two pleaders should be engaged in every appeal : *Held*, that the Judge was bound to see if the reasons set forth in the application were reasonable or not—*Shoamad Ali Sowdagur* vs. *Eusoof Khan*, 15 W. R., 80. If the application is rejected, the reasons for rejecting should be stated in the order—*Huro Chunder* vs. *Ram Coomar*, 2, W. R., 254.

The deposit of tullubana in a wrong Court is no ground for the revival of an appeal dismissed for default, on the ground that the appellant had not deposited tullubana and respondent had not been served—*Mohesh Chunder* vs. *Rhugoban Chunder*, 3 W. R., Mis., 29.

Limitation.—One month from the date of the dismissal—Art. 168, Schedule II, Act XV, 1877. On the Bombay side it was held under Act VIII, that the period did not begin to run until after the appellant had an opportunity to come in under Regulation II, 1827, section 54, cl. 2—*Alikhan Umarkhan*, 4 Bom., 92.

Appeal.—An appeal lies from an order refusing to re-admit an appeal—section 588, *post*; but apparently not from an order of re-admission. The latter can be only challenged on appeal from the appellate decree—*Kirani Ahmedula* vs. *Subabhat*, I. L. R., 8 Bom., 28: And see *Huro Chunder* vs. *Ram Coomar*, 2 W. R., 254; *Hirdhamun* vs. *Jinghoor*, I. L. R., 5 Cal., 711.

Power to adjourn hearing and direct persons appearing interested to be made respondents.

559. If it appear to the Court at the hearing that any person who was a party to the suit in the Court against whose decree the appeal is made, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court, and direct that such person be made a respondent.

Act VIII of 1859, section 73. This section applies to H. C.

Respondent.—This section does not allow a person to be made an appellant, even if he consents; but, under section 5, Act XV of 1877, a respondent can be added, even if the time to appeal against him has passed—*Manikya Moyee* vs. *Baroda Prosad*, 11 C.L. R., 430; I. L. R., 9 Cal. 355, *Sohna* vs. *Khalak*, I. L. R., 13 Alla., 78; but see *Atma Ram* vs. *Balkishen*, I. L. R., 5 Alla., 266.

The Court can make a person respondent who in the original suit was arrayed on the same side as the appellant—*Sohna* vs *Khalak*, I. L. R., 13 Alla., 78.

Consent Order.—An appellant like a plaintiff is the person interested in procuring the name of the person against whom he is to proceed—*Lakshmabai* vs. *Balkrishna*, I. L. R., 4 Bom., 654, but if he consents, there is no harm in placing a person on the record, although he may not be the legal representative of a deceased party—*Lakshmibai* vs. *Santapa*, I. L. R., 13 Bom., 22.

Re-hearing on application of respondent against whom *ex-parte* decree made.

560. When an appeal is heard *ex-parte* in the absence of the respondent, and judgment is given against him, he may apply to the Appellate Court to re-hear the appeal; and if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him.

This section is new. It applies to H. C.

Ex-parte.—This section applies whether the respondent has or has not entered appearance—*Esab* vs. *Krishna Narayan*, 11 C. L. R., 164; see also *Sheo Churn* vs. *Heera Lall*, 11 C. L. R, 537.

The Court is bound to enquire into the truth of an application made under this section; and it must be accompanied by evidence in support of the allegation on which the petition is founded—*Miselbach*, Petitioner, 6 W. R., Mis., 43, *Mahomed Kalun* vs. *Dinomoyee Dashya*, 8 C. L. R., 112; *Anunda Shaha Biswas* vs. *Kema*, I. L. R., 6 Cal., 548.

Appeal.—An appeal will lie from an order refusing to re-hear an appeal under this section—section 588, *post*, and an appeal will also lie against the decree—*Ajudhia* vs. *Balmukand*, I. L. R., 8 Alla., 354.

A defendant who did not appear in the first Appellate Court, although his interests were identical with those of the plaintiffs, cannot appeal specially against the judgment passed in favour of his co-defendants—*Jugunnath Chatterjee* vs. *Gordon Stuart & Co.*, 6 W. R., 36.

Review—Respondent may also apply for a review of the judgment—*Amir Hasan* vs. *Ahmad*, 232, I. L. R., 9 Alla., 36.

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

561. Any respondent, though he may not have appealed against any part of the decree, may upon the hearing not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has filed the objection in the Appellate Court within one month from the date of the service on him or his pleader under section 553 of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Form of notice, and provisions applicable thereto.

Such objection shall be in the form of a memorandum, and the provisions of section 541, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

Unless the respondent files with the objection a written acknowledgment from the appellant or his pleader of having received a copy thereof, the Appellate Court shall cause such a copy to be served, as soon as may be after the filing of the objection, on the appellant or his pleader, at the expense of the respondent.

The provisions of Chapter XLIV shall, so far as they can be made applicable, apply to an objection under this section.

Act VIII of 1859, section 348 This section applies to H. C. The latter portion of the first, and the third and fourth paragraphs have been added by Act VII of 1888, section 48.

Object of Cross-Appeal—A party may be satisfied with the decree of the lower Court and may be willing to allow it to stand unimpeached if his opponent does not think it necessary to appeal, but he may not be willing to have the decree modified or altered upon appeal in favour of his opponents without having the whole decree set right. Suppose a defendant sets up two defences to a claim brought against him, and the lower Court determines in his favour as to one of them, and against him as to the other, the plaintiff's claim would be dismissed. The lower Court might be wrong as to both defences, and ought to have decided in the defendant's favour the defence which was decided against him, and *vice versâ*. If the plaintiff were to appeal and to reverse the decision of the lower Court upon the defence decreed in the defendant's favour, it would be unjust not to allow the defendant, if he could, to show that the lower Court was wrong in point of law in determining the other defence against him, for he might thereby be able to show that the lower Court was substantially right in dismissing the plaintiff's suit, though wrong as to the defence which barred it—*Ishore Ghose* vs. *Hills*, W. R., Sp. No. 49; Marsh., 151, p. 153; in other words, "he may support the decree on any of the grounds decided against him in the lower Court." On the other hand, the respondent who fails to file a petition under this section is not bound by the findings against him arrived at by the lower Court—*Bhagoji* vs. *Bapuji*, I. L. R., 13 Bom., 75; *Lala Gowri* vs. *Janki*, 17 Ind. App., 57, and he may take at the hearing whether an appeal lies or not—*Kamat* vs. *Kamat*, I. L. R., 8 Bom., 368, any objection to the decree of the lower Court which he might have taken if he had preferred a separate appeal—*In the matter of*

Mirza Himmut Bahadoor, B. L. R. (F. B.), 431, but only such an objection—*Balak Tewari* vs. *Kausil Mior*, I. L. R., 4 Alla., 491; *Jamaitunnissa* vs. *Lutfunnissa*, I. L. R., 7 Mad., 606; and show that the points decided against him should have been decided in his favour—*Hills* vs. *Ishore Ghose*, Marsh, 151, but does not do so, the appellant should not be put in a worse position by his own appeal, and the most unfavourable order that, should be passed is to dismiss the appeal—*Hem Chunder* vs. *Ahmed Reza*, Marsh., 332.

Does not Apply.—This principle does not cover any questions decided between the co-respondents, and only extends to the contention between the respondent and the appellant who has forced him into Court—*Baboo Shote Lall* vs. *Kishun Singh*, S. D., N. W., 1863, p. 361; unless the decree has proceeded on a common ground of the nature referred to in section 544 [but see *Anund Chunder* vs. *Mohesh Chunder*, 1 W. R., 229, and the remarks on it at 24 W. R., 181]: not followed—*Timmayya* vs. *Lakshmana*, I. L. R. Mad., 215. So where A sued B for possession of land and made C a co-defendant, alleging collusion with B, and the Court decreed the suit against B, but dismissed it against C, holding that she had been long in possession as ryot and there was no collusion, it was held, on an appeal by B, that the plaintiff A should not be allowed to take a cross-appeal as regards the dismissal of his case against C—*Anwar Jan* vs. *Azmut Ali*, 15 W. R., 26. And when A sued B and C, and the suit was dismissed as regards C, it was held that A could not raise the question of dismissal by a cross-appeal on the appeal of B—*Anunto Dass Sein* vs. *Ramjoy*, 11 W. R., 435; *Greesh Chunder* vs. *Gour Mohun*, 7 W. R., 49; and see *Hossein Buksh* vs. *Baroo Beparee*, 5 W. R., 50. Both parties appealed from the decision of the first Court, and the appeals were dismissed. Plaintiff then appealed to the High Court: *Held*, defendant could not, by way of cross-objection, impugn, the decision of the lower Court dismissing his appeal—*Gunga Prasad* vs. *Gajadhar*, I. L. R., 2 Alla., 651. See, however, *Kamat* vs. *Kamat*, I. L. R., 8 Bom., 368; *Timmayya* vs. *Lakshmana*, I. L. R., 7 Mad., 215.

A defendant or respondent cannot be heard by way of cross-appeal against a co-defendant or co-respondent—*Tarucknath Roy* vs. *Tubooroonnissa*, 7 W. R., 39; *Goonomonee Dossia* vs. *Parbutty*, 10 W. R., 326; but see *Timmayya* vs. *Lakshmana*, I. L. R., 7 Mad., 215. In a later case A, B and C sued D and others for possession of 3 kanees of land. The suit was dismissed as to one-half against A and B, decreed as to one-half in favor of B and C under a different title; A and B appealed as regards the portion disallowed, and it was held that D could not raise any question as regards the portion decreed to B and C jointly, as C was not before the Court—*Mooizunnissa* vs. *Mooraree Dhur*, 22 W. R., 314. This certainly appears to unduly limit the section. In any case, if it were considered necessary to have the absent party present, the Court should have given the respondent an opportunity to procure his attendance under section 559—*Mahomed Ameer* vs. *Pran Kishore Deb*, 21 W. R., 338. So in a suit against several persons for damages the single defendant who last appealed, and in appeal the plaintiff objected that the damages were insufficient, and that the other defendant should have been made jointly liable: *Held*, the Court was justified in bringing the other parties before it, in increasing the damages, and assessing them jointly on the original appellant and one of the acquitted defendants—*Anund Chunder* vs. *Mohesh Chunder*, 1 W. R., 229; but see the case at 9 W. R., 273.

Where the defendant does not appeal against nor file objections to the amount awarded to the plaintiff by the Court of first instance, the Appellate Court has no power to reduce it—*Nyanchandra* vs. *Narayan*, I. L. R., 4 Bom., 293.

Objections not Allowed.—A respondent cannot insist on his objections being heard when the appeal is dismissed for default—*Buroda Kant* vs. *Pearee Mohun*, 23 W. R., 57; or if the appellant withdraws from the appeal before the hearing has begun—*Bahodoor Singh* vs. *Bhugwan Dass*, 2 Agra, F. B., 23; *Coomar Poresh Narain* vs. *Watson*, 23 W. R., 229; *Shamachurn Ghose* vs. *Radhakristo*, 14 W. R., 210; *Dhondi Jagannath* vs. *The Collector of Salt Revenue*, I. L. R., 9 Bom. 28; *Maktab Deg* vs. *Hasan Ali*, I. L. R., 8 Alla., 551; or generally when the appeal is dismissed without being decided on the merits—*Ramjiwan* vs. *Chand*, I. L. R., 10 Alla., 587; although if it has been called on he will get his costs—*Ram Pershad Ojha* vs. *Bhurosa*, 9 W. R., 328; and the fact that the appellant has, by withdrawing his appeal, deprived the respondent of the right to have his objection heard is no ground for admitting the latter to appeal after time—*Surbhai Dayalji* vs. *Raghunathji*, 10 Bom., 397.

If once the hearing has commenced, the respondent can insist on having his objection heard and determined—*Venkataramanaiya* vs. *Kuppi*, 3 Mad., 302; *Coomar Poresh Narain* vs. *Watson*, 23 W. R., 229; *Dhondi Jagannath* vs. *The Collector of Salt Revenue*, I. L. R., 9 Bom., 28; if it is brought forward before the respondent has closed his case—*Thakoor Dass* vs. *Gopeekristo*, 15 W. R., 18. Even though it should be ultimately decided that an appeal would not lie—*Kamat* vs. *Kamat*, I. L. R., 8 Bom., 368. See note on section 373, *ante*.

Special Appeals.—In Bengal this section applies to special appeals—*Hills* vs. *Ishore Ghose*, Marsh., 153, section 587, *post*; *In the matter of Pisza Himmut Bahadoor*, B. L. R., 429. Not so in Madras—*Makudu Ravuttan* vs. *Mastan*, 1 Mad., 102. An appellant, who

files objection in the Court below can appeal from the findings on them—*Ganapati* vs. *Sitharam*, I. L. R., 10 Mad., 292.

Stamp.—A cross-appeal raising an objection cannot be in *formâ pauperis*—*Narayana* vs. *Krishna*, I. L. R., 8 Mad., 214; it must be in the form of a memorandum of appeal, should bear the proper stamp and cannot be heard until the stamp shall have been paid—*Sharoda Soondures* vs. *Gobind Monee*, 24 W. R., 179; nor can the Court remit the stamp-duty—*Brojeshwari Dasi* vs. *Guroo Churn*, I. L. R., 11 Cal., 735.

Form of Decree in Cross-Appeals.—See *Ranga Chariar* vs. *Yegna*, I. L. R., 13 Mad., 524; *Rughoobuns* vs. *Asloo*, 20 W. R., 429.

One Month from Date of Service—An appeal should not be set down for hearing on a date less than one month from the date of service—*Sundaram* vs. *Annangar*, I. L. R., 13 Mad., 492.

Extension of Time—Where the respondent, in order to save costs delayed instructing counsel within the prescribed period to draw up objections to the decree, until they had received the paper books, the Court declined to extend the time—*Sulleman* vs. *Joosub*, I. L. R., 14 Bom., 111.

Remand of case by Appellate Court.

562. If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register and proceed to determine the suit on the merits.

The Appellate Court may, if it thinks fit, direct what issue or issues shall be tried in any case so remanded.

Act VIII of 1859, section 351. This section applies to H. C. It has been amended by Act VII of 1888, section 49.

Before this section was amended by Act VII of 1888, where a case had been decided on a preliminary point, and essential evidence had thereby been excluded, and the decree reversed in appeal, then the Appellate Court had the discretionary power to remand the case—*Muniappah Naidu* vs. *Iysamy*, 5 Mad., 313; but now the Court can remand whether evidence has or has not been excluded—*Muhammad* vs. *Muhammad*, I. L. R., 10 Alla., 289; subject to the general rule, that under no circumstances can a case be remanded on account of any error, defect or irregularity in the decision or procedure, unless the error, defect or irregularity affects the merits of the case, or the jurisdiction of the Court—section 578.

Remand not Allowed.—No remand should be allowed if the decision of the first Court has been upheld in great part—*Madhab Chunder* vs. *Ram Guho*, 8 W. R., 303, since it implies a reversal of the first judgment—*Kebul Kishen* vs. *Ambala*, 7 W. R., 326. And where the lower Court has not decided the whole case on a preliminary point—*Banwari* vs. *Samman*, I. L. R., 11 Alla., 488; *Lingammal* vs. *Chinna*, I. L. R., 6 Mad., 239—*i.e.*, before the case is gone into—*Syud Hussun Ali* vs. *Manoowar*, 21 W. R., 413; *Durga* vs. *Hyder*, I. L. R., 7 Alla., 167; *Mudun Mohun* vs. *Bhoggomanto*, I. L. R., 8 Cal., 923; but has gone into evidence—*Goluck Chunder Sein* vs. *Puresh Mahomed*, 25 W. R., 284; the Appellate Court must keep the case on its own file, and decide it, proceeding under section 566, if necessary—*Abrahim* vs. *Abrahim*, I. L. R., 17 Cal., 168; *Santu* vs. *Ramji*, I. L. R., 14 Bom., 232; *Makund Lall* vs. *Hur Bullabh*, 12 C. L. R., 136, and cannot grant a remand, although the lower Court may have confined its decision to limitation—*Rama Kooer* vs. *Lulla Bhugwan Lall*, 22 W. R., 224; *Syud Hussun Ali* vs. *Manoowar*, 21 W. R., 413; but see *Raisingji* vs. *Balavantrao*, I. L. R., 11 Bom., 663; or to one or two issues without finding on the rest—*Raisingji* vs. *Balavantrao*, I. L. R., 11 Bom., 663; *Abrahim* vs. *Abrahim*, I. L. R., 17 Cal., 168; *Banwari* vs. *Samman*, I. L. R., 11 Alla., 488; *Amma* vs. *Kunhunni*, I. L. R., 9 Mad., 355; and this procedure has been approved of by the Privy Council—*Tarakant Banerjee* vs. *Puddomoney Dossee*, 5 W. R., P. C., 63. A remand should not be granted even to take additional evidence—*Mohesh Chunder* vs. *Madhub Chunder Sirdar*, 13 W. R., 85; nor to re-settle issues, the issues being wrong—*Shaikh Futtehoollah* vs. *Oomdanissa*, 14 W. R., 69; otherwise—*Muhammad* vs. *Muhammad*, I. L. R., 10 Alla., 289; nor to amend the plaint—*Farzand Ali* vs.

Yusuf Ali, I. L. R., 2 Alla., 669: not followed—*Lingammal* vs. *Chinna*, I. L. R., 6 Mad., 239. Nor can a case be remanded because the evidence has been imperfectly recorded—*Mohesh Chunder* vs. *Madhub Chunder Sirdar*, 13 W. R., 85; nor for defect of parties—*Ganesh* vs. *Bhikaji*, I. L. R., 10 Bom., 398; nor because several distinct cases have been tried together—*Suadden* vs. *Todd, Finlay & Co.*, 7 W. R., 313; nor for erroneous valuation; but if the valuation affected jurisdiction, the suit should be dismissed—*Augopura Chowdhry* vs. *Meah Bebee*, 10 W. R., 207. Much less should a case be remanded when the applicant asserts that he has proved his case—*Gopal Chunder* vs. *Juggodumba*, 10 W. R., 411; *Mahomed Ashan* vs. *Mahomed Yasin*, 9 W. R., 106; or there has been a local investigation—*Jeebun Kissen Roy* vs. *Dwarkanath*, W. R., 1864, 63. In some cases remands have been allowed on the ground of surprise—*Shib Pershad* vs. *Nobo Kishen*, 17 W. R., 446; or that the Court mistook the nature of the case—*Juggur Nath* vs. *Chutter Narain*, 17 W. R., 410, or to try an issue not properly tried—*Ram Chand* vs. *Kumeenee Debea*, 10 W. R., 236; *Muhammad* vs. *Muhammad*, I. L. R., 10 Alla., 289; but see *Umbika Churn* vs. *Ramdhun*, 11 W. R., 35.

Special Appeals.—As to how far this section applies to special appeals.—See "AS FAR AS MAY BE," section 587, and section 588, cl. (28) *post*, *Muhammad* vs. *Muhammad*, I. L. R., 10 Alla., 289; *Janki* vs. *Nand Rave*, I. L. R., 11 Alla., p. 223.

Effect of Remand.—An improper order of remand is not necessarily void, only irregular—*Savitri* vs. *Ramji*, I. L. R., 14 Bom., 232; *Mirza Jowad Ali* vs. *Hossein*, 8 W. R., 207; it is void—*Cheda Lal* vs. *Badullah*, I. L. R., 11 Alla., 35; *Rameshur* vs. *Sheodin*, I. L. R., 12 Alla., 510; against it an appeal will lie, secton 588, *post*—*Loki Mahto* vs. *Aghoree*, I.L.R., 5 Cal., 144; but this is not necessary, and a party may impeach the remand on appeal from final decree—*Cheda Lal* vs. *Badullah*, I. L. R., 11 Alla., 35; *Savitri* vs. *Ramji*, I. L. R., 14 Bom., 232; and then it will be set aside, provided it has prejudiced the merits of the case or the jurisdiction of the Court—*Nowcowrie Mundul* vs. *Mookta*, 2 W. R., 181; *Nussurudeen Hossein* vs. *Lall Mahomed*, 13 W. R., 234; but not otherwise—*Gung Monee* vs. *Issen Chunder*, 17 W. R., 465 and compare *Chundunath* vs. *Ramanath*, 1 W. R., 69.

New Evidence.—When a case is remanded no express order is necessary to take evidence—*Kristo Churn Chuckerbutty* vs. *Muggun*, 10 W. R., 491; *Ram Sunkur Sein* vs. *Nilkant Biswas*, 9 W. R., 392. Where the order is general, and for a new trial it opens up the whole case—*Tarinee Kant* vs. *Koonj*, 12 W. R., 112; *Gudhadur Dutt* vs. *Shushee Monee*, 21 W. R., 7; and evidence may be received from defendants who did not appear at the former trial—*Koonj Beharee* vs. *Tarinee Kant*, 8 W. R., 285; save so far as the case has been decided by the Appellate Court—*Judoobunsee Kooer* vs. *Asman*, 14 W. R., 370; and the decision was necessary to support the remand—*Deokishen* vs. *Bansi*, I. L. R., 8 Alla., 172; but see *Girdhari Lal* vs. *Crawford*, I. L. R., 9 Alla., 147. Where a case was remanded for trial on the merits, it was held that the lower Court had jurisdiction to decide on the plea of limitation—*Tej Kishen Roy* vs. *Shib Chunder* 3 W. R., Act X, 158; though ordinary remand to try on the merits excludes all questions of limitation and *res-judicata*—*Sheo Sahoy* vs. *Ram Pershad*, 24 W. R., 333; *Sahab Tewaree* vs. *Kishoree Sahoy*, *id.*, 330; *Moru* vs. *Gopal*, I. L. R., 2 Bom., 120; *Datta* vs. *Kasai*, I. L. R., 8 Bom., 535; and jurisdiction—*Temulji Rustamji* vs. *Fadunji*, 5 Bom., 138; and binds the parties to the issues laid down—*Gungaram Dutt* vs. *Chowdhry Junmajoy*, 1 C. L. R., 144; *Suraj Dev* vs. *Chattar*, I. L. R., 3 Alla., 755; and unless an application for review be made, an order for remand made on special appeal is a conclusive determination of the point of law involved, and the correctness of law so laid down cannot be questioned on a second appeal—*Ramkuvarbhai* vs. *Damodhar*, 6 Bom., 146. See, however, *Muhammad Zahur* vs. *Cheda Lal*, I. L. R., 14 Alla., 141.

A party cannot change the nature of his case after remand—*Radha Kishore* vs. *Mahtab Chund*, 3 W. R., Mis., 5; *Norendro Coomar Dutt* vs. *French*, 3 W. R., 198.

When a case is remanded by one Judge, and subsequently comes before another of equal jurisdiction—*Brojo Soondur* vs. *Juggut Chunder*, 21 W. R., 199; *Kharag Prasad* vs. *Durdhari*, I. L. R., 14 Alla., 348; or the Judge's successor—*Lulest Panday* vs. *Byjnath Singh*, 14 W. R., 285; the latter officer cannot set aside the order of remand. So, where a Judge remanded a case to be tried on a certain issue, and directed the Munsiff to give plaintiff a decree according to the decision at which he would arrive, and the case went back againin appeal before another Judge, it was held that the Appellate Court was limited to seeing whether the issue was a proper issue or not; but could not go behind the order—*Bodun Burooah* vs. *Abdool Gunny*, 19 W. R., 281. See also *Suraj Dev* vs. *Chattar*, I. L. R., 3 Alla., 755.

An order to examine witnesses about seals impliedly includes a direction to have the seals produced—Reg. App. No. 3187.

Appeal—An appeal lies from an order of remand, section 588, *post*, and this right is not restricted by section 586, *post*—*Mahadev Narsingh* vs. *Rayho Keshav*, I. L. R., 7 Bom., 292; *Kirto Mohaldar* vs. *Ramjan*, I. L. R., 10 Cal., 525. In such an appeal the High Court may enter into the merit of the case, and if it finds the order defective may still allow the party who won in first Court to retain the benefit of his decree—*Loki Mahto* vs. *Aghoree*, I. L. R., 5 Cal., 144; *Abrahim* vs. *Abrahim*, I. L. R.,

17 Cal., 168; *Badam* vs. *Imrit*, I. L. R., 3 Alla., 675; *Bhav Bhala* vs. *Bapuji*, I. L. R., 14 Bom., 14, see section 588, (cl. 28), *post*. It cannot do so—*Sohan Lall* vs. *Aziz-un-nissa*, I. L. R., 7 Alla., 136; it can—*Deokishen* vs. *Bansi*, I. L. R., 8 Alla., 172.

Effect of Order being Set Aside.—Where an order of remand is set aside in second appeal, as not warranted by this section, the High Court cannot decide any of the questions of fact raised in the suit—*Deokishen* vs. *Bansi*, I. L. R., 8 Alla., 172. When an order of remand is set aside and proceedings subsequent to the order fall with it—*Iatenga Valley Co.* vs. *Chara Co.*, I. L. R., 12 Cal., 45.

Practice after Remand.—When a case is remanded, the lower Court should fix a reasonable date for the parties to appear and carry on the suit—*Haradhun Chuckerbutty* vs. *Protap Narain*, 14 W. R., 401; *Watson & Co.* vs. *Kunhye Bahadoor*, 9 W. R., 294; and if they do not appear, the case should be dismissed—*In re Kalee Mohun Doss*, 17 W. R., 70. No fresh vakalutnama is necessary—*Nobin Monee* vs. *Joy Gopal*, 1 W. R., 276. Costs of the Appellate Court can be recovered only when the order of remand provides for them—*Digambur Chatterjee* vs. *Ram Roodro*, 13 W. R., 39.

When a case is remanded to a District Judge, he should not transfer it to another officer—*Chowdhry Hamedoolah* vs. *Muteeonnissa*, 15 W. R., 574.

If a party, who is offered a remand, elects to go on with the case as it stands, he is estopped from impugning the decision on that point—*Nobho Lall Khan* vs. *Odheranee Narainee*, 3 W. R., 5. Where a case came on before a Court on remand, and the Judge observed that the evidence of witnesses would be unnecessary, the plaintiffs were held justified in not applying to summon any—*Ram Jewun* vs. *Radha Pershad*, 16 W. R., 109.

If, on the return of the case, it appears that the remand order has not been carried out, the Court, in remanding it a second time, should point out the manner in which the carrying out of the previous order secured defective—*Radhabullub* vs. *Anundmoyee*, W. R., Mis., 1864, p. 39.

A review was granted for the purpose of seeing whether a chitta should be admitted and the case remanded for re-hearing: *Held*, it was too late to object to the admission of the chitta in special appeal from the whole decree—*Makhun Kooer* vs. *Tincowree Dutt*, 14 W. R., 22.

N.-W. P Rent Act.—See *Girwar Sing* vs. *Sita Ram*, I. L. R., 11 Alla., 31.

563. Repealed by Act VII of 1888, section 50.

Limit to remand.

564. The Appellate Court shall not remand a case for a second decision, except as provided in section 562.

This section applies to H. C.

Second Decision.—This does not prevent the Court of Appeal remanding a case and directing the Judge to return the plaint—*Lingammal* vs. *Chinna*, I. L. R., 6 Mad., 239.

Shall not Remand.—A wrong order of remand is void, not irregular—*Cheda Lal* vs. *Badullah*, I. L. R., 11 Alla., 35; *Rameshur* vs. *Sheodin*, I. L. R., 12 Alla., 510, not necessarily so—*Savitri* vs. *Ramji*, I. L. R., 14 Bom., 232, p. 235; *Mirza Jowad* vs. *Hossein Bibee*, 8 W. R., 207. See also "EFFECT OF REMAND," section 562, *ante*.

When evidence on record sufficient, Appellate Court may determine case finally.

565. When the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after re-settling the issues, if necessary, finally determine the case, notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

This section applies to H. C. The word "may" has been substituted for "shall" by Act VII of 1888, section 51.

If the evidence on the record is sufficient, the Court should decide the case; if insufficient, then the Court should proceed under the next section—*Bandi Subbayya* vs. *Mandala Palli*, I. L. R., 3 Mad., 96.

Determine the Case.—This does not enable the Court of Appeal to determine a question of fact on the evidence on the record, unless the case which it is set up to support, has been made in the first Court. Thus, where A sued for a declaration as zemindar and his suit being dismissed, he got a declaration as patnidar in the Appellate Court, this decree was set aside by the Privy Council—*Official Trustee* vs. *Krishna Chunder*, 12 Ind. App., 166; I. L. R., 12 Cal., 239. But if all the points in dispute are covered by the issues and there is evidence to decide them, there cannot be a remand—*Rudha Pershad* vs. *Lal Sahab*, 17 Ind. App., 150, p. 156. See note under section 566, *post*.

Special Appeal.—This does not empower the High Court on special appeal to try a question of fact—*Sheo Ratan* vs. *Lappu Kuar*, I. L. R., 5 Alla., 14; *Sohawan* vs. *Babu*, I. L. R., 9 Alla., 26, p. 30; *Girdhari Lal* vs. *Crawford*, I. L R., 9 Alla., 147.

When Appellate Court may frame issues and refer them for trial to Court whose decree is appealed against.

566. If the Court against whose decree the appeal is made has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues for trial, and may refer the same for trial to the Court against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return to the Appellate Court its finding thereon together with the evidence.

This section applies to H. C. The words "and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question" have been repealed by Act VII of 1888, section 52, and the words "if necessary" inserted.

If the first Court has entered on the merits of the case, has fixed the proper issues and taken sufficient evidence (section 565), or has not fixed the proper issues, but taken sufficient evidence (section 565), the Appellate Court must decide the appeal without further delay. Two other cases still remain. The lower Court may have omitted to try a certain issue essential to the right decision of the case set up in the first Court—*Official Trustee* vs. *Krishna Chunder*, 12 Ind. App., 166; I. L. R., 12 Cal., 239; *Mora Soshi* vs. *Ram Chandra* I. L. R., 15 Bom., 24; but see *Chandi Din* vs. *Naraini*, I. L. R., 14 Alla., 366; or it may not have been guilty of any such omission, but decided the case on insufficient evidence. The latter case falls within section 568, the former within the present section—*Runpal Singh* vs. *Joy Mungul*, 11 W. R., 106; *Tiluck Chunder* vs. *Broja Soondur*, 24 W. R., 121. And under it the Appellate Court may at its discretion and on its own motion—*Chotay Lall* vs. *Chunnoo Lall*, 3 C. L. R., p. 468, frame the issues which are essential and send them to the lower Court for trial, but should not remand and direct the lower Court to frame the issues—*Chunderanath Sarma* vs. *Ramanath*, 1 W. R., 69. This is also the course which should be pursued, if the first Court has not formally settled issues and has failed to pass a satisfactory judgment on any important point raised before it—*Greesh Ch. Lahuree* vs. *Mussamut Bhuggobutty Debia*, 13 Moore, 426; *Brojo Soondur* vs. *Futtick Ch.* 17 W. R., 407; see also *Mussamut Mitra* vs. *Syad Fuzl Rub*, 13 Moore, 573; or if the investigation has been wholly irregular and incomplete—*Umer Ali* vs. *Ramzan Ali*, 23 W. R., 347. But it is always dangerous to allow parties to make a new case in the Mofussil Appellate Courts—*Hurpershad* vs. *Sheo Dyal*, 3 Ind. App., 279; and the Court should be cautious in raising an issue unasked—*Sreeman Chunder Dey* vs. *Gopal Chuckerbutty*, 11 Moore, 48; *Sreenath Biswas* vs. *Luckhee Narain Aich*, 24 W. R., 268; and should never allow a point not appearing in the plaint or pleading, or raised in any other way in the first Court, to be framed into an issue—*Ram Narain Roy* vs. *Nilmonee Adhikaree*, 23 W. R., 169; *Pran Kissore Deb* vs. *Mahomed Ameer*, 21 W. R., 333; *Mussamut Ustooram* vs. *Caboo Mahun Lall*, 21 W. R., 333; *Brojo Soondur* vs. *Futtick Chunder*, 17 W. R. 407. See also the remarks of Lord Westbury in *Caton* vs. *Caton*, L. R., 2 H. L., at p. 144. See "**Determine the Case**," section 565, *ante*, and "**Duty of an Appellate Court**," section 573, *post*; "**Additional Evidence**," section 568, *post*.

In a suit for damages for negligence, where the Court may take two or more different views as to the proper measure of damages, the plaintiff must come prepared with evidence as to the proper amount of damages according to the view which the Court adopts; and if he neglects to do so, the Appellate Court is not bound to take additional evidence itself or to send the case back for re-trial—*Anundo Lall* vs. *Boycunt Ram.*, 4 C. L. R., 473.

When a Judge proceeds under this section, he should not reverse the decree of the lower Court and remand the suit—*Bonchares Ghose* vs. *Atnoodeen Biswas*, 24 W. R., 137 [but see *Umbika Churn* vs. *Ramdhun*, 11 W. R., 35], though if he does, no special appeal lies, unless it affects the merits of the case or the jurisdiction of the Court—*Gunga Monee Dassee* vs. *Issur Chunder*, 17 W. R., 465 [but see *Bungo Chunder Banerjee* vs. *Chunder Nath*, 25 W. R., 47]. But he should frame the necessary issues and send them down for trial—*Naraimharav Krishnarav* vs. *Antaji Virupaksh*, 2 Bom., 61; and keep the suit pending till the return of the first Court's finding on the issues with the record of the trial—*Wise* vs. *Ishan Chunder*, 14 W. R., 380.

Effect of Order—The effect of such an order is not a re-hearing, and save as to the issues sent down the first Court has no power to deal with the case—*Gossain Dowlut* vs. *Bissessur*, 22 W. R., 207. The successor of a Judge, who has fixed an issue and sent it down to be tried, cannot go behind the order—*Wise* vs. *Ishan Chunder* 14 W. R., 380; *Kali Kristo Tagore* vs. *Judoo Lall*, 24 W. R., 20. See, however, *Lachman* vs. *Jamna*, I. L. R., 10 Alla., 162. The parties should have the fullest opportunity to produce their evidence—*Latoo Mundul* vs. *Bhoobun Mohun*, 17 W. R., 361.

A Court to which a case is remanded for re-trial on a particular issue amongst others, cannot allow that issue to be abandoned and proceed to try the case upon the other issues raised—*Shib Chunder Lahiri* vs. *Joymala*, 7 C. L. R., 103; nor can the Court refer the case to arbitrator—*Nandram* vs. *Fakir Chand*, I. L. R., 7 Alla., 526, and when the High Court acts under this section the issues cannot be sent to the first Court for decision—*Sabri* vs. *Ganesha*, I. L. R., 14 Alla., 23.

Shall Return its Finding.—Where a Judge has heard the argument on some of the issues and expressed his decision upon them, he is not bound to hear the whole case on the return made to another issue framed under this section—*Lachman* vs. *Jamna*, I. L. R., 10 Alla., 162.

Scope of the Section.—It was doubted whether the corresponding section of Act VIII of 1859 applied to special appeal—*Kali Kristo Tagore* vs. *Judoo Lall*, 24 W. R., 20. A doubt has been also expressed as to the power of a single Judge sitting in *special appeal case* to refer issues for trial—*Kali Kristo Pal* vs. *Ram Chunder*, 9 C. L. R., 461. See note under section 568.

See, in connection with the section, *Shepherd* vs. *Henderson*, 7 App. Cas., 49.

Appeal.—There is no appeal from an order referring issues for trial—*Kali Kristo Pal* vs. *Ram Chunder*, 9 C. L. R., 461; but apparently it would be liable to review—*Bibi Mutto* vs. *Ilahi Begum*, I. L. R., 6 Alla., 65; *Harohur* vs. *Budds*, 13 C. L. R., 254.

Finding and evidence to be put on record. Objections to finding.

567. Such finding and evidence shall become part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to the finding.

Determination of appeal.

After the expiration of the period fixed for presenting such memorandum, the Appellate Court shall proceed to determine the appeal.

This section applies to H. C.

The Appellate Court, on the return of the finding and evidence—*Shumboo Chunder* vs. *Russick Chunder*, 15 W. R., 346, should fix a reasonable time for the parties to file their objections; one day is not sufficient—*Bukhtouree* vs. *Mohun Lall*, 3 Agra, 96. After the period has expired, the Court may at its discretion receive or decline to receive any written objection—*Damodur Das* vs. *Gokul Chund*, I. L. R., 7 Alla., 692, but in any case it proceeds to determine the appeal—*Chotay Lall* vs. *Chunnoo Lall*, 3 C. L. R., p. 468; *Lachman* vs. *Jamna*, I. L. R., 10 Alla., 162; and is bound itself to consider the finding of the lower Court on the merits; it is not precluded from hearing arguments for and against the finding at the hearing of the appeal—*Umed Ali* vs. *Salima*, I. L. R., 6 Alla., 383; *Woomesh Chunder* vs. *Jonardun Hajrah*, 15 W. R., 235; *Akbari Begum* vs. *Welayat Ali*, I. L. R., 2 Alla., 908; *Umed Ali* vs. *Salima*, I. L. R., 6 Alla., 383; [but see *Ashrufoonnissa Begum* vs. *Stewart*, 9 W. R., 438], but if no objection is raised by either party within the period allowed, neither has a right to be heard; though the Court has discretion to allow objections afterwards and if no objection to raised then or at the hearing, the Appellate Court is not bound to amend the finding—*Ratan Singh* vs. *Wazir*, I. L. R., 1 Alla., 165; *Kali Doss Roy* vs. *Khirod Soondures Debia*, 16 W. R., 300, but still it should not accept it blindly—*Mumtaz Begum* vs. *Fateh Hussein*, I. L. R., 6 Alla., 391; *Akbari Begum* vs. *Wilayat Ali*, I. L. R., 2 Alla., 908. See also the case of *Chotay Lall* vs. *Chunnoo Lall*, I. L. R., 4 Cal., 744.

Objection : Special Appeal—Where an issue has been directed to be tried in special appeal and the finding and evidence returned, a special appellant cannot take an objection, going to the merits, such as that the finding is contrary to the evidence. The objection must be such as would form a ground of special appeal—*Girdhari Lal* vs. *Crawford*, I. L. R., 9 Alla., 147; *Gopal Singh* vs. *Jhakri*, I. L. R., 12 Cal., 37; and if no objection is taken to the finding on new issues in the first Court, it cannot be raised in special appeal—*Hinde* vs. *Ponnath Brayan*, I. L. R., 7 Mad., 52; and see *Gopal Singh* vs. *Jhakri*, I. L. R., 12 Cal., 37; *Girdhari Lal* vs. *Crawford*, I. L. R., 9 Alla., 147. See note under section 565, *ante;* and section 583, *post.*

Production of additional evidence in Appellate Court.

568. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(*a*) the Court against whose decree the appeal is made refuses to admit evidence which ought to have been admitted, or

(*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment; or for any other substantial cause,

the Appellate Court may allow such evidence to be produced or document to be received, or witness to be examined.

Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission.

This section applies to H. C.

Additional Evidence.—See "EFFECT OF ORDER," section 569, *post;* "FORM OF ORDER," section 570, *post.*

New Case.—It is always dangerous to allow parties to make a new case and call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially so in the Mofussil Courts in India—*Hurpurshad* vs. *Sheo Dyal*, 3 Ind. App., 259, p. 279; *Sangram Singh* vs. *Rajah Bahi*, I. L. R., 12 Cal., 219; *Ramdass* vs. *The Official Liquidator*, I. L. R., 9 Alla., 366; and the power given under this section should be exercised very sparingly by the Courts, except at the instance of the parties; because, when it is done not at the instance of the parties, but at the suggestion of the Court itself, witnesses may be called who are not the witnesses the parties themselves would have thought fit to adduce, and it is possible that the new enquiry may be itself imperfect and not sufficiently extensive to answer the purposes of justice—*Sreemanchunder Dey* vs. *Gopaulchunder*, 11 Moore, 28, p. 48. Even on the application of parties great caution should be exercised in admitting new evidence. *In the case of Ram Persad Sookul* vs. *Rajunder Sahoy*, 6 W. R., 265, Peacock, C. J., said:—"I am of opinion that the case ought not to be remanded for the purpose of enabling the plaintiff to make out a fresh case. Each of the parties had to prove his case in the lower Court, and each of them ought at that time to have given all the evidence in his power in support of his case. If we were to remand cases for the purpose of allowing parties to improve their respective cases by calling further witnesses, there would be no end to litigation." Properly speaking, it is only when a Court sees that, from some inadvertence, mistake or surprise, a party has not adduced evidence which he was capable of adducing, and that he is likely to be prejudiced by the omission, that the Court should allow further evidence to be taken—*Gowhur Ali Khan* vs. *Salheena Khanum*, 15 W. R., 507; *Bigsby* vs. *Dickenson*, 4 C. D., 24. See also *Weston's case*, 10 C. D., at p. 582. It can exercise the power even after the case has been remanded on special appeal—*Kali Kristo Tagore* vs. *Judoo Lall*, 24 W. R., 20. It is not necessary that the party, before applying to the Appellate Court under this section, should have sought for a review of the original Court's judgment, and asked it to receive the evidence—*Ram Lall* vs. *Rung Lall*, 17 W. R., 47; see note under section 566, *ante.*

Documents.—An application to admit fresh documents, the genuineness of which can be tested with certainty stands on a much more favourable footing than an application to admit fresh parol evidence after the pinch and pressure of the case has been sustained—*In re Wiltshire Iron Company*, 3 Ch. App., 449; but they should not be

admitted if the appellant cannot show sufficient cause—*Nudiar Chand* vs. *Chunder Sikhur*, I. L. R., 15 Cal., 765, or if having had an opportunity of tendering them in the Court below he omitted to do so—*Ex-parte Isaac*, 6 Ch. App., 58; *Bebee Zahrah* vs. *Bhugwan*, 16 W. R., 211; or resisted their production—*Manohar* vs. *Lakhminarain*, I. L. R., 12 Bom., 247; or if they do not bear on the issues tried by the Court of first instance, an affidavit explanatory of appellant's conduct in carrying on the case is inadmissible—*Leslie* vs. *Allender*, 17 W. R., 390.

Evidence Taken—Where the first Court refused plaintiff's application for a postponement to summon five of his witnesses, but postponed the case for ten days as 15 witnesses were present, new evidence was allowed—*Abelakh Roy* vs. *Guggun Bhuggut*, 22 W. R., 268; and so where plaintiff was not examined on a certain point, and at the close of the defendant's case one of the witnesses gave evidence discrediting him, and it was of such a nature as could not be easily fabricated, the Court of Appeal allowed rebutting evidence, although no application had been made in the lower Court till the close of the speech of the plaintiff's counsel—*Bigsby* vs. *Dickenson*, 4 C. D., 24; and see *Komuroodeen* vs. *Monye Mundul*, 16 W. R., 220. And where a Munsiff, without framing issues or examining the plaintiff, passed a decree in his favour upon an admission made by the defendant and upon the inspection of a document that was upon the record of a former suit, and the Judge in appeal reversed the decison on account of the want of evidence, it was held that the Judge should have proceeded under this section, since the Munsiff, though asked, did not take the plaintiff's evidence—*Appa* vs. *Vithoba*, 6 Bom., 88. See also *Bhoobun Mohun* vs. *Ainooddeen*, 1 Shome, 147; *Khuda Buksh* vs. *Imam Ali*, I. L. R., 9 Alla., 339. See *Evans* vs. *Benyon*, 37 C. D., 329, p. 339.

A local enquiry may be ordered under this section—*Roy Sooltan* vs. *Laloo Kooer*, 17 W. R., 300.

The improper reception of evidence under this section is not sufficient to reverse a decision, if, independently of that evidence, there is sufficient evidence on the record—*Jugadindra Bunwari* vs. *Bhabatarani*, 5 B. L. R., App., 54; 14 W. R., 19.

After a review has been admitted, fresh evidence may be taken under this section—*Beharee Lall* vs. *Troyluckho Moyee*, 12 W. R., 223; *Gunesh Ram Surmah* vs. *Rohinee*, 14 W. R., 236.

Practice.—When a Court exercises the power allowed it under this section the reason for so doing should be invariably recorded or minuted on the proceedings—*Sreemanchunder* vs. *Gopaulchunder*, 11 Moore, 28, p. 48; *Hurpurshad* vs. *Sheo Dyal*, 3 Ind. App., 259; in open Court in the presence of the parties—*Gunput Roy* vs. *Ram Deour*, 21 W. R., 416; but it is not a condition precedent to the reception of the evidence—*Gunga Gobind Mundul* vs. *The Collector of 24-Pergunnahs*, 11 Moore, 368; so that the omission to do so would not render the evidence inadmissible—*Bhugan Chunder* vs. *Raj Coomar*, 13 W. R., 303; *Gopal Singh* vs. *Jhakri*, I. L. R., 12 Cal., 37, but see *Hafiz Abdul* vs. *Sri Kissen Rai*, I. L. R., 11 Cal., 139. See also *Beharee Lall* vs. *Troyluckho Moyee*, 12 W. R., 223.

In England a person desiring to produce further documentary evidence should give notice to the other side that he will apply at the hearing for leave to produce it—*Hastie* vs. *Hastie*, 1 C. D., 562; *Hyde* vs. *Wardin*, 3 Ex. D., 74; but if he wishes to examine witnesses, he must apply for leave by motion previous to the hearing of the appeal—*Dicks* vs. *Brooks*, 13 C. D., 652. See also *Cahill* vs. *Martin*, L. R. Ir., 7 C. D., at p. 365; *Jones* vs. *Chennell*, 8 C. D., at p. 504.

Second Appeal.—A special appeal will not lie from an order refusing to admit additional evidence—*Kulpo Singh* vs. *Thakoor Singh*, 15 W. R., 429; *Golam Mukdoom* vs. *Hafeezoonnisia*, 7 W. R., 489 [the remedy is by review—*Ram Lall* vs *Rung Lall*, 17 W. R., 47; *Mohesh Chunder Sheet* vs. *Soshee Mokhee*, 6 W. R., 196, or from an order admitting it; but both may be reviewed in an appeal from the final decree unless the appellant has taken advantage of the order, and so cannot subsequently impugn it in appeal—*Damoodur Dass* vs. *Ritoo Sing*, 24 W. R., 325]. If it be found that evidence has been improperly admitted, the Appellate Court may, apparently, reject it—*Mohesh Chunder* vs. *Madhub Chunder*, 13 W. R., 85. See *Juggut Indar Bunwaree* vs. *Bhubo Tarinee*, 14 W. R., 19.

When evidence is taken by the first Appellate Court, it does not justify the High Court in special appeal referring to the evidence and dealing with the case as a regular appeal—*Mahomed Kamil* vs. *Abdool Lateef*, 23 W. R., 51; *Gopal Singh* vs. *Jhakri*, I. L. R., 12 Cal., 37. See "OBJECTION," section 567, *ante*.

Mode of taking additional evidence.

569. Whenever additional evidence is allowed to be received, the Appellate Court may either take such evidence, or direct the Court against whose decree the appeal is made, or any other subor-

dinate Court, to take such evidence and to send it when taken to the Appellate Court.

Act VIII, 1859, section 356. This section applies to H. C.

The lower Court taking evidence under this section acts in a ministerial capacity, and the parties may object to the admissibility of the evidence recorded before it without objection, when it is submitted for the consideration of the Appellate Court—*Ram Joy Surmah* vs. *Prankishen Singh*, 2 W. R., 80.

Effect of Order.—If the order is for particular evidence, the lower Court cannot go beyond it. If the order directed the examination of A, the lower Court could not examine A and B—*Bolakee Loll* vs. *Radha Singh*, 1 W. R., 357. But in a case where A was directed to be examined and was ill, his agent was allowed to be examined in his place—*Syud Rezza* vs. *Enaet Hossein*, 1 W. R., 330. See "ADDITIONAL EVIDENCE," section 568, *ante*; "FORM OF ORDER," section 570, *post*.

Points to be defined and recorded.

570. In all cases where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

This section applies to H. C.

Form of Order.—The Principal Sudder Ameen having found the first and second issues in favour of the plaintiff, upon evidence which was not legally admissible against the defendants, Burroda and Promoda, and Jankishore and Nobokishore Lahoree (or other reason), and this Court not being able to pronounce a satisfactory decree upon the merits without further evidence, and being willing to allow the plaintiff to advance further evidence as he may think necessary, it is therefore ordered that the plaintiff be at liberty to adduce such further evidence, provided he give security to the satisfaction of the Principal Sudder Ameen for the restitution of the property taken in execution of the decree of the lower Court, and for the due performance of the decree of this Court. If the plaintiff neglect to give such security within one month from this date, or within such further time as may be allowed on application to this Court, this appeal will be dismissed with costs and interest, and the decree of the lower Court reversed. The evidence to be adduced is to be confined to the following points :—

1st.—Whether, according to the usage of the family, the plaintiff, as eldest son, is entitled to inherit on the death of his father ?

2nd.—Whether, if any usage prevailed in the family, it was waived or abandoned on the death of the father ?

3rd.—Whether there is anything contained in any grant or other document relating to the estate, either before or after the accession of the British Government, such as a restriction against alienation or division of the estate which would prevent the plaintiff from being bound by the acts or laches of the father ?

If further evidence be adduced by the plaintiff, the defendants are to be at liberty to adduce such further evidence as they may consider necessary. The evidence is to be taken by the Principal Sudder Ameen, and returned to this Court. All exhibits intended to be used by either party are to be filed within six weeks from the date of the arrival of this to the Court of the Principal Sudder Ameen, or within such further time as the Principal Sudder Ameen may allow for that purpose. As soon as the exhibits shall have been filed, an early day is to be fixed by the Principal Sudder Ameen for taking and recording the evidence. The record in this case to be returned to the Principal Sudder Ameen, and to be sent back to this Court with the evidence. Upon the return of the evidence either party will be at liberty to apply to the Chief Justice to fix a day for hearing the case—*Ramjoy Surmah Mozoomdar* vs. *Rajah Purun Kishen Singh*, W. R., Sp. No., 125..

Of the Judgment in Appeal.

Judgment when and where pronounced.

571. The Appellate Court, after hearing the parties or their pleaders, and referring to any part of the proceedings, whether on appeal or in the Court against whose decree the appeal is made, to which reference may be considered necessary, shall pronounce

judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders.

This section applies to H. C.

Hearing.—When a case is called up for hearing in regular appeal, the Court should allow the parties or their pleaders to submit the evidence on the record and to comment on it—*Lala Juggessur* vs. *Gopal Lall*, 15 W. R., 54. The senior pleader present has entire control of the appeal—*Sreenesebush Roy* vs. *Umbica Churn*, 12 W. R., 375. Appellants will ordinarily be restricted to their written grounds of appeal—*Mackintosh* vs. *Watson*, 3 W. R., Act X, 123; and where a written ground is not referred to, when the appeal comes on, the Court need not notice it—*Yusoof Ali* vs. *Fyzaonissa Khatoon*, 15 W. R., 296.

Duty of an Appellate Court.—See "**Determine the Case.**" section 565, *ante*, and "**First Raised in Special Appeal, "Changing Suit,"** section 584, *post*.

Point not Raised First in Appeal.—As a rule, an objection such as that the proper parties are not before the Court—which, if taken in the first Court, might have been cured should not be listened to in appeal—*Dhurm Dass* vs. *Shama Sundri Lebiah*, 3 Moore, at p. 242; *Nural Hossein* vs. *Sheosahai*, I. L. R., 20 Cal., 1; see, however, the case of *Abdulla* vs. *Subbarayyar*, I. L. R., 2 Mad., 346, *Subba* vs. *Nagappa*, I. L. R., 12 Mad., 353; *Vithu* vs. *Dhondi*, I. L. R., 15 Bom., 407. And subject to this rule an Appellate Court cannot raise an issue in appeal not raised in the Court of first instance—*Brajo Soondur* vs. *Futick Chunder*, 17 W. R., 407; *Kashinath Roy Chowdhry* vs. *Roy Dwarkanath*, 7 W. R., 61; *Moung Hmoon* vs. *Mah Hpwah*, 11 Ind. App., 109, p. 120; *Madhab Ali* vs. *Hosein Reza*, 4 C. L. R., 52; but see *Madho Pershad* vs. *Gajadhar*, 11 Ind. App. 186, p. 193; or have the case argued on grounds not presented to the Court below — *Caton* vs. *Caton*, L. R., 2 H. L., at p. 144; *The Official Trustee* vs. *Krishna Chunder*, 12 Ind. App., 166, I. L. R., 12 Cal., 239; *Kachubhai* vs. *Krishnabhai*, I. L. R., 2 Bom., 625; see, however, *Keenan* vs. *Murphy*, L. R. Ir., 8 Q. B. D. 285; *Hickson* vs. *Lambard*, L. R., 1 Eng. App., 324; but when an issue is raised, care should be taken that the parties should have the fullest opportunity of producing evidence on it—*Latoo Mundul* vs. *Bhoobun Mohun*, 17 W. R., 361.

A Court should not interfere with a finding not appealed against—*Kalee Doss*, vs. *Khiroda Soonduri*, 16 W. R., 300; *Mussamut Ritoorraj* vs. *Oojagur Singh*, 15 W. R., 227; *Appee* vs. *Heera Nund*, 3 Alla., 44; *Kalee Coomar* vs. *Kristo Kishore*, 14 W. R., 196; even though it be on limitation—*Alimunnissa* vs. *Syed Hussein*, 6 C. L. R., 267; *Rughunath Singh* vs. *Purseshram*, I. L. R., 9 Cal., 935. Thus on an appeal as to costs only, it cannot remand the case for trial on the merits—*Muthra Pershad* vs. *Bundee Roy*, 5 Alla., 20.

An Appellate Court should not reject evidence admitted below—*Mohabeer Doss* vs. *Lalla Roy*, 1 W. R., 12; nor decide the case not on the evidence, but upon the allegations in the plaint—*Suttrooghun Puttee* vs. *Manik Ram Gangooly*, *id.*, 199; nor dismiss the suit because it was brought as a rent-suit—*Ahmed Kubeer* vs. *Mackrae*, 25 W. R., 417; nor because the claim was greatly exaggerated—*Ram Chunder Chowdhry* vs. *Mariott*, 15 W. R., 465; nor interfere with the result of a local enquiry—*Monkee Dumber* vs. *Monkee Bhullunder*, 15 W. R., 423; especially when the Judge himself has inspected the spot—*Brindabun Bharottee* vs. *Dhununjoy Narain*, 18 W. R., 452.

Points Raised First in Appeal.—Care should be taken that injustice should not be done by interpreting the pleadings too strictly—*Gunga Pershad Saho* vs. *Maharani Bibi*, 12 Ind. App., 47, p. 51; and the Judge of the first appeal has jurisdiction to take cognizance of a defence raised in the grounds of appeal, though not raised, in the first Court—*Madho Pershad* vs. *Gajadhar*, 11 Ind. App., 186; or a title in support of the claim—*Sunduri* vs. *Mudhoo Chunder*, I. L. R., 14 Cal., 592. The rule that the Court of Appeal should not decide the case on a new point which should be observed where the parties have litigated on a certain state of facts—*Lukhee Dossee* vs. *Mahomed Afzul*, 2 W. R., 2, does not refer to cases in which the plaintiff has failed to prove this basis of his claim such as notice to quit, the infirmity can be pointed out in special appeal—*Abdulla* vs. *Subarayyar*, I. L. R., 2 Mad., 346; *Subba* vs. *Nagappa*, I. L. R., 12 Mad., 353; *Vithu* vs. *Dhondi*, I. L. R., 15 Bom., 407; and see *Khaja Ahsanulla* vs. *Hurri Churn*, 19 Ind. App., 191; nor hold when the points raised are as to jurisdiction—*Ram Ruttun Bhuggat* vs. *Bukaoolah*, 1 W. R., 259; *Aukhil Chunder* vs. *Moheesee Mohun*, 4 C. L. R., 491; *Sethu* vs. *Venkatrama*, I. L. R., 9 Mad., 112; *Nagamma* vs. *Subba*, I. L. R., 11 Mad., 197, or limitation—*Okhetoonissa* vs. *Koochil Sirdar*, 2 W. R., 45, or *res-judicata*—*Koylasnauth Chund* vs. *Monmoheeny*, Marsh., 276; *Muhammad Ismail* vs. *Chattar Singh*, I. L. R., 4 Alla., 69; but see *Vaythenatha* vs. *Sami Pandither*, I. L. R., 3 Mad., 116, or go to bar the suit—*Sarasvati* vs. *Puchanna Setti*, 3 Mad., 258. But where an issue, which should have formed the subject of a regular suit, was contested on the merits in an interlocutory proceeding, the Court of Appeal would not allow any objection to the form of the litigation to be taken in regular appeal—*Gilbert* vs. *Endean*, 9 C. D., at p. 266; *Azzedin* vs. *Ramanugra*, I. L. R., 14 Cal., 605. An objection on the ground of misjoinder should not be allowed to be raised for the first time in the Court of Appeal—*Fakirapa* vs. *Rudrapa*, I. L. R., 16 Bom., 120; nor

should any objection to granting a declaratory decree be allowed where the case was heard on the merits—*Maganlal* vs. *Govindlal*, I. L. R., 15 Bom., 697; compare *Maina* vs. *Brij Mohan*, 17 Ind. App., 187. See "REVERSED," section 578, *post*, "FIRST RAISED ON SPECIAL APPEAL," section 585, *post*. As to objections to evidence admitted in the first Court, see "OBJECTIONS WHEN MADE," section 187, *ante*.

Judgment of Court.—The parties to the suit are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions; though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect—*The Glannibanta*, 1 P. D., 287; *Tayammaul* vs. *Sashachalla Naiker*, 10 Moore, 436; *Sheikh Muhammad* vs. *Zubaida*, 16 Ind. App., 205, p. 211; *Smith* vs. *Chadwick*, 9 App. Cas., 187, p. 194. *In the case of Bigsby* vs. *Dickenson*, 4 C. D., 29; this proposition was re-affirmed. James, L. J., said:—"With respect to the great weight due to the decision of a Judge of the Court of first instance, whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements, I repeat, and adhere to, what we said in the case of *The Glannibanta* (1 P. D., 287). Of course, if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened. But, then, that would be in truth doing away with the right of appeal in all cases of nuisance, for there is never one brought into Court in which there is not contradictory evidence, and there have been, I am satisfied, a larger percentage of appeals in these cases than in any other." So it has been held that the Judge of the Appellate Court should state his own views of the case, and should not confine himself to approving of those of the Court of first instance—*Rohimani Dabi* vs. *Zamirudin*, 8 C. L. R., 597; *Kirani Ahmedula* vs. *Subabhai*, I. L. R., 8 Bom., 28; whether it has been remanded under section 562 or dealt with under section 566—*Uhmed Ali* vs. *Salima*, I. L. R., 6 Alla., 383; *Mumtaz Begam* vs. *Fateh Husain*, I. L. R., 6 Alla., 391. There are decisions which are difficult to reconcile with this doctrine; such as that an Appellate Court commits an error in law in disbelieving witnesses believed by the first Court, unless there are *good reasons* for so doing—*Nobin Chunder* vs. *Bungo Chunder*, 25 W. R., 363; *Hoymobutty Dossee* vs. *Sreekishen Nundee*, 14 W. R., 58; *Anund Chunder*, vs. *Rutnessur Doss*, 25 W. R., 50; or that it is not justified in believing a witness whose demeanour has been declared not satisfactory—*Gopee Nath Mookerjee* vs. *Boddhumunt Mal*, 25 W. R., 26.

Concurrent Judgment.—Although the Appellate Court should form its own opinion, it should bear in mind that the advantage which the Judges of the first Court have of forming a correct opinion on the credibility of the witnesses affords a strong presumption in favour of the correctness of their decisions. The Privy Council has declared that, in a case of disputed fact, when they appear to have been properly and diligently investigated in the Courts below, and their Lordships can find no palpable mistake in the appreciation by the Court below of the evidence, they never advised Her Majesty to reverse a decree which is brought before them under such circumstances—*Chunder Monee* vs. *Munmoheenee*, 8 Moore, 489; *Musadee Mahomed* vs. *Meerza Ally*, 6 Moore, 49; *Mudhoo Soodun* vs. *Suroop Chunder*, 4 Moore, 431; *Ram Lal* vs. *Mehdi Husain*, I. L. R., 17 Cal., 882; and this, to a great extent, is the practice in India—*Heralall Chuckerbutty* vs. *Moheshchunder Ghosal*, Hyde, 105; but the distinction, as laid down in *Saroda Soondery Dossee* vs. *Tincowry Nundy*, 1 Hyde, 223 is, that "the rule of the Privy Council not to disturb a judgment of a Court in India upon a question of a credibility of witnesses, unless it is manifestly clear from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusions drawn from such evidence [*Misadee Mahomed Cozin Sheranee* vs. *Meerza Ally Mahomed Shooshy*, 8 Moore, P. C. Cases, p. 110] however necessary as regards a Court of Appeal far removed from India, would hardly be extended, as one equally necessary and applicable with the same strictness to a Court of Appeal in India, which has the opportunity of calling witnesses and has all the advantages to be derived from a personal acquaintance with the people, their feelings, habits and character, as well as other local advantages." But see *Lallah Jha* vs. *Bibee Tullebmatool Zuhra*, 21 W. R., 437; *Mahomed Salleh* vs. *Nusseeroodeen Hossein*, *id.*, 284.

Presumption in Favour of First Court—The presumption is in favour of the judgment of the lower Court, and the Appellate Court should not interfere unless it is shown to be wrong—*Tahboonissa* vs. *Koomar Sham*, 15 W. R., 228; *Shetabuee Biswas* vs. *Molamdee Mundul*, 25 W. R., 30; manifestly wrong—*Wise* vs. *Sunduloonissa Chowdhrain*, 11 Moore, 181; and then the Appellate Court should show the grounds on which it comes to an opposite conclusion—*Munsoob Bibee* vs. *Ali Meah*, 17 W. R., 358.

Language of judgment.

572. The judgment shall be written in English; provided that if English is not the mother-tongue of the Judge, and he is not able

to write an intelligible judgment in English, the judgment shall be written in his mother-tongue or in the language of the Court.

This section applies to H. C.
See note under section 200, *ante*.

Translation of judgment.

573. When the language in which the judgment is written is not the language of the Court, the judgment shall, if any party so require, be translated into such language, and the translation, after it has been ascertained to be correct, shall be signed by the Judge or such officer as he appoints in this behalf.

This section applies to H. C.

Contents of judgment.

574. The judgment of the Appellate Court shall state—

(*a*) the points for determination ;

(*b*) the decision thereupon ;

(*c*) the reasons for the decision ;

(*d*) when the decree appealed against is reversed or varied, the relief to which the appellant is entitled

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Date and signature.

This section applies to H. C.

Points for Determination.—The judgment must be confined to the issues tried in the lower Court—*The Official Trustee* vs. *Krishna Chunder*, 12 Ind. App., 186; *Lachho* vs. *Harsahai*, I. L. R., 12 Alla., 46. See note under section 566; *ante*.

Reasons.—Not the reasons for coming to any conclusion of fact, but the reason-showing upon what points of fact or law the decision runs—*Ramessur Bhuttacharjee* vs. *Bhanoo*, 12 W. R., 272.

Contents of Judgment.—It is incumbent on an Appellate Court to state in the judgment the different points mentioned in this section—*Shurbessur Ghose* vs. *Sadhoo Churn Ghose*, 15 W. R., 130; and give its reasons—*Gopalrao* vs. *Kishore*, I. L. R., 9 Bom. 527; *Sohawan* vs. *Babu Nand*, I. L. R., 9 Alla., 26; even if it generally confirms the decision of the lower Court—*Radha Gobind* vs. *Ram Kishore*, 8 W. R., 340; *Rajoo* vs. *Raj Coomar Singh*, 7 W. R., 137; *Khetlur Mohun* vs. *Bhyrub Chundar*, 3 W. R., 126; *Bhaghut Khun* vs. *Puddo Bewa*, 3 W. R., 192; *Korban Ali* vs. *Askan Ali*, 4 W. R., 4.

Where the judgment was "the appeal dismissed with costs," the judgment was set aside—*Srikant Das* vs. *Huri Das Pal*, 11 C. L. R., 131, and where it ran as follows: "This is a dispute as to whom a yard in front of a house occupied by the plaintiff belonged. The evidence is conflicting. The lower Court held that of the plaintiff to be the most creditable, and decreed in his favour. The defendants appeal on the merits. I see no ground to dispute the propriety of the lower Court's decision The appeal is dismissed." It was held, that simply recording the result of the Court's judgment that no grounds appeared to dispute the propriety of the lower Court's decision was not sufficient, as the section required the judgment should contain the points for decision, the decision, and the reasons for the decision—*Rughobur Sahai* vs. *Chattraput*, 2 Agra (F. B.), 73. So, in another case, the Judge, having stated the claim and answer, proceeded as follows: "Munsif decreed the case against which the defendant appeals. Now I have to see whose purchase is true, and before the dispossession who was in possession. From the plaintiff's registered kobala, chitta, kabooleut, and witnesses, it has been proved that the plaintiff is the real purchaser and was in possession, and the kobala was registered some months after by Mahomed himself when the defendant registered his; after that again, the defendant, to prove the gift, has filed in this Court the Deputy Collector's roobakaree in

which the gift appears; but that does not signify, because the plaintiff's kobala is prior to that of the defendant; so the appeal is dismissed with costs." *Held*, he should not have confined himself to saying the plaintiff's evidence proved plaintiff's case, but should have stated what the evidence was, and in what way and for what reason it proved the plaintiff's case—*Trilochun Dutt* vs. *Ishen Chunder*, 3 W. R., 176. So where the Judge said—"It is unnecessary, therefore, to record any finding on the second issue; but, if necessary, I would hold it clearly proved, by the evidence in the case, that the land does not belong to the respondent, and that Parvatibai was entitled to mortgage it"—he was directed to determine the issue—*Kamat* vs. *Kamat*, I. L. R., 8 Bom., 368. So where a Judge disposed of the case in the following words: "The execution of the defendant's deed of sale is proved, and the Munsif is altogether mistaken in alleging that there were any erasures in it," it was considered insufficient—*Imrit Singh* vs. *Koylashoo Koer*, 11 W. R., 559. And where a Judge discredited witnesses without giving his reasons, as where he found a lease not proved, because "beyond the oral evidence of the witness before whom it was executed, there is an absence of all corroborating evidence"—*Dhun Rae* vs. *Ramphul Rae*, 2 Alla., 109; or stated that "the claim is absurd," or simply that "there is no proof of any just claim"—*Hem Chunder* vs. *Syed Ahmed Reza*, Marsh., 333; or that the defence is "ridiculous" or "absurd," without giving reasons—*Juggessuree Debia* vs. *Gudhadhur*, 6 W. R., Act X, 21; or gave no opinion at all, but merely concurred with the first Court—*Ommutul Fatima* vs. *Janee Khanum*, 1 W. R., 295; *Khelluck Chunder* vs. *Nund Ram*, 2 W. R., 7; or merely said that he considered the "Munsif's decision fair and equitable:" in all these cases the judgments have been considered imperfect—*Kristna Reddi* vs. *Srinivasa*, 5 Mad., R., 174. But where the decision of a case involves issues of fact chiefly, and the first Court has gone into the evidence carefully, the Court, if it agrees with the lower Court, is not bound to state in detail the reasons previously recited and in which it concurs—*Lalla Juggessur* vs. *Gopal Lall*, 15 W. R., 54; *Shah Ekbal Hossein* vs. *Bunee Sahoo*, 25 W. R., 12. The rule should, however, be followed strictly when the judgment of the first Court is reversed—*Kartick Nepit* vs. *Porsonomoyee Naptinee*, 2 W. R., 77; *Munsoob Bibee* vs. *Ali Meah*, 17 W. R., 358; *Shathuk Paul* vs. *Gudhadur Roy*, 4 W. R., 100; although it is not necessary to meet categorically every one of the arguments advanced by it—*Krishnendro Roy* vs. *Digumburee Debia*, 16 W. R., 15; or to give a review or setting forth of the whole of the evidence—*Noor Mahomed* vs. *Zuhoor Ali*, 11 W. R., 34.

High Court.—The same rule applies to judgments passed by the High Court on appeal—*Katchekaleyana* vs. *Kachivijaya*, 12 Moore, 502; and to cases remanded for the trial of issues—*Umed Ali* vs. *Salima*, I. L. R., 6 Alla., 383; it is doubtful if it applies to cases in special appeal where the Court upholds the judgment for the reasons given by the Court below—*Sundari Bibi* vs. *Biseshar Nath*, I. L. R., 9 Alla., 93. See section 633, *post*.

Special Appeal—The mere omission to record a judgment is not a good ground of special appeal—*Golam Hossein* vs. *Ram Doyal*, 12 W. R., 152; *Bisnarath Malti* vs. *Baidyanath*, I. L. R., 12 Cal., 199; otherwise in Allahabad—*Sohawan* vs. *Babu*, I. L. R., 9 Alla., 26; but if the same Judge is in office, the High Court may, if it considers it necessary—*Shumshuroddy* vs. *Jan Mohomed*, 21 W. R., 260, keep the case in special appeal, but return the proceedings to the lower Court and require the Judge to state his reasons—*Dolee Chand* vs. *Oomda Begum*, 18 W. R., 473, or if he is not in office direct a retrial—*Kristo Chunder* vs. *Ram Brohmo*, 20 W. R., 403; *Assanullah* vs. *Hafiz Mahomed* I. L. R., 10 Cal., 933.

See note on section 203, *ante*.

Decision when appeal is heard by two or more Judges.

575. When the appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

If there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed:

Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court, and shall be

decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it.

When there is no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed.

The High Court may, from time to time, make rules consistent with this Code to regulate references under this section.

This section applies to H. C.

Court.—The only Bench that can hear the case is the Judges who differed and the third Judge—*Rohilkhand* vs. *Kumaon Bank*, I. L. R., 6 Alla., 468; and see *Subbayya* vs. *Krishna*, I. L. R., 14 Mad., 186, p. 190. In Bombay the third Judge to hears the case alone—*Naga* vs. *Salu*, I. L. R., 15 Bom., 424.

Application of Section—The provisions of this section extend to miscellaneous proceedings and supersede the Letters Patent—*Appaji* vs. *Shivlal*, I. L. R., 3 Bom., 204; they also extend to proceedings in execution—*Balaji* vs. *Manager of Estate of Mohanlal*, I. L. R., 5 Bom., 680, but not to reviews—*Hurbans Sahoy* vs. *Thakoor Pershad*, I. L. R., 10 Cal., 108, and where the Judges differed on a preliminary question, namely, as to whether the appeal was barred, it was held that the result was governed by the Charter, and not by this section—*Husaini* vs. *The Collector of Mozaffarnaggar*, I. L. R., 11 Alla., 176.

Reference—If the Judges differ on a question of fact only there is no power to refer—*Gridhariji* vs. *Romanlalji*, I. L. R., 17 Cal., 1, p. 10. If the Judges deliver judgments without any reservation they cannot afterwards refer—*Lal Singh* vs. *Ghansham*, I. L. R., 9 Alla., 625, and the judgment of the lower Court is affirmed—*Devachand* vs. *Hirachand*, I. L. R., 13 Bom., 449.

Appeal.—If Judges differ but do not refer there is an appeal under the Letters Patent—*Ragunath* vs. *Jurawan*, I. L. R., 8 Alla., 105; *Devachand* vs. *Hirachand*, I. L. R., 13 Bom., 449; *Gridhariji* vs. *Purshotum*, I. L. R., 10 Cal., 814.

Dissent to be recorded.

576. When the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

This section applies to H. C.

What judgment may direct.

577. The judgment may be for confirming, varying or reversing the decree against which the appeal is made, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be passed in appeal, the Appellate Court may pass a decree or order accordingly.

This section applies to H. C.

See *Bandhu Bhagat* vs. *Shah Muhammad* I. L. R., 14 Alla., 350.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

578. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or

otherwise, not affecting the merits of the case or the jurisdiction of the Court.

Act VIII of 1859, section 350. This section applies to H. C. As to the modification of this section when objection is taken on appeal that the suit or appeal is not properly valued, see Act VII of 1887, section 11, which is as follows:—

"Procedure where objection is taken on appeal or revision that a suit or appeal was not properly valued for jurisdictional purposes.

"11. (1) Notwithstanding anything in section 578 of the Code of Civil Procedure, an objection that by reason of the over-valuation or under valuation of a suit or appeal a Court of first instance or lower Appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an Appellate Court unless—

"(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower Appellate Court in the memorandum of appeal to that Court, or

"(b) the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

"(2) If the objection was taken in the manner mentioned in clause (a) of sub-section (1), but the Appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower Appellate Court.

"(3) If the objection was taken in that manner and the Appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

"(4) The provisions of this section with respect to an Appellate Court shall, so far as they can be made applicable, apply to a Court exercising revisional jurisdiction under section 622 of the Code of Civil Procedure or other enactment for the time being in force. And see *Krishnasami* vs. *Runakasabai*, I. L. R., 14 Mad., 183."

Not Affecting the Jurisdiction of the Court.—This means not affecting the competency of the Court to try—*Matra Mondal* vs. *Hari Mohun*, I. L. R., 17 Cal., 155.

As to the distinction between irregularity and jurisdiction, see *Combe* vs. *Edwards*, 3 Prob. D., at p. 128.

Not Reversed.—No decree can be reversed or case remanded for any irregularity, error or defect not affecting the merits of the case or the jurisdiction of the Court, such as trying ten suits together—*Anundmoyee Chowdhrain* vs. *Sheeb Chunder*, Marsh., 455; *Param* vs. *Achal*, I. L. R., 4 Alla., 289; nor for mis-joinder—*Kalian Singh* vs. *Gur Doyal*, I. L. R., 4 Alla., 163; nor for error in valuing a suit—*Ramessur Doyal Singh* vs. *Raj Kishore Singh*, 13 W. R., 325; *Param* vs. *Achal*, I. L. R., 4 Alla., 289; such as where a Subordinate Judge tries a case cognizable by a Munsif—*Nidhi Lal* vs. *Muzhar*, I. L. R., 7 Alla., 230; *Matra Mondal* vs. *Hari Mohun*, I. L. R., 17 Cal., 155, nor for admitting a document not properly stamped—*Devachand* vs. *Hirachand*, I. L. R., 13 Bom., 449. As to the old law, compare *Manlappa Nad Gowda* vs. *Busuanuf Rao Nadgodwa*, 14 Moore, 39; *Safdar Ali* vs. *Lachman Das*, I. L. R., 2 Alla., at p. 559; *Chedi Lal* vs. *Kirath Chand*, I. L. R., 2 Alla., 682; unless it be the plaint when the suit must be dismissed under section 12, Act VI of 1870—*Shama Soondary* vs. *Hurro Soondary*, I. L. R., 7 Cal., 348. See, however, *Mehdi Hossein* vs. *Madar Baksh*, I. L. R., 2 Alla., 889; nor for omission to give a detailed examination of the evidence—*Noor Mahomed* vs. *Zuhoor Ali*, 11 W. R., 34; nor the exclusion of evidence unless the Appellate Court thinks it would affect the decision—*DeSouza* vs. *Pestanji*, I. L. R., 8 Bom., 408; nor because the lower Court omitted to give reasons for its decision; in regular appeal—*Katchekaliyana* vs. *Kachivijaya*, 12 Moore, 502; or in special appeal.—See "SPECIAL APPEAL," section 574, *ante*; nor because the plaintiff had not filed certain documents with his plaint or appealed for an order on defendant to produce them—*Muttoo Doobey* vs. *Sheomang Singh*, S. D., N. W., 1864, p. 593; nor because he had filed them after first hearing and on a date other than had been fixed—*Hoonooman* vs. *Tell*, S. D., N. W., 1868, p. 148; nor because the plaint was indistinct—*Gour Surun Doss* vs. *Kanhya Singh*, 2 W. R., 237; nor because the Judge, instead of dismissing a suit under Act VIII of 1859, section 15, changed it into a regular suit on payment of the proper stamp—*Doorga Nath* vs. *Rookminee Kant*, 24 W. R., 167; nor because the Judge has wrongly exercised the powers given him by section 42 of Act I of 1887—*Mahammad* vs. *Khuda Baksh*, I. L. R., 9 Alla., 622, nor because the wrong side began—*Makund* vs. *Behari Lal*, I. L. R., 3, All., 824; nor because the Judge expressed himself wrongly in the judgment, if the decree is correct—*Ram Chunder* vs. *Ram Jeebun*, 14 W. R., 141. Otherwise, if a document declared

invalid has been admitted—*Girdhar Nagjishet* vs. *Ganpat Moroba*, 11 Bom., 135; unless the judgment is based not on it, but on other grounds—*Womes Chunder* vs. *Chundee Churn*, I. L. R., 7 Cal., 293; or judgment has been delivered on evidence taken by another officer and the irregularity has not been waived—*Naranabhai Vrijbhukandas* vs. *Naroshankav*, 4 Bom., 98.

Discretion—And where the relief asked is in the discretion of the Court by a declaratory decree, the Court of Appeal should not set aside the decree on an objection not going to the merits and not raised in the first Court—*Sant Kumar* vs. *Deo Saran*, I. L. R., 8 Alla., 365.

Form of Suit—Where a corporate body was sued, not in its corporate capacity, and a decree was given not against it, but against an agent, the error was held to affect the merits of the case—*Nubeen Chunder Paul* vs. *Stephenson*, 15 W. R., 535, and where a person sued on behalf of another and the objection was raised in the first Court the suit was dismissed on appeal. And where plaintiff sued without authority from his principal, and no objection was made in the first Court, it was held that objection could be raised in appeal, or in special appeal, and that the defect could not be cured by the production of a proper power in the special appeal—*Shivram Vithal* vs. *Bhagirthabi*, 6 Bom., 20; but where it was objected in appeal that the plaintiff's next friend had not been properly appointed, the objection was disallowed—*Baboo Hurdey Narayan* vs. *Pundit Baboo*, 11 Ind. App., 26, *Venkatrao* vs. *Madhavrav*, I. L. R., 11 Bom., 53. See, however, *Parmeshar* vs. *Bela*, I. L. R., 9 Alla., 508. It has been held that non-registration of a document can be raised in regular appeal—*Basawa* vs. *Kalkapa*, I. L. R., 2 Bom., 489; *Safdar Ali* vs. *Lachman Das*, I, L. R., 2 Alla., 554. See "*Points Raised First in Appeal*, section 571, *ante*. And see *Prabhakarbhat* vs. *Vishwambhar*, I. L. R., 8 Bom., 313.

When a suit is set aside on the ground that it was of a value beyond the jurisdiction of the first Court, the plaint should be returned in order to be presented in the proper Court—*Edoo* vs. *Hafazut Hossein*, 13 W. R., 358. See note on section 562, *ante*.

Not Within the Section.—See *Cheda Lall* vs. *Badullah*, I. L. R., 11 Alla., 35, and *Venkatrao* vs. *Madhavrao*, I. L. R., 13 Bom., 53, *supra*, *Matra Mondal* vs. *Hari Mohun*, I. L. R., 17 Cal., 155.

Of the Decree in Appeal.

Date and contents of decree.

579. The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

The decree shall contain the number of the appeal, and the memorandum of appeal, including the names and description of the appellant and respondent, and shall specify clearly the relief granted or other determination of the appeal.

The decree shall also state the amount of costs incurred in the appeal, and by what parties and in what proportions such costs and the costs in the suit are to be paid.

The decree shall be signed and dated by the Judge or Judges who passed it:

Judge dissenting from judgment need not sign decree.

Provided that where there are more Judges than one, if there be a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

This section does not apply to the H. C. in the exercise of its appellate jurisdiction.

Date.—The date which the decree must bear is the date when the judgment was delivered—*Parbati* vs. *Bhola*, I. L. R., 12 Alla., 79.

Claim.—It is not necessary that the claim should be stated in the decree, so as to make it a part of the decree itself—*Soude Shrinivasapa* vs. *Krishnapa*, I. L. R., 11 Bom., 177.

The decree of the Appellate Court supersedes that of the first Court and is the decree to be executed, and limitation runs from the date on which it is passed—*Muhammad* vs. *Muhammad*, I. L. R., 11 Alla., 267; section 583, *post*.

As to appellate decrees, and decrees generally, see note under section 206, *ante*, pp. 164—169.

The decree in appeal may vary the decree appealed against not only in the points in which it is erroneous, but also in respect of matters occurring subsequently which are admitted—*Sakharam* vs. *Hari*, I. L. R., 6 Bom., 113, provided the erroneous portion has been appealed against—*Raghunath* vs. *Pareshram*, I. L. R., 9 Cal., 635. See "FINAL DECREE," section 206, *ante*.

The decree should state by what parties and in what proportions, if necessary, the costs of the suit are to be paid. This sum the Court must take for granted; and it need not go into particulars or set forth in a schedule the different items which go to make up the cost of the first Court—*Mothoora Mohun Roy* vs. *Hury Kishore*, 18 W. R., 286, on review from 17 W. R., 455, *Rajkrishno Singh* vs. *Pranoda Dabee*, 21 W. R., 74. When an appeal is affirmed upon wholly different grounds from those relied on in the lower Court, the appeal should be dismissed without costs—*Fisher* vs. *Kamala Naicker*, 8 Moore, 170.

The Appellate Court can direct how its decree should be carried out—*Kalee Doss Sandyal* vs. *Roy Luchmiput*, 14 W. R., 145.

Where the decree of an Appellate Court was in general terms, *viz.*, "That the appeal be decreed with costs," and the judgment indicated a different intention, it was held that execution should not have been allowed for the whole of the claim; but confined to what was the manifest intention of the Court. In other words, the decree should be interpreted by the judgment—*Mirza Mehdee* vs. *Zelal*, 15 W. R., 530. This seems doubtful.

Effect of Decree.—See "EFFECT OF DECREE," section 595, *post*.

Copies of judgment and decree to be furnished to parties.

580. Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Court and at their expense.

This section applies to H. C.

Certified copy of decree to be sent to Court whose decree appealed against.

581. A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed against, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

This section applies to H. C.

Appellate Decree.—The effect of these sections (579--581) is that the decree in appeal completely supersedes the decree of the first Court, even when it merely affirms it—*Mahammad Salaiman* vs. *Mahammad Yar*, I. L. R., 11 Alla., 267, and see "WHAT DECREE TO BE EXECUTED," section 223, *ante*, and "FINAL DECREE," section 206, *ante*.

Appellate Court to have same powers as Courts of original jurisdiction.

582. The Appellate Court shall have, in appeals under this Chapter, the same powers, and shall perform as nearly as may be the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Chapter V; and, in Chapter XXI, so far as may be, the word "plaintiff" shall be held to include a plaintiff-appellant or defendant-appellant, the word

"defendant" a plaintiff-respondent or defendant-respondent, and the word "suit" an appeal, in proceedings arising out of the death, marriage or insolvency of parties to an appeal.

The provisions hereinbefore contained including those of section 372A, shall apply to appeals under this Chapter so far as such provisions are applicable.

This section applies to H. C. It has been modified by Act VII of 1888, section 53.

In Appeals.—In Act VIII the words were "in cases of appeal," and these were held to limit the action of the Court to cases where the subject which was being dealt with by the Court was the actual appeal itself. This limitation has been removed—*Kalikrishna* vs. *Harihar*, 1 B. L. R., 155, p. 159.

Powers.—The word "powers" is not used in the sense of jurisdiction. It means powers to grant time to adjourn a hearing, to examine parties and pleaders, to award costs, &c.—*Kalikrishna* vs. *Harihar*, B. L. R., 155, p. 163; to allow a case to be withdrawn—*Gregory* vs. *Dooley Chand*, 14 W. R., A. O., 17; to separate mis-joined suits and try them separately—*Shoroop Chunder* vs. *Mothoor Mohun*, 4 W. R., 109.

So far as may be.—That is, so far as may be necessary to carry into effect the remedies contemplated by Chapter XXI. As to the law before this section was amended, see *Narain Dass* vs. *Lajja Ram*, I. L. R., 7 Alla., 693; *Rameshar* vs. *Biseshar*, I. L. R., 7 Alla., 734; *Udit Narain* vs. *Harogouri*, I. L. R., 12 Cal., 590.

An Appellate Court can, with consent of parties, refer a case to arbitration—*Sangaralingham Pillai*, Petitioner, I. L. R., 3 Mad., 78; *Bhugwan Dass* vs. *Nund Lall*, I.L.R., 12 Cal., 173; direct a local investigation, but not by the Judge against whose decree the appeal has been filed—*Roy Sooltan* vs. *Laloo Kooer*, 17 W. R., 300; or send for the Ameen and examine him—*Sheo Doyal Singh* vs. *Hodgkinson*, 24 W. R., 342; or add a respondent to the record—*Showdaminee Dassee* vs. *Ram Roodro*, 8 W. R., 367; see, however, *Ranjit Singh* vs. *Sheo Prasad*, I. L. R., 2 Alla., 487 (a person cannot claim to be added as of right—*Watson & Co.* vs. *Ranee Shurno Moyee*, 9 W. R., 259); or separate suits mis-joined, and try them—*Shoroop Chunder* vs. *Mothoor Mohun*, 4 W. R., 109; or levy a stamp on the memorandum of appeal after it had disposed of the case—*Mahadei* vs. *Ram Kishen*, I. L. R., 7 Alla., 528.

This section does not justify a Judge, hearing an appeal *ex-parte*, in travelling beyond the case set up in appeal and opening up the whole case—*Durga Prasad* vs. *Khairati*, I. L. R., 1 Alla., 545.

Adding Parties.—See "PRACTICE," section 368, *ante*.

Co-Appellant.—There is no power in the Code to make a party to a suit a co-plaintiff. The section read with section 32, *ante*, empowers the Court to strike out parties or direct new parties to be added—*Vasudev* vs. *Salubai*, I. L. R., 10 Bom., 227.

Costs.—Under section 366, the Appellate Court can award costs to the respondent, when an appeal abates—*Lakshmibai* vs. *Balkristno*, I. L. R., 4 Bom., 654; *Raj Monee Dabee* vs. *Chunder Kant*, I. L. R., 8 Cal., 440.

Court-Fees. Clauses (*a*) and (*b*) of section 54, *ante*, do not apply to the High Court in the exercise of its appellate jurisdiction—*Balkaram* vs. *Gobind Nath*, I. L. R., 12 Alla., 129, p. 132.

Validation of certain memoranda of appeals or applications for review of judgment.

582A. If a memorandum of appeal or application for a review of judgment has been presented within the proper period of limitation, but is written upon paper insufficiently stamped and the insufficiency of the stamp was caused by a mistake on the part of the appellant or applicant as to the amount of the requisite stamp, the memorandum of appeal or application shall have the same effect and be as valid as if it had been properly stamped: Provided that such appeal or application shall be rejected unless the appellant or applicant suplies the requisite

stamp within a reasonable time after the discovery of the mistake to be fixed by the Court.

This is a new, and added by Act VI of 1892.

Execution of decree of Appellate Court.

583. When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits.

This section applies to H. C.

Restitution: Forms of Proceeding.—Property obtained under a decree can not be recovered in a fresh suit or action while the decree or judgment remains in force. If it is reversed or superseded the property is recoverable either by a new suit or by summary process—*Shama Purshad* vs. *Hurro Purshad*, 10 Moore, 203; 3 W. R., P. C., 11; *Hurro Chunder* vs. *Shoroodhonee*, 9 W. R. (F. B.), 402; although restitution is not provided for by the decree—*Balavantrav* vs. *Sadrudin*, I. L. R., 13 Bom., 485; *In re Rajkissen*, B. L. R. (F. B.), p. 607; a regular suit will lie—*Jogesh Chunder* vs. *Kali Churn*, I. L. R., 3 Cal. (F. B.), 80; *Joykurun* vs. *Ranee*, 5 W. R., 125; *Shurnomoyee* vs. *Pattari Sirkar*, I. L. R., 4 Cal., 625; *Ram Ghulam* vs. *Dwarka*, I. L. R., 7 Alla., 170; *Abheli* vs. *Natha*, 5 Bom., 74; but the person seeking restitution is not compelled to bring a regular suit and can obtain summarily under this section everything he can get in a regular suit—*Nagindas* vs. *Nathu*, 10 Bom., 297; *Rodgers* vs. *Comptoir d'Escompte de Paris*, L. R., 3 P. C., 465; *Forester* vs. *The Secretary of State*, 4 Ind. App., 137; *Ayyavayyar* vs. *Shastram*, I. L. R., 9 Mad., 506; *Ram Sahai* vs. *Bank of Bengal*, I. L. R., 8 Alla., 262; *Mohamed* vs. *Kally Modun*, I. L. R., 5 Cal., 589; *Govind Vaman* vs. *Sakharam*, I. L. R., 3 Bom., 42; *Vasudeo* vs. *Vishnu*, I. L. R., 11 Bom., 724; no regular suit will lie—*Jaswant* vs. *Dip*, I. L. R., 7 Alla., 432, unless for mesne profits during the period of dispossession—*Ram Ghulam* vs. *Dwarka*, I. L. R., 7 Alla., 170; *Aziz-ud-din Hossein* vs. *Ramanugra*, I. L. R., 14 Cal., 605; but whichever view is right, it does not prevent a party from suing for the value of crops carried away by his opponent which he was entitled to under the decree—*Shurnomoyee* vs. *Pattari Sirkar*, I. L. R., 4 Cal., 625.

Limitation.—An application by the judgment-debtor for refund of money taken out of Court by decree-holder in excess of the amount of his decree is a question relating to the execution of the decree and limitation, possibly three years—*Sheikh Ally Hossein* vs. *Shaikh Muzha Hossein*, 4 C. L. R., 577. And see *Nund Ram* vs. *Seth Ram*, I. L. R., 8 Alla., 545; *Umiashankar* vs. *Chhotalal*, I. L. R., 1 Bom., 19.

Duty of the Court.—The Court in making restitution is bound to restore the parties so far as they can be restored, to the same position they were in at the time when the Court by their erroneous action had displaced them from it—*Hurro Chunder* vs. *Shoorodhonee*, 9 W. R. (F.B.), 402; and in a suit for possession of land, restitution carries mesne profits and interest on them—*Mokoond Lal* vs. *Mahomed Sami*, I. L. R., 14 Cal., 484; *Kulianasundram* vs. *Egnavedeswara*, I. L. R., 11 Mad., 261; *Hamida* vs. *Bhudhun*, 20 W. R., 238, although the decision is silent on the point—*Id.*, *Balavantrav* vs. *Sadrudin*, I. L. R., 13 Bom., 485; *Latu Kooer* vs. *Sobudra*, I. L. R., 3 Cal., 720, and in short to do everything and make every order fairly and properly consequential on the reversal of the original judgment, such as giving costs and interest on the refund—*Rogers* vs. *Comptoir d'Escompte de Paris*, L. R., 3 P. C., 465, *Forester* vs. *The Secretary of State*, 4 Ind. App., 137; *Jaswant* vs. *Dip*, I. L. R., 7 Alla., 432; *Ayyavayyar* vs. *Shastram*, I. L. R., 9 Mad., 506; *Ram Sahai* vs. *Bank of Bengal*, I. L. R., 8 Alla., 262. And where after decree defendant made a payment which was not certified under section 258, and the decree was subsequently set aside, the money paid was ordered to be refunded—*Vasudeo* vs. *Vishnu*, I. L. R., 11 Bom., 724.

Person making Restitution, or Assignee.—The person making restitution is bound to restore everything to which he is not entitled, and cannot set up another person's title—*Prosunno Coomar* vs. *Mathoora*, 17 W. R., 232; and he is bound to give up anything in his possession. If property is sold under a decree and bought in by the creditor, and the decree is afterwards set aside, he is bound to restore it—*Sadasivayyar* vs. *Muttu*, I. L. R., 5 Mad., 106; though he may sue for his purchase-money—

Hira Lall vs. *Gourmoni*, I. L. R., 13 Cal., 326. But where property to which a party is entitled to restitution is transferred after decree, the party entitled cannot put the transferree on the record under section 372, *ante*, and summarily enforce his rights—*Goodall* vs. *Mussoorie Bank*, I. L. R., 7 Alla., 681.

According to the Rules in Force for the Execution of Decrees in Suits—This means an application should be made for restitution, in the proper Court in the sense of art. 179 of the Limitation Act—*Nand Ram* vs. *Sita Ram*, I. L. R., 8 Alla., 545.

A Zillah Court must execute its own decrees; it has no power to direct any other Court to take up and dispose of an application for execution—*Rajeeb Ram Doss* vs. *Mahomed Haseem*, 6 W. R., Mis., 51; unless authorized under section 19, Act XVI, 1868—*Rumdan* vs. *Beharee Lall*, 1 Alla., 200; but see—*Pulukdhari Roy* vs. *Raja Radha Pershad Singh*, 8 Ind. App., at p. 71, and the note under section 25, *ante*. But if the Court which passed the decree has been abolished and its duties transferred to another Court, the latter continues to possess jurisdiction to execute even after a new Court, similar to the Court which passed the decree, has been established—*Biroja Monee* vs. *Wooma Moyee*, 7 W. R., 124.

The decree executed is "the decree passed in appeal"—*Kristo Kinkur Roy* vs. *Rajah Burroda Kaunt Roy*, 14 Moore, 489, 490; *Mahammad Saliaman* vs. *Mahammad Yar*, I. L. R., 12 Alla., 267, and see "WHAT DECREE MAY BE EXECUTED" section 223, *ante*.

Jurisdiction.—A Subordinate Judge is not limited to 5,000, rupees, when his decision has been set aside on appeal to the District Judge—*Balavantrav* vs. *Sadrudin*, I. L. R., 13 Bom., 485.

Surety.—See *Nenkapa Naik* vs. *Baslingapa*, I. L. R., 12 Bom., 411; *Thirumalai* vs. *Ramayyar*, I. L. R., 13 Mad., and note under section, 253, *ante*.

CHAPTER XLII.

OF APPEALS FROM APPELLATE DECREES.

This Chapter has been repealed in Ajmere and Merwara—See Reg. I of 1877.

Second appeals to High Court.

584. Unless, when otherwise provided by this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds (namely) :—

Ground of second peal.

(*a*) the decision being contrary to some specified law or usage having the force of law;

(*b*) the decision having failed to determine some material issue of law or usage having the force of law;

(*c*) a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.

An appeal may lie under this section from an appellate decree passed *ex-parte*.

This section applies to H. C. In regard to the Andamans and Nicobar Islands, see Reg. I of 1884 and to the Sonthal Pergunnahs, see *Sorbojit* vs. *Gonesh*, I. L. R., 10 Cal., 761. The last paragraph has been inserted by Act VII of 1888, section 54.

Unless Otherwise Provided.—A special appeal lies from a decree under section 39 of the Land Acquisition Act—*Atri Bai* vs. *Arno Poorna*, 12 C. L. R., 409; *The Secretary of State* vs. *Sham Bahadur*, I. L. R., 10 Cal., 769; and from the decision of a Political Agent in the Southern Maratha country—*Nilowa* vs. *Fakirappa*, 6 Bom., 75; from the decision of a District Court under section 10 of Madras Forest Act of 1882—*Kamaraju*

vs. *The Secretary State*, I. L. R., 11 Mad., 309; but not from the decree of a special Judge under the Bengal Rent Act in regard to the settlement of rents—*Shewbarat* vs. *Nirpat*, I. L. R., 16 Cal.. 596.

Rent-Suits.—see As regards Bengal Act VIII of 1885—*Hurrosunderi Dabi* vs. *Brojohari Das*, I. L. R., 13 Cal., 86; *Prasanna Kirut* vs. *Srinath*, I. L. R., 15 Cal., 231; *Mohesh Chunder* vs. *Umatara*, I. L. R., 16 Cal. 638; *Lala Kerub*, vs. *Palukdhari*, I. L. R., 17 Cal., 326; and as regards Chota Nagpore, see *Ramjan* vs. *Raman*, I. L. R., 10 Cal., 89.

"May Have Produced."—This means "May not improbably have produced," and not "May by some possibility"—*Ram Chunder Chowdhry* vs. *Kashee Mohun*, 21 W. R., 57.

Practice—The jurisdiction of the Courts in special appeal is confined to the determination of such matters of law as may arise on the special appeal—*Eshan Chunder Singh* vs. *Shama Churn*, 7 Moore 19, p. 11. It cannot decide facts, even with the consent of parties—*Kadambinee Dassee* vs. *Doorga Churn*, Marsh., 4; nor draw any inference of fact from the evidence in the case—*Dvarkadas Lulabhai* vs. *Adam Ali*, 3 Bom., p. 5; nor lay down any rule as to what weight should be attached to evidence—*Oamut Fatima* vs. *Bhujo Gopal*, 13 W. R., 50, or to the credibility of witnesses—*Putsahee Koer* vs. *Sheo Pershad*, 24 W. R., 61. But if the finding of the lower Court is unnecessary for the disposal of the case the Court may expunge them from the record—*Nanda Lal* vs. *Bonomali*, I. L. R., 11 Cal., 544, and if it is based on error in law, the Court is empowered to reverse it—*Juggurnauth Deb* vs. *Mahomed Mokeem*, 17 W. R., 161; *Mahomed Aizaddi Shaha* vs. *Shuffi Malla*, 8 B L. R., 26, and fully decide case if there is no legal evidence on the record to support the case of one party—*Tej Protap Singh* vs. *Champa Kali*, I. L. R., 12 Cal., 96, or the remaining facts found by the lower Court are sufficient for its disposal—*Shah Jughan* vs. *Shaikh Muksood Ali*, 6 W. R., 97; *Waiganhar* vs. *Wadehar*, Bom., 194; *Mohan Chunder Dhur* vs. *Kidge*, Marsh , 381; *Joy Ram Roy* vs. *Omrao Roy*, 12 W. R., 431; but in all other cases of material error, either in law or procedure, the Court from inability to determine facts must remand the case to have the error amended or for re-trial, as the case may be. Thus, if the lower Court has omitted to record reasons for the decree framed, the Court in special appeal can call on it to record them, or, if the Judge appears to have been transferred, direct a new trial—*Nowab Khan* vs. *Roghoonath Doss*, 20 W. R., 474. If wrong issues have been fixed, it can fix a proper issue and send it down for trial—*Sah Koondun Lall* vs. *Makhun Lall*, 1 Alla., 247; *Goluck Chunder* vs. *Anunt Kishore*, 25 W. R., 38; or direct the lower Court to complete the inquiry if it has been inadequate—*Shagur Chunder* vs. *Mohamaya*, 25 W. R., 25; or even direct a re-trial—*Chunder Monee Dossee* vs. *Modhoo Dey*, 23 W. R., 166; and this last is the usual procedure where a very material error in law or procedure has been committed by the lower Court—*Shaikh Charoo* vs. *Zobeida Khatoon*, 25 W. R., 54; *Kristo Gobind Kur* vs. *Gunga Pershad*, 23 W. R., 266; *Goluck Nath* vs. *Rakhal Das*, I. L. R.. 16 Cal., 645.

If the plaint does not disclose a cause of action the proper order is to reject the plaint and not to dismiss the suit—*Gunga Narain* vs. *Tiluckram*, 15 Ind. App., 119. When on appeal under Act VIII of 1859 the decision of the lower Court was found to have been passed without jurisdiction, the Court directed that on the appellant paying within three months the cost of the litigation that the plaint should be sent for trial to the proper Court—*Dhun Monee* vs. *Wooma Churn*, 23 W. R., 445.

The fact that the High Court may have called for a case and decided it in regular appeal does not affect the ordinary course of appeal in execution of that decree, and enable a party to claim a regular appeal when he has only the right of special appeal—*Ramanoogra Sahoy* vs. *Bujnath Lall*, 15 W. R., 164.

Limitation—See "LIMITATION," section 540, *ante*.

Ninety days on the Appellate Side and twenty days on the Original Side from the date of the decree appealed against—Arts. 156, 157, Sched. II, Act XV, 1877; the Court can extend the time for sufficient cause—*Flowest* vs. *Kootab Hossein*, 1 Agra, F. B., 100; *Kashinauth* vs. *Mynooddeen*, W. R. (F. B)., 146 Act XV, 1877, section 5.

Letters Patent.—If two Judges differ as to the admission of an appeal after time there is an appeal under the Letters Patent—*Husaini* vs. *The Collector of Muzuffarnagar*, I. L. R., 9 Alla., 655.

Special Appeal.—The High Court can in special appeal, look into the grounds upon which an appeal has been admitted after time by the lower Appellate Court—*Chander Das* vs. *Boshoon Lall*, 11 C L. R., 177; but it will not interfere if the Court has exercised its discretion in a sound and reasonable manner—*Ranchodji* vs. *Lallu*, I. L. R., 6 Bom., 394; *Fatima Begum* vs. *Hansi*, I. L. R., 9 Alla., 244. See "LIMITATION," section 540, *ante*.

Single Judge.—The order of a single Judge admitting is liable to be impugned at hearing before two Judges—*Dabey Sahai* vs. *Gunesh Lall*, I. L. R., 1 Alla., 34; *Husaini* vs. *The Collector of Muzuffarnagar*, I. L. R., 9 Alla., 11; and if the appeal is admitted *ex parte* then the respondent can always raise the question of limitation—*Moshaullah* vs. *Ahmedullah*, I. L. R., 13 Cal., 78; *Venkatrayudu* vs. *Nagadu* I. L. R., 9 Mad., 450.

Who may or may not Appeal.—See "WHO MAY APPEAL," section 540, *ante*.

A person who has not an interest in a suit cannot file a special appeal. A Hindu widow and her sons sued for confirmation of her title in certain property which she claimed as separate property, and both the Courts declared that it was joint and not her separate property. It was held that the sons not being affected by the finding could not appeal—*Doorga Pershad* vs. *Radha Mohun*, 15 W. R., 536. In a suit for rent against A, he pleaded a transfer to B, and the latter was made a party; in regular appeal the Court decreed the rent against A, and dismissed the suit as against B. B was not allowed to appeal—*Mussamut Oognee Chowdhrain* vs. *Shaikh Keramutoollah*, 17 W. R., 219. As in regular appeal a special appellant is affected by his relation to the other parties to the suit. Thus one defendant cannot appeal against another—*Ramessur Ghose* vs. *Azeem Joardar*, 17 W. R., 373.

Minor.—A suit was brought by a minor who appeared by her next friend and obtained a decree. Defendant appealed, making the next friend alone respondent and got a decree. On second appeal the decree of the lower Court (Appellate), was set aside and that of the first Court restored—*Bhobotarini* vs. *Sreeram Paul*, I. L. R., 9 Cal., 629.

Decree—See "DECREE," section 540, *ante*.

Under the Code an appeal lies from the decree only—*Koylash Chunder* vs. *Ram Lall*, I. L. R., 6 Cal., 206.

Appeal will Lie.—*Error.*—The error must be an error of law and not of fact—*Meer Mahomed Hossain* vs. *Forbes*, 2 Ind. App., 1, though an apparent finding of fact may be an erroneous inference of law—*Sevaji* vs. *Chinna*, 10 Moore, 151; and see *Shephérd* vs. *Henderson*, 7 App. Cas., p. 64; *Elliott* vs. *Turguand*, 7 App. Cas., p. 85. An appeal will lie for discrediting witnesses for general reasons not affecting the credit of any particular witnesses—*Sheo Pershun* vs. *Brun Pandey*, 24 W. R., 251, such as disbelieving a witness because he is a Naib Patwaree—*Mackenzie* vs. *Jowahir Mahtoon*, 25 W. R., 137; or for a misdirection as to the effect of evidence—*Ram Prosad Das* vs. *Rajo Koer*, 5 C. L. R., 94, as where a Judge held that if a village had not been sold it must have been mortgaged—*Sevaji* vs. *Chinna*, 10 Moore, 151, p. 164; or that if A did not support plaintiff, he could have no right—*Ramdhun* vs. *Ram Narain*, 11 W. R., 311; or that documents not denied—*Kirtcebash Mayetee* vs. *Ramdhun*, B. L. R. (F.B.), 658, or objected to—*Naranbhai* vs. *Naroshankar*, 4 Bom., A. C., p. 101, are admitted or that from the fact of one person carrying on a business firm, and appearing to the world to be the only person carrying it on, that there could be no other person in partnership with him—*Shoobul Chunder* vs. *Koylash Chunder*, 14 W. R., 23. And an appeal will lie for the wrong admission of secondary evidence—*Lachman Singh* vs. *Puna*, 16 Ind. App., 125; *Chunder Kant* vs. *Showdaminee*, 9 W. R., 517, or for finding a fact without any evidence or without evidence from which the conclusion might be reasonably drawn—*Hemanta Kumari* vs. *Brojendro Kishore*, I. L. R., 17 Cal., 875; 17 Ind. App., 65, see, however, *Virbhadrappa* vs. *Mahanlappa*, I. L. R., 15 Bom., 670—or admitting an unregistered document—*Bawawa* vs. *Kalkapa*, I. L. R., 2 Bom., 489; *Ramapa* vs. *Umanno*, I. L. R., 9 Bom., 123; or for treating as evidence a document filed with the plaint, but not proved or entered in the list of documents admitted—*Damoo Mahata* vs. *Doya Coomaree*, 25 W. R., 101; or for starting with the assumption, that certain evidence has not been produced, and it is on the record—*Hur Gobind* vs. *Joya Roy*, 24 W. R., 146; or for looking at the evidence of one side only—*Mohunt Deo Surun Poory* vs. *Moonshee Mahomed Ismail*, 24 W.R., 200; or for misconceiving the legal position of the parties—*Doorga Churn* vs. *Shamanund Gossain*, 12 W. R., 376.

Appeal will Lie.—*Defect.*—Admitting a re-hearing after time of a case decided *ex-parte*—*Runglal Misser* vs. *Tokhan Misser*, I. L. R., 2 Cal., 114; abstaining from enquiring into plaintiff's title on the erroneous ground that he was the party through whom defendant claims—*Abdool Salam* vs. *Imraloonnissa*, Marsh., 6; trying an issue not raised—*Ram Soondur* vs. *Kalee Pershad*, 19 W. R., 267; or trying a case without framing issue—*Rewun Pershad* vs. *Jankee*, 11 Moore, 27; *Sheo Sahoy* vs. *Bechun Singh*, 22 W. R., 31; *Chunder Monee Dossee* vs. *Modhoo Dey*, 23 W. R., 166, unless the parties have gone to trial, knowing what the real question between them was—*Mitna* vs. *Syud Fuzl Rub*, 13 Moore, 583; refusing to issue a commission to examine a witness on the ground he was not material—*Jhotee Singh* vs. *Gopal Singh*, 23 W. R., 457; allowing the plaintiff in the lower Appellate Court to change his suit from confirmation to one for recovery of possession—*Teniput Singh* vs. *Gossain*, I. L. R. 4, Cal., 46, refusing costs to a defendant who had successfully pleaded want of jurisdiction in both Courts—*Moshigan* vs. *Mozari*, I. L. R., 12 Cal., 271; adding a co-plaintiff—*Googlee Sahoo* vs. *Premlall*, I. L. R., 7 Cal., 148; remanding a case irregularly—*Narabhai* vs. *Ramshat*, 6 Bom., A. C., 156; admitting a review without proper enquiry or proof where proof is necessary—*Bhyrub Chunder* vs. *Madhub Ram*, 20 W. R., 84, (otherwise if evidence has been taken—*Sahebjan* vs. *Syud Sufdar*, 22 W. R., 288,) have been considered good grounds for special appeal.

Costs.—See note under section 218, *ante*.

Finding of Fact.—An appeal does not lie on the ground of an erroneous finding of fact, however gross and inexcusable the error may be; but an appeal does lie to impeach the conclusions arrived at from the findings—*Ram Gopal* vs. *Shamskhaton*, 19 Ind. App., 288; *Luchmessur Singh* vs. *Manowar Hossein*, 19 Ind. App., 48. Where there is no

error or defect in the procedure, the finding of the first Appellate Court is final if that Court had before it evidence proper for its consideration in support of the finding, and an appeal will not lie on the ground that the lower Court has misapprehended the evidence, discarded or not given sufficient weight to other evidence, or given weight to other evidence to which it was not entitled—*Radha Prosad* vs. *Bal Kowar*, I. L. R., 17 Cal., 726, p. 742; *Durga Choudhrain* vs. *Jawahir*, 17 Ind. App., 122; I. L. R., 18 Cal., 23; *Pertab Chunder* vs. *Mohendra*, 16 Ind. App., 233; I. L. R., 17 Cal., 291; *Lachman Singh* vs. *Puna*, 16 Ind. App., 125; I. L. R., 16 Cal., 753; but if reasons are not given for the finding it does not bind in Bombay—*Purshotam* vs. *Durgoji*, I. L. R., 14 Bom., 452. The existence of a custom—*Syud Ali* vs. *Gopal Doss*, 13 W. R., 420, of a right of user—*Wuzuruddin* vs. *Sheobund*, 11 W. R., 285, of good faith—*Bhubun Mohun* vs. *Saudamani*, 5 B. L. R., App., 59, of reasonableness of notice—*Bidhumukhi* vs. *Keyfutullah*, I. L. R., 12 Cal., 93, is a question of fact, and so is the amount of damages to be awarded—*Banee Madhub* vs. *Bholanath*, 10 W. R., 164; and so also is the meaning of document or a deposition—*Himmut Ali* vs. *Nyamatoollah*, 23 W. R., 250; *Chatenay* vs. *Braz. Telgh. Co.*, 1 Q. B., (1890), 79; but the construction of it, *i.e.*, its legal effect is a matter of law—*Id;* and see *Nowbut Singh* vs. *Chutter Dharee*, 19 W. R., 223.

Appeal does not Lie.—A special appeal will not lie from the legal exercise of a discretionary power—*Gopal Khunder Rao* vs. *Deokee Nundun*, 6 Alla., 173: such as refusing to take additional evidence—*Kulpo Singh* vs. *Thakoor Singh*, 15 W. R., 429; or admitting it—*Radhanath Doss* vs. *Khellut Chunder*, 17 W. R., 558; or refusing to allow an appeal by A for a minor B to stand for B, he not being a minor—*Shama Churn Ghose* vs. *Tarak Nath Mukhopadhya*, 3 B. L. R., App., 115; or from an order refusing to allow an appeal to be withdrawn — *Raj Kishen* vs. *Raj Kishen*, 6 W. R., Act X, 24; or refusing to restore an appeal withdrawn—*Mudhoomutty Debia* vs. *Dhunpat Singh*, 13 W. R., 167; or refusing to allow more evidence after the party had closed his case—*Rakhal Doss* vs. *Protab Chunder*, 12 W. R., 455; or refusing to admit an appeal after time—*Roghoonath Singh* vs. *Roy Mohun Lall Mitter*, 7 W. R., 296; *Phoolbasee* vs. *Baboo Bisheshur Pershad*, 4 Agra, 301; but see *Gopeenath Roy* vs. *Gopeenath Chatterjee*, 6 W. R., Mis., 106; nor on the mere ground that the lower Court has not recorded the reasons for its decision in the manner prescribed in this Code—*Bisvanath* vs. *Baidynath*, I. L. R., 12 Cal., 199; *Bhagavat Sangji* vs. *Partab Singji*, 4 Bom., 105; nor for disbelieving a witness on the ground that he was interested, nor for any other reason within its discretion—*Dwarkanath Doss* vs. *Muddun Mohun*, 6 W. R, 292; such as ordering or not ordering a local inquiry—*Herallal* vs. *Gungadhur*, W. R. (F. B.), 19; *MacDonald* vs. *Munar Roy*, B. L. R. (F. B.), 358, or not taking steps under section 23, *ante*, for the protection of the decree-holders not executing the decree—*Hera Roy* vs. *Gujadhur Pershad*, 24 W. R., 286; or refusing to amend a plaint—*Watson & Co.* vs. *Nidhoo*, 10 W. R., 87; refusing to allow a witness to be called after plaintiff's case closed—*Rakhal Doss* vs. *Protab Chunder*, 12 W. R., 455, and see *Baring* vs. *Furlong*, 2 Ch. (1891), 172; nor from a finding on the genuineness of a deed in evidence—*Bhugwan Chunder* vs. *Dukhina Debia*, 8 W. R., 356; nor because the Judge did not write out his judgment containing the reasons for his decision, until after the decree in appeal was passed, or even after he vacated his office—*Bhagvatsangji* vs. *Jalansangji*, 4 Bom., 105; nor for omitting to decide a point raised—*Wise* vs. *Huro Lall*, 16 W. R., 150; nor for mis-joinder—section 32; *Hera Lall* vs. *Bistoo Lall*, 22 W. R., 288; nor where no appeal lay to the lower Court—*Hurdyal Singh* vs. *Kunhya Lall*, 19 W. R., 247; *Chidimbara Pilai* vs. *Kaman*, 1 Mad., 189; nor where the lower Court dismissed an appeal after hearing it on the merits, though no appeal lay—*Golam Eshak* vs. *Hyder Mollah*, W. R., Sp. No., 46—see, however, "OBJECTIONS TO JURISDICTIONS," p. 43, *ante*—nor because the lower Court admitted documents insufficiently stamped—*Makbul Ahmed* vs. *Itikharunissa*, 7 Alla., 124; *Hurchunder Ghose* vs. *Wooma Sunderee Dassee*, 23 W. R., 170; and see the case of—*Gurpadapa* vs. *Naro*, I. L. R., 13 Bom., 493; or did not send for a record, where a decision on the propriety of sending for it had been postponed till the hearing and the application was not renewed—*Chundi Churn* vs. *Doorga Persad* 12 C. L. R., 81; or that a witness ought to have been examined, when no such application was made in the Court below—*Somasekhara* vs. *Subhadramaji*, I. L. R., 6 Bom., 524; *Gulam* vs. *Badrudin*, I. L. R., 13 Bom., 336; or for an error in valuation not affecting jurisdiction—*Kisto Churn Mojoomdar* vs. *Dwarkanath Biswas*, 10 W. R., 32, or because the Judge omitted to record an opinion on an Ameen's report—*Sreemutty Bindhoo Sookolany* vs. *Joy Prakash Singh*, W. R., 1864, p. 367. Where the point is then raised for the first time, a special appeal will not lie on the ground that the plaint has not been verified, when the defendant filed a written statement without objection—*Shama Soondures* vs. *Rohimoodeen*, 24 W. R., 71, nor for a mistake in account—*Ram Kunt Roy Chowdhry* vs. *Kalee Mohun Mookerjee*, 22 W. R., 310; nor for hearing a case before the fixed date if the parties are present—*Hukeemunnissa* vs. *Bibee Muckdoonun*, 1 W. R., 246; nor generally, for any error not of importance or not appealed against in the lower Court—*Achumbheet Teoaree* vs. *Bhugwant Pandey*, 1 Alla., 161, such as the admission of immaterial evidence—*Watson & Co.* vs *Gopee Soondures Dossee*, 24 W. R., 392.

Grounds of Appeal—See "MEMORANDUM OF APPEAL," section 543, *ante*, and note on section 542, *ante*.

The memorandum need not be accompanied by the decree of the first Court—*Pirathe* vs. *Vencatramanayyan*, I. L. R., 4 Mad., 419.

A vakeel cannot certify his own appeal—*Thakoor Doss Mookerjee* vs. *Ameer Mundul*, 14 W. R., 168.

The grounds of special appeal should be full—*Ram Kristo* vs. *Raj Chunder*, 11 W. R., 246, and specific, and should clearly indicate the error of law assigned, or the substantial error of defect in law or procedure or investigation which is imputed; and in the latter case it should be made to appear on the face of the ground of appeal that such error or defect probably produced error or defect in law in the decision on the merits by stating what bearing the supposed error or defect had on the merits of the case—*Nund Kishore* vs. *Ram Kulpo Roy*, 15 W. R., 8.

The general rule as to grounds of appeal is that a party is not entitled to relief upon facts or documents not referred to or stated in the pleadings—*Mohummud Zahoor* vs. *Thakooranee Rutta Kooer*, 11 Moore, 475; or inconsistent with them—*Eshan Chunder* vs. *Shama Churn*, 11 Moore, 7; nor on any ground which has never been considered, taken, or tried in the Courts below—*Sremutee Dossee* vs. *Ranee Lalahmonee*, 12 Moore, 475; *Protab Chunder* vs. *The Collector of Gowalparah*, 22 W. R., 216; except is a pure point of law going to the jurisdiction of the lower Courts and capable of being determined without the consideration of any other evidence than that on the record—*Fakir Chand* vs. *Anunda Chunder*, I. L. R., 14 Cal., 586. And where parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted they cannot afterwards, in a special appeal, question it and recede from the tacit admission—*Mohima Chunder Roy* vs. *Ram Kishore Acherjee Chowdhry*, 15 B. L. R., 155; *Devaji Gogaji* vs. *Godaedbhai Godabhai*, 2 Bom., 28; *Gunga Phulojha* vs. *Gopal Oopadhya*, 1 W. R., 136; and where instead of objecting to the form of a suit in the first Court, they litigate on certain issues, they cannot recede from this position in special appeal—*Mahomed Hashim* vs. *Kalee Churn*, 13 W. R., 91, and assert that the plaint disclosed no cause of action—*Bukh Ali Sowdagar* vs. *Joyanut*, 11 W. R., 248. See, however, *Lachman Prasad* vs. *Bahadur Singh*, I. L. R., 2 Alla., 884, though if the suit were remanded to the first Court for trial on the merits, the appellant could do so there—*Doorgaram Roy* vs. *Nur Singh* 11 W. R., 134.

First Raised in Special Appeal.—Parties should not be allowed to present a new case in special appeal—*Madari* vs. *Malki*, I. L. R., 6 Alla., 428, except under very special circumstances. Where the Judge in the first Court refused to examine a party's witnesses as he was satisfied without them, and the party did not raise the point when the suit was appealed—*Gooroo Doss Akhoolee* vs. *Puran Mundle*, 12 W. R., 363; *Osman Singh* vs. *Chumnum Mahtoox*, 15 W. R., 87; *Gulam* vs. *Badrudin*, I. L. R., 13 Bom., 336; or the first Court refused to summon his witnesses—*Onooroop Chunder Mookerjee* vs. *Heera Monee Dossee*, 11 W. R., 418, the party was not allowed to raise it in special appeal. So the competency of plaintiff to sue as agent—*Soorendro Nath Roy* vs. *Rughoobur Deyal Awastee*, 15 W. R., 392; as guardian—*Thummun* vs. *Golab Rae*, 2 Alla., 89; or as co-sharer—*Nanoo Roy* vs. *Joomuck Lall Doss*, 18 W. R., 376; whether of the value of the suit, or the residence of the defendant or any other facts, which is necessary for jurisdiction, has been shewn—*Trilochun Doss* vs. *Gugun Chunder*, 24, W. R., 413 (but *see Ramtarak Karati* vs. *Dinanath Mandal*, B. L. R., 184; *Court of Wards* vs. *Mussamut Roop Moonjaree Kooer*, 25 W. R., 260; *Ramanund Roy Chowdhry* vs. *Urnokalee Debea*, 2 W. R., 257); whether the plaintiff could have of demanded further relief and should not get a declaration, none of these should be allowed for the first time in special appeal—*Chomu* vs. *Umma*, I. L. R., 14 Mad., 46.

The plea of *res-judicata*—*Muhammad Ismail* vs. *Chattar Singh*, I. L. R., 4 Alla., 69, incompetency to bring a suit—*Radha Kishen* vs. *Bukhtawar Lal*, 1 Agra (F. B.), 176, or any matter of law going to the root of the plaintiff's suit—*Kuppa* vs. *Dorasami*, I. L. R., 6 Mad., 76, such as jurisdiction patent on the record—*Bapuji* vs. *Umedbhai*, 8 Bom., 245; *Mohan Ishwar* vs. *Haku Rupa*, I. L. R., 4 Bom., 638; *Sayad Nyamtula* vs. *Nana*, I. L. R., 13 Bom., 244, such as there is no cause of action—*Jan Ali* vs. *Khondkar*, 14 W. R., 420; *Amrita* vs. *Naru*, I. L. R., 13 Bom., 490, and the point manifestly arises out of the pleadings—*Mahommed Ismail* vs. *Chattar Sing*, I. L. R., 4 Alla., 69; or want of notice in a suit for ejectment of a tenant—*Abdulla* vs. *Subaryyar*, I. L. R., 2 Mad., 346; *Vithu* vs. *Dhonde*, I. L. R., 15 Bom., 407; but compare *Mahomed* vs. *Ganapati*, I. L. R., 13 Mad., 277; or the lower Courts have misconceived the above case—*Kalee Mohan* vs. *Kalee Kisto*, 11 W. R., 183; *Narayana* vs. *Muni*, I. L. R., 10 Mad., 363; it may be raised on special appeal, but not limitation—*Shivapa* vs. *Dod Nagaya*, I. L. R., 11 Bom., 114; nor non-joinder of parties—*Moidin Kutti* vs. *Krishnan*, I. L. R., 10 Mad., 322; nor any objection to the admission of evidence other than that taken in the Court below—*Bapu* vs. *Baji*, I. L. R., 14 Bom., 372. And where it was contended in second appeal that the matter in dispute should have been decided under section 244 and no regular suit would lie: *Held*, as the Judge who tried the case would also have tried the matter if raised under section 244, no question of jurisdiction arose—*Azizuddin* vs. *Ramanugra*, I. L. R., 14 Cal., 605. See "DUTY OF APPELLATE COURT," section 571, *ante*.

Where the plaintiff in appeal to the District Court did not make it a ground of appeal that the lower Court had revived an *ex-parte* decree after the proper time, he was not allowed to make it the ground of special appeal—*Boro Khasia* vs. *Jata Sirdar*,

8 B. L. R., 78; but this is a matter of discretion and the Court may allow it to be argued—*Madho Pershad* vs. *Gunga Dhar*, 11 Ind. App., 186.

Changing Nature of Suit.—See "DUTTY OF APPELLATE COURT," section 571, *ante*. An appellant should not be allowed to set up a plea directly and fraudulently repudiated in the lower Court—*Sutyabhama* vs. *Krishna Chunder*, I. L. R., 6 Cal., 55; nor raise any point not raised below, though there is some evidence in support of it if by any possibility the respondent might have rebutted it—*Ex-parte Firth*, 19 C. D., 419; nor present a new case—*Madari* vs. *Malki*, I. L. R., 6 Alla., 428; *The Secretary of State* vs. *Nanja*, I. L. R., 5 Mad., 163; *Jamsedji* vs. *Lakshmiram*, I. L. R., 13 Bom., 323; nor should be allowed to change his suit in special appeal—*Gopal* vs. *Hanmant*, I. L. R., 6 Bom., 107, such as a suit based on benamee, to one for want of consideration—*Puriag Dutt* vs. *Brojo Koomwar*, 9 W. R., 503; on a *mowrasi*, to a right of occupancy—*Soorjo Koomar* vs. *Gungadhur Roy*, 12 W. R., 81; for property as self-acquired to a suit for a share of it as joint property—*Hamanginee* vs. *Pitamber Dey*, 5 W. R., 197, or for property as purchased from the owner, to property entitled on partition—*Muttusami* vs. *Ramakrishna*, I. L. R., 12 Mad., 292; or as heir of A to heir of B—*Kripa Nath* vs. *Saroda*, 1 W. R., 283; for property on the ground of plaintiff's father, a Hindu, having transferred it for an immoral purpose, to one for property as the joint owner under Mitakshara law—*Shiu Dass Narain Singh* vs. *Bhagwan Dutt*, 2 B. L. R., App., 15; from a suit based on *den mohur*, to one on heirship—*Umbika Churn* vs. *Nadir Hossein*, 11 W. R., 133. Nor unless under special circumstances from a suit for confirmation to one for recovery of possession—*Teriseput Singh* vs. *Gossain*, I. L. R., 4 Cal., 46; nor from a suit for possession on a special title to one based on twelve years' adverse possession—*Krishna Churn* vs. *Protab Chunder*, I. L. R., 7 Cal, 560, or on possession as an occupancy-ryot—*Brindabun Chunder* vs. *Dhanunjoy*, I. L. R., 5 Cal., 246, but a suit to eject can be changed into a suit to redeem—*Sankana Kalanka* vs. *Virupakshapa*, I. L. R., 7 Bom., 146. And where a suit was contested on the ground whether A had purchased from B, the title of B was not allowed to be raised in special appeal—*Shaikh Ahmed* vs. *Sonaoollah*, 8 W. R., 5; and this is on the broad ground that a case should not be decided on grounds not raised in the lower Courts—*Shib Suhaye* vs. *Nursingh Lall*, 22 W. R., 352; *Bunsee Lall* vs. *Aoladh Ahsan*, *id.*, 552; *Jugdeep Narain* vs. *Deen Dyal*, 20 W. R., 174, 192; *Meer Bahadoor Ali* vs. *Suneechuro*, 6 W. R., 157. And in all cases where the issue sought to be raised must be taken in connection with the evidence, or appears capable of explanation, it cannot be started for the first time in special appeal—*Jan Ali* vs. *Khondkar*, 14 W. R., 421. It may be raised in special appeal.

Remand.—Before remanding a case the Court is empowered to see if there is any evidence on the record to warrant a contrary finding to that arrived at by the Judge—*Ram Persad* vs. *Rajunder*, 6 W. R., 262; *Jugdeep Narain* vs. *Deen Dyal*, 20 W. R., 174.

Neither the lower Courts nor the High Court can go behind the decision on remand. If not changed in review it is final—*Ram Kuvarbai* vs. *Damodhar*, 6 Bom., 146; *Nursingh* vs. *Anderson*, 19 W. R., 125, and see *Dasaradhi* vs. *Joddumoni*, I. L. R., 5 Mad., 193. But see *Deokishen* vs. *Bansi*, I. L. R., 8 Alla., 172.

When a case is remanded to try a single issue the order prevents the case being re-opened—*Syed Mooltan Alee* vs. *Shew Buksh*, Marsh., 603; *Puree Jan* vs. *Bykunt Chunder*, 9 W. R., 380.

The first Court held the suit was barred; this decision was set aside on regular appeal, and the case remanded for trial on the merits. The first Court then decreed the claim and the Appellate Court dismissed it. In special appeal it was held that, though the defendant might have appealed from the first decision of the Appellate Court on the question of limitation, he could raise the same objection in cross-appeal on the plaintiff's special appeal—*In the matter of Mirza Himmut Bahadur*, B. L. R., F. B. R., 429. And see *Dasaradhi* vs. *Joddumoni*, I. L. R., 5 Mad., 193.

The general affirmation of a judgment in special appeal can only refer to the points raised by the appellant, and the rejection of the appeal does not necessarily affirm the other findings of fact or law incidentally arrived at by the lower Court—*Ahmed Hossein* vs. *Bandee*, 15 W. R., 91. Where the lower Court decided the issue of limitation against, but the other issues in favour of, the defendant, and the High Court remanded the case without passing any judgment on the issue of limitation, it was held that when the case came up again in special appeal, the Court could enter on the question of limitation—*Phool Koomaree* vs. *Woonkar Pershad*, 7 W. R., 67.

Error of Judge.—When it is stated in special appeal that the lower Court refused to examine witnesses, it is not sufficient to put in an affidavit to the effect that a verbal request of the vakeël to examine witnesses was refused. The general practice is for the pleaders to apply for examination of witnesses by petition—*Rameswur Bhattacharjee* vs. *Shib Narain*, 14 W. R., 419. See note under section 180, *ante*, *Raj Lukhee Debia* vs. *Gokool Chunder*, 13 Moore, 225, 226.

When a Judge states that an admission was made before him by one of the parties to the suit, the High Court cannot in special appeal enquire whether the Judge is right or wrong in making the statement—*Bykuntnath Goopta* vs. *Prosunno Moyee* 5 W. R., 196.

Second appeal on no other grounds.

585. No second appeal shall lie except on the grounds mentioned in section 584.

This section applies to H. C. In regard to Coorg, see Reg. I of 1886, section 9. See note under section 588, cl. 28, *post*.

No second appeal in certain suits.

586. No second appeal shall lie in any suit of the nature cognizable in Court of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

Act XXIII of 1861, section 27. This section applies to H. C. It is not in force in the Andaman and Nicobar Islands—Reg. I of 1884, section 4, and has been modified in Coorg—Reg. I of 1885, section 9.

Practice in Appeal.—If in appeal it appears that there is a Small Cause Court in the place where the suit was instituted, and it was filed in the ordinary Courts, the proceedings will be set aside as without jurisdiction and the plaint returned—*Kalian Dayal* vs. *Kalian*, I. L. R., 9 Bom., 259.

Right to Begin.—The appellant begins even where this right of appeal is contested—*Rustomji* vs. *Burtonji*, I. L. R., 8 Bom., 287, 289.

Cognizable in Court of Small Causes.—The law now in force in regard to Courts of Small Causes is Act IX of 1887; but I have retained a few of the old cases for the present.

In Bombay, when a suit was of a Small Cause Court nature, but a question of title was gone into and decided in the first Appellate Court, a special appeal was allowed—*Dikshit* vs. *Dikshit*, 2 Bom., 4; but this is not the present practice—*Bapuji* vs. *Kuvarji*, I. L. R., 15 Bom., 400; *Shidu* vs. *Ganesh*, I. L. R., 16 Bom., 128; and a special appeal will not lie in Calcutta—*Mohesh Matho* vs. *Sheikh Piru*, I. L. R., 2 Cal., 470, nor in Madras—*Manappa* vs. *McCarthy*, I. L. R., 3 Mad., 192.

And it is the nature of the suit and not the Court in which it is tried determines the appeal—*Kalian Dayal* vs. *Kalian*, I. L. R., 9 Bom., 259; so that if a case is of a Small Cause Court nature, though for special reasons it can not or has not been tried in a Small Cause Court, no appeal lies—*Id.*; *Musa Miya* vs. *Sayad Golam*, I. I. R., 7 Bom., 100; *Harakh* vs. *Ram Sarup*, I. L. R., 12 Alla., 579; *Muttukar Uppan* vs. *Sellan*, I. L. R., 15 Mad., 98; *Aunamalai* vs. *Subramanyan*, I. L. R., 15 Mad., 298.

Appeal Does not Lie.—No special appeal lies in a suit for contribution under section 69 of the Contract Act where the parties are not sharers in joint property—*Srinivasa* vs. *Sivakalundu*, I. L. R., 12 Mad., 349; nor on a bond specially registered under section 53, Act XX of 1866, for an amount less than 500 rupees—*Sri Bullov* vs. *Baburam*, I. L. R., 11 Cal., 169; nor in a suit by an heir for personal property valued at Rs. 200, said to have been taken from his ancestor—*Kapalee Bewa* vs. *Keshram Kooch*, 11 W. R., 93; nor by some members of a caste to compel other members to deliver caste vessels to the caste priest—*Kalian Dayal* vs. *Kalian*, I. L. R., 9 Bom., 259; nor in a suit for the recovery of the value of grass alleged to have been cut and taken away—*Krishna* vs. *Maizuddin*, I. L. R., 17 Cal., 707; nor for money had and received—*Muhamdi Begum* vs. *Abbas Ali*, I. L. R., 5 Alla., 531; *Kalian Singh* vs. *Chunni Lal*, I. L. R., 6 Alla., 10; nor for a share in money recovered by a co-plaintiff—*Dabi Das* vs. *Luchman Singh*, I. L. R., 7 Alla., 896; and see *Asman Singh* vs. *Doorga Roy*, I. L. R., 6 Cal., 284.

Appeal Lies.—A special appeal lies from a decree on a mortgage-bond for an amount under Rs. 500, if the property is made liable—*Tripoora Soondaree* vs. *Koylash Chunder Bose*, 15 W. R., 265; but where A sued for Rs. 500 on a bond, and the suit was decreed by consent, and the decree-holder got 1½ beegahs of land instead of money, it was held that this did not change the nature of the suit so as to give an appeal—*Talun Bibee* vs. *Tenoo Bibee*, 15 W. R., 65. A special appeal will lie from a decree for possession of six decrees valued less than Rs. 500, with declaration of power to execute them—*Balam Das* vs. *Babu Dwarka Das*, 7 Alla., 88; *Debukee Nundun* vs. *Mudhoo Muttee*, 24 W. R., 478; and where plaintiff sued father and sons on a bond executed by the father alone, the sons were allowed to appeal—*Narasinga* vs. *Subba*, I. L. R., 12 Mad., 139. A suit for damages on account of withholding a receipt for agricultural rent is not within the section—*Shoyeendro Geer* vs. *Pato Das*, 23 W. R., 304.

Any Suit—This section applies to a suit on an award filed in Court—*Mussamut Banoo* vs. *Narain Sahoo*, 13 W. R., 233; proceedings in execution—*Sri Bullov* vs. *Baburam*, I. L. R., 11 Cal., 169; *Aithala* vs. *Subbanna*, I. L. R., 12 Mad., 116; *Harakh* vs. *Ram Sarup*, I. L. R., 12 Alla., 579; but not where the matter in dispute in the original suit did

exceed 500 rupees—*Nazar Husain* vs. *Kesri Mal*, I. L. R., 12 Alla., 581; and if the order is a decree of a Small Cause Court nature, no special appeal lies—*Perumal* vs. *Venkatarama*, I. L. R., 11 Mad., 130.

Orders.—This section only applies to appeals from appellate decrees, and not to appeals from orders; it does not prevent an appeal from an order remanding a case for re-trial—*The Collector of Bijnor* vs. *Jafar Ali*, I. L. R., 3 Alla., 18. So it does not prevent an appeal from an order in a Small Cause Court suit which is given under sections 588, 589 of this Code—*Mahader* vs. *Keseaw*, I. L. R., 7 Bom., 292; *Gulam* vs. *Sayad*, I. L. R., 8 Bom., 260; *Chaudri* vs. *Tafar Ali*, I. L. R., 3 Alla., 18. But see *Aithala* vs. *Subbanna*, L. R., 12 Mad., 116; *Sri Bullov* vs. *Baburam*, I. L. R., 11 Cal., 169.

Provisions as to second appeal.

587. The provisions contained in Chapter XLI shall apply, as far as may be, to appeals under this Chapter, and to the execution of decrees passed in such appeals.

This section applies to H. C.

As far as may be—This means "as far as is consistent with the principles on which appeals from appellate decrees are admitted and determined"—*Hinde* vs. *Brayan*, I. L. R., 7 Mad., 52; and cases are frequently remanded in second appeal for reasons not contemplated in section 562, *ante*—*Ganesh Bhikaji* vs. *Bhikaji*, I. L. R., 10 Bom., 398; *Sohawan* vs. *Babu Nund*, I. L. R., 9 Alla., 26, p. 29. See "OBJECTION," section 567, and "SPECIAL APPEAL," section 565, *ante*.

The Appellate Court in special appeal can remand a case for re-trial—*Wazeer Ali* vs. *Kalee Coomar Chuckerbutty*, 11 W. R., 228; or for a finding on an issue—*Lala Ram Lall* vs. *Mohurput Roy*, 21 W. R., 52; and in Bengal can allow a cross-appeal to be raised on any point which might have been taken by a regular appeal—*Hills* vs. *Ishore Ghose*, Marsh., 151; *Narayan Ayyar* vs. *Lakshmi Ammal*, 3 Mad., 216; see, however, *Makudu Ravulan* vs. *Mastan Sohib*, 1 Mad., 132. But it cannot try an issue of fact as in regular appeal—*Hinde* vs. *Brayan*, I. L. R., 7 Mad., 52; *Sheo Ratan* vs. *Lappee Kuar*, I. L. R., 5 Alla., 14. And see I. L. R., 7 Mad., 53; 12 Cal., 37; 9 Alla., 147.

CHAPTER XLIII.

OF APPEALS FROM ORDERS.

Orders appealable.

588. An appeal shall lie from the following orders under this Code and from no other such orders:—

(1) orders under section 20, staying proceedings in a suit;

(2) orders under section 32, striking out or adding the name of any person as plaintiff or defendant;

This includes an order that plaintiff be made a defendant—*Lakhemana* vs. *Paramasiva*, I. L. R., 12, Mad., 489.

(3) orders under section 36 or section 66, directing that a party shall appear in person;

(4) orders under section 44, adding a cause of action;

(5) orders under section 47, excluding a cause of action;

(6) orders returning plaints for amendment or to be presented to the proper Court;

This means the Court of first instance—*Bindesheri Chaubey* vs. *Nundee*, I. L. R. 3 Alla., 456.

(7) orders under section 111, setting-off, or refusing to set-off, one debt against another;

(8) orders rejecting applications under section 103 (in cases open to appeal) for an order to set aside the dismissal of a suit;

Suit—This does not give an appeal to a judgment-debtor whose application to set aside a sale has been dismissed under 102, and whose application to set the dismissal aside has been refused under section 103—*Ningappa* vs. *Gangawa*, I. L. R., 10 Bom., 433; *Raja* vs. *Strinivasa*, I. L. R., 11 Mad., 319.

(9) orders rejecting applications under section 108 for an order to set aside a decree *ex-parte*;

"Or" has been replaced by "for"—Act VII of 1888, section 55.

(10) orders under sections 113, 120 and 177;

(11) orders under section 116 or section 245, rejecting, or returning for amendment, written statements or applications for execution of decrees;

(12) orders under sections 143 and 145, directing anything to be impounded;

(13) orders under section 162, for the attachment and sale of moveable property;

(14) orders under section 168 for attachment of property, and orders under section 170 for the sale of attached property;

(15) orders under section 261, as to objections to draft conveyances or draft-endorsements;

(16) orders under section 294, and orders under section 312 or section 313, for confirming, or setting aside, or refusing to set aside, a sale of immoveable property;

The words "The first paragraph" have been replaced by "and orders under," see Act VII of 1888, section 55.

(17) orders in insolvency-matters, under section 351, section 352, section 353 or section 357;

An appeal lies from an order refusing to grant an application to be made by an insolvent—*Nubbi Buksh* vs. *Chasni*, I. L. R., 6 Cal., 168; 7 C. L. R., 282; *Baikunta* vs. *Moidin*, I. L. R., 15 Mad., 89. See note under section 589, *post*.

(18) orders under section 366, paragraph two, section 367 or section 368;

(19) orders rejecting applications under section 370 for dismissal of a suit;

(20) orders under section 371, refusing to set aside the abatement or dismissal of a suit;

(21) orders disallowing objections under section 372;

(22) orders under section 454, section 455 or section 458, directing a next friend or guardian for the suit to pay costs;

(23) orders in interpleader-suits under section 473, clause (*a*), (*b*) or (*d*), section 475 or section 476;

(24) orders under section 479, section 480, section 485, section 492, section 493, section 496, section 497, section 502 or section 503 ;

Refusal to pass an order under section 500 is appealable—*Venkatasami* vs. *Stridavamma*, I. L. R., 10 Mad., 179.

An appeal lies from an order to appoint a Receiver and the order in appeal is final—*Baidya Nath* vs. *Makhan Lal*, I. L. R., 17 Cal., 680.

(25) orders under section 514, superseding an arbitration ;

(26) orders under section 518, modifying an award ;

(27) orders of refusal under section 558 to re-admit, or under section 560 to re-hear, an appeal ;

(28) orders under section 562, remanding a case ;

An order remanding a Small Cause Court case for re trial is appealable, though none would lie from the final decree — *The Collector of Bijnore* vs. *Jafar Ali*, I. L. R., 3 Alla., 18; and see *Aithala* vs. *Subbanna*, I. L. R., 12 Mad., 116.

When a case is remanded by the lower Appellate Court and an appeal is preferred against the order of remand, the High Court is not restricted to a consideration merely of the form of the order, but may examine it on its merits—*Loki Mahto* vs. *Aghoree Ajail*, 4 C. L. R , 465, I. L R., 5 Cal , 144; *Bhau Bala* vs. *Bapaji*, I. L. R., 14 Bom., 14; but see *Abrahim* vs. *Abrahim*, I. L. R., 17 Cal., 168. See also "APPEAL," section 562, *ante*.

(29) orders under any of the provisions of this Code, imposing fines, or for the arrest or imprisonment of any person, except when such imprisonment is in execution of a decree.

An order enforcing a penalty under the Stamp Act is not appealable under this clause—*Sonaka* vs. *Bhoobunjoy*, I. L. R., 5 Cal., 311; but an order or sentence under section 651 *post*, is—*Empress* vs. *Amar Nath*, I. L. R., 5 Alla., 318. This clause does not apply to attachment for contempt—*Navivahoo* vs. *Narotam Dass*, I. L. R., 7 Bom., 5.

The orders passe in appeals under this section shall be final.

This section applies to H. C.

High Court.—The corresponding section of Act X of 1877 did not apply to appeals or restrict them from the decision of a single Judge of the High Court to the full Court—*Hurrish Chunder* vs. *Kali Sunderi*, I. L. R., 9 Cal., 482; but this section has affected the Letters Patent — *Achaya* vs. *Ratnavela*, I. L. R., 9 Mad., 253, and no appeal lies from the decision of one Judge of the High Court refusing an application to appeal in *formâ pauperis* — *Banno Bibi* vs. *Mehdi*, I. L. R., 11 Alla., 375; *Raja Gopal*, I. L R., 9 Mad., 447: or rejecting a review—*Aubhoy Churn* vs. *Shamont*, I. L. R., 16 Cal., 788; or from an order granting a certificate to appeal to the Privy Council—*Lootf Ali* vs. *Asgur Reza*, I. L. R., 17 Cal., 455; or refusing to extend time to furnish security—*Kishen Pershad* vs *Teluckdhari*, I. L. R., 18 Cal , 182. And an appeal lies from an order committing for contempt—*Navivahoo* vs. *Narotam Dass*, I. L. R., 7 Bom., 5; and see *Muhammad* vs. *Ihsanullah*, I. L. R., 14 Alla., p 231.

No Appeal.—The appeals allowed by this Chapter are only appeals from orders made under the Code, either original or appellate, and upon matters arising in the course of a suit or in execution of decree.

An order under section 5 of the Court-Fees Act is not within this section—*Balkaran Rai* vs. *Gobind Nath*, I. L. R., 12 Alla., 157, and an order under section 69 of the Probate Act falls under clause (2) *ante*—*Abhiram* vs. *Gopal*, I. L. R., 17 Cal., 49.

No appeal lies from an order of a District Judge fixing the amount of the stamp-fees, where, plaintiff not paying, the suit was dismissed —*Narayan Madhavrao* vs *The Collector of Thana*, I. L. R., 2 Bom., 145; *Manohar Ganesh* vs. *Bawa*, I. L. R., 2 Bom., 219; or against sanctioning a prosecution — *In the matter of Bulwunt Rai*, 6 Alla., 124; *In the matter of Ram Persad Hazrah*, B. L R., F. B. R., 426; or against an order directing a penalty to be enforced under the Stamp Act—*Sonaka Chowdhrain* vs. *Bhoobunjoy*, I. L. R., 5 Cal , 311; or refusing a mortgagor an excess payment said to have been made by him under Reg. XV of 1793 — *Sreemut Chunder* vs. *Mudhoo Soodun*, 24 W. R., 17; see also 19 W. R., 122; or refusing to fine a recusant witness — *Pran Kisto Deo* vs. *Kalee Doss*, 7 W. R., 460.

A, having brought a suit against B, was allowed to withdraw with leave to bring a fresh suit, and also ordered to pay costs. A, brought a new suit, and the Court, holding that the payment of costs had not been made a condition precedent, refused to stop the suit until the costs had been paid: *Held*, no appeal lay against such an order—*Chutto Sheikh* vs. *Kaju Majur Hossein*, 2 Hyde, 212.

Where, on remand from the High Court for trial, the Judge considered himself bound to carry out the orders, although the parties petitioned that they had entered into a compromise before the appeal, it was held that an appeal did not lie—*Suroop Narain* vs. *Soondur*, 11 W. R., 505.

No appeal lay from an order directing the issue of *mandamus* commanding persons to make compensation for damage—*The Justices of the Peace for the Town of Calcutta* vs. *The Oriental Gas Company*, 17 W. R., 364; but no writ of *mandamus* can now be issued—Act I of 1877, section 50.

What Courts to hear appeals.

589. When an appeal from any order is allowed by this Chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, or, when such order is passed by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court:

Provided that an appeal from an order specified in section 588, clause (17), shall lie—

(*a*) to the District Court where the order was passed by a Court subordinate to that Court, and

(*b*) to the High Court in any other case.

The last paragraph has been added by Act X of 1888, sec. 3.

This section applies to H. C. The first paragraph and the word "other" in the second paragraph have been repealed by Act VII of 1888, section 56, and now no appeal lies to the High Court from an order in insolvency passed by a Court subordinate to a District Court—*Sitharama* vs. *Vythilinga*, I. L. R., 12 Mad., 472; *Vaikunta* vs. *Moidin*, I. L. R., 15 Mad., 89.

Appellate Jurisdiction.—See *Kirte Mohaldar* vs. *Ramjan*, I. L. R., 10 Cal., 523.

Procedure in appeals from orders.

590. The procedure prescribed in Chapter XLI shall, so far as may be, apply to appeals from orders under this Code, or under any special or local law in which a different procedure is not provided.

Act VIII, 1859, section 366. This section applies to H. C.

This section does not govern appeals from orders passed under the Insolvent Act—*In the matter of Brown*, I. L. R., 12 Cal., 629.

No other appeal from orders; but error therein may be set forth in memorandum of appeal against decree.

591. Except as provided in this Chapter, no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction; but, if any decree be appealed against, any error, defect or irregularity in any such order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

Act XXIII of 1861, section 26. This section applies to H. C.

Error, Defect or Irregularity.—These mean an error, defect or irregularity in procedure or law, and not in matters of fact—*Sankali* vs. *Murlidhar*, I. L. R., 12 Alla., 200.

Attachment.—An order of attachment for contempt on the Original Side of the High Court does not fall within this section, and is appealable—*Navivahoo* vs. *Narotum Dass*, I. L. R., 7 Bom., 5.

Court-Fees.—A decision under section 5 of the Court-Fees Act is not an order under this section—*Balkaran Rai* vs. *Gobind Nath*, I. L. R., 12 Alla., p. 158.

Interlocutory Orders.—There is no law in India which renders it imperative upon a party to appeal from every interlocutory order under the penalty, if he does not do so, of forfeiting the benefit of the consideration of the Appellate Court and whether the order is subject to appeal or not, the party aggrieved can impugn it in an appeal from the decree—*Googlee Sahoo* vs. *Premlal*, I. L. R., 7 Cal., 148; *Har Narain* vs. *Kharag*, I. L. R., 9 Alla., 447; *Goodall* vs. *The Mussooria Bank*, I. L. R., 10 Alla., 97; *Savitri* vs. *Ramji*, I. L. R., 14 Bom., 232. So where an interlocutory decree was given as to interest, the appellant was allowed to contest it in appeal from the decree, although he had not appealed against the decree when delivered—*Shah Mukhun Lall* vs. *Sree Kishen*, 12 Moore, 185. So also an order of remand not appealed from was impugned in appeal—*Savitri* vs. *Ramji*, I. L. R., 14 Bom., 232; *Forbes* vs. *Ameeroonissa*, 10 Moore, 359. An order nominating arbitrators—*Sheonath* vs. *Ramnath*, 10 Moore, 423; an order admitting an appeal after time—*Mowree Bewa* vs. *Soorundarnath Roy*, 10 W. R., 178; and an order granting a review—*Joy Kishen Mookerjea* vs. *Parbutty Churn Ghosal*, 22 W. R., 183; *Bhyrub Chunder* vs. *Madhab Ram*, 20 W. R., 84; and even an order refusing to set aside an *ex parte* decree—*Luchmidas* vs. *Ebrahim*, I. L. R., 2 Bom., 644; have been impeached in appeal from decree.

Second Appeal.—No second appeal lies from an order admitting on review, after a re-hearing had been refused, and the case struck off for default of prosecution—*Hirdhamun* vs. *Jinghoor*, I. L. R., 5 Cal., 711.

CHAPTER XLIV.

OF PAUPER APPEALS.

Who may appeal as pauper.

592. Any person entitled under this Code or any other law to prefer an appeal, who is unable to pay the fee required for the petition of appeal, may, on presenting an application accompanied by a memorandum of appeal, be allowed to appeal as a pauper, subject to the rules contained in Chapters, XXVI, XLI, XLII and XLIII, in so far as those rules are applicable:

Procedure on application for admission of appeal.

Provided that the Court shall reject the application, unless, upon a perusal thereof and of the judgment and decree against which the appeal is made, it sees reason to think that the decree appealed against is contrary to law, or to some usage having the force of law, or is otherwise erroneous or unjust.

This section applies to H. C.

Appeal.—An application for leave to appeal in *formâ pauperis* need not be preceded by separate formal application for inquiry into the pauperism of the applicant—*Kamod Poory* vs. *Sheo Poory*, 1 Alla., 246. It must be presented within 30 days from the date of the decree appealed against, and must be accompanied by a memorandum of appeal, a copy of the decree or order appealed against, and copy of the judgment upon which the decree or order is founded. No extension can be allowed under section 5, Act XV of 1877—*Bechi* vs. *Ahsanulla*, I. L. R., 12 Alla., 461; *Parbati* vs. *Bhola*, I. L. R., 12 Alla., 79; p. 93. And where an application to appeal in *formâ pauperis* was rejected, and a regular appeal on a proper stamp was subsequently presented but after time, it was held not to relate back to the time of the application in *formâ pauperis*—*Bishnath* vs. *Jagarnath*, I. L. R., 13 Alla., 305.

Security.—If the appellant is found to be a pauper and the appeal is admitted, he cannot be called on to give security for costs—*Nusseeroodeen Biswas* vs. *Ujjul Biswas*, 17 W. R., 68 [see, however, *In the matter of Jogendra Deb Roy Kut*, 19 W. R., 102]; but if he is not an appellant, but a respondent, and wishes to file a cross-appeal, he must pay the fee before it can be heard—*Rashamonee Dassee* vs. *Chowdhry Junmejoy Mullick*, 9 W. R., 356.

Order Rejecting : Appeal.—The Code gives no appeal from an order refusing leave to appeal as a pauper. In one suit the High Court, on a motion from such an order, sent it back to the Appellate Court for reconsideration, with an expression of their opinion—*In the matter of Moshaollah Khan*, 14 W. R., 445. See, however, *Harsaran Singh* vs. *Raza*, I. L. R., 4 Alla., 91.

An appeal presented on behalf of a pauper by a vakeel retained under an ordinary retainer and not authorized to sign as agent should be rejected—*Bhugobutty Koer* vs. *Gunesh Dutt*, 21 W. R., 308. It should be made by the party in person—*In re Narisi*, I. L. R., 8 Mad., 504.

Original Side.—No appeal is allowed from the order of a single Judge rejecting an application, on the Original Side of the High Court—*In re Rajagopal*, I. L. R., 9 Mad., 447; *Banno* vs. *Mehdi Husain* I. L. R., 11 Alla., 375. See "HIGH COURT," section 588, *ante*.

Where a guardian obtains leave to sue in *formâ pauperis* on behalf of a minor, the mere rejection of the suit supplies no ground for throwing the costs of the suit on the guardian—*Brijessuree Dossia* vs. *Kishore*, 25 W. R., 316.

See note to sections 401 and 404, *ante*.

Inquiry into pauperism.

593. The inquiry into the pauperism of the applicant may be made either by the Appellate Court or by the Court against whose decision the appeal is made under the orders of the Appellate Court:

Proviso.

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court against whose decree the appeal is made, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees special cause to direct such inquiry.

This section applies to H. C.

CHAPTER XLV.

OF APPEALS TO THE QUEEN IN COUNCIL.

"Decree" defined.

594. In this Chapter, unless there be something repugnant in the subject or context, the expression "decree" includes also judgment and order.

Act VI of 1874, section 3.

When appeals lie to Queen in Council.

595. Subject to such rules as may, from time to time be made by Her Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained,

an appeal shall lie to Her Majesty in Council—

(*a*) from any final decree passed on appeal by a High Court or any other Court of final appellate jurisdiction;

(*b*) from any final decree passed by a High Court in the exercise of original civil jurisdiction, and

(*c*) from any decree, when thecase, as hereinafter provided, as certified to be a fit one for appeal to Her Majesty in Council.

Act VI of 1874, section 4.

Right to Admit.—This Code does not limit the prerogative of Crown to admit an appeal—*Rahimbhoy* vs. *Turner*, I. L. R., 15 Bom., 155.

Effect of Decree under Appeal—Pending the result of an appeal to the Privy Council, the person who, subject to that appeal, is the owner of the estate, can sue third parties in that character—*Perhlad Sein* vs. *Budhoo Singh*, 12 W. R., P. C., 6, p. 20.

When and When not Appeal Lies—No appeal is allowed as to costs—*Keemee Banee* vs. *Luchmun Das*, 5 W. R., P. C., 59; nor from a criminal case—*Joykissen Mookerjee*, Petitioner, 1 W. R., P. C., 13, unless certified by the High Court; nor from an order under section 562 remanding a case to be tried on the merits—*Ishvargar* vs. *Caudasama*, I. L. R., 8 Bom., 548; nor an order directing accounts to be taken in a particular manner—*Aben Sha Salit* vs. *Cassirao*, I. L. R., 6 Bom., 260 (see I. L. R., 8 Bom., 290 & 549); nor from an order cancelling on the ground of mistake a notification declaring a person had been enrolled as a pleader—*In re Sakhnandan Lall*, I. L. R., 6 Alla., 163; nor apparently from a consent decree—*Rogubar Doyal* vs. *Jolomp*, Fulton, 146.

An appeal lies from the order of a single Judge of the High Court, on the Appellate Side, as to the interpretation of a Privy Council decree for more than Rs. 10,000—*Leelanund* vs. *Lakchmissar*, 14 W. R., P. C., 23, but not from the decision of one Judge in the original jurisdiction; and an appeal lies from the decree of a Division Bench when the Judges differ, although there is a further appeal on the point of difference to the High Court—*The Court of Wards* vs. *Leelanund*, 16 W. R, 191; but see section 507, *post*.

Final Decree.—A decision under section 244, *ante*, is a decree—*Ram Kirpal* vs. *Rup Kuar* I. L. R., 3 All., 633; and so is a refusal to execute—*Hurrish Chunder* vs. *Kalisunderi*, I. L. R., 9 Cal., 482; see the cases cited in *Kishen Pershad* vs. *Tiluckdhari*, I. L. R., 18 Cal., 182. See, however, *Jogessur Sahai* vs. *Muracho*, 1 C. L. R., 354. No appeal lies from an interlocutory order, but only from a final decree unless it falls within clause (*c*)—*Ramhibhoy* vs. *Turner*, I. L. R., 14 Bom., 429. As to what is and is not a final decree, see *Sonbai* vs. *Ahmedbhai*, 9 Bom., 398, *Palak Dhari* vs. *Radha*, I. L. R., 2 Alla., 65; *Aben Sha Salit* vs. *Cassirao*, I. L. R., 6 Bom., 260; *Jogeshur Sahoy* vs. *Pulasho Koer*, 1 Shome, 80; *Ramadhin Mahton* vs. *Ganesh*, I. L. R., 4 Alla., 238; *Joyessur Sahai* vs. *Muracho*, 1 C. L. R., 354; *Ramhibhoy* vs. *Turner*, I. L. R., 14 Bom., 428; 18 Ind. App., 6; I. L. R., 15 Bom., 155; *Tirunarayana* vs. *Gopalasami*, I. L. R., 13 Mad., 349.

On Appeal.—An appeal will not lie from an order rejecting a review—*Enaet Hossein* vs. *Rowshun Jehan*, 10 W. R. (F. B.), 1, but if the review is granted and a new decision passed, it would be otherwise—*Lekraj Roy* vs. *Kanhya Singh*, 18 W. R., 494. An appeal lies from orders passed under section 15 of the High Court's Act—*Girdharee Singh* vs. *Hurdoy Narain*, 21 W. R, 263.

Value of subject-matter.

596. In each of the cases mentioned in clauses (*a*) and (*b*) of section 595,

the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards,

or the decree must involve, directly or indirectly, some claim or question to, or respecting, property of like amount or value,

and, where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree the appeal must involve some substantial question of law.

Value.—The value of the property is the selling or market value—*Mohun Lal Sookul* vs. *Rebee*, 8 Moore, 193; 7 Moore, 428; *Lekraj Roy* vs. *Kanhya Singh*, 1 Ind. App., 317; *Pichayee* vs. *Sivagami*, I. L. R., 15 Mad., 237. Though if a defendant, having the means of proving the real value of a suit, makes no objection to the plaintiff's under-valuation, and in special appeal under values it, he cannot be allowed to prove the real value of the estate for the purpose of appealing to the Privy Council—*In the matter of Ranee Bhugobutty Debia*, 14 W. R., 62; but see *Lekhraj Roy* vs. *Kanhya Singh*, 18 W. R., 494; *Reedhnath Sahee* vs. *Gopee*, 19 W. R., 191.

Value of the Subject-matter of the Suit.—If the land and wasilat sued for amount to Rs. 10,000, it is sufficient—*Gooroodoss Roy* vs. *Gholam Mowlah*, Marsh., 24.

The subject matter of the suit is not the same as the subject-matter in dispute—*Hikmat Ali* vs. *Wali Unnisa*, I. L. R., 12 Alla., 506.

Value of the Appeal.—A suit was brought to recover a zemindary in the possession of different persons under deeds of sale in execution of decree. The value of the property was, as stated in the plaint, Rs. 14,325. The Sudder Court upheld the sales so far as related to the claims of some of the defendants. The other defendants applied for leave to appeal, but it was refused on the ground that the value of their portion was only Rs. 8,215: but the Privy Council seemed to hold that the words of the old order "The value of the matter in dispute in any such appeal to Her Majesty in Council" related to the whole matter involved in the suit which was the subject of judicial enquiry in the Courts, and allowed the appeal—*Ameena Khatoon* vs. *Radhabenod*, 7 Moore, 261; *Onooroop Chunder Mookerjee* vs. *Pertap Chunder Paul*, 6 W. R., Mis., 4; but see *In the matter of Reedhnauth Sahee* vs. *Gopee*, 19 W. R., 191. Where a decree was given, and the amount actually decreed *including interest* up to decree, exceeded Rs. 10,000, it was held that the matter in dispute in appeal being whether the decree was right or not, was above Rs. 10,000 in value—*Suteeschunder* vs. *Guneshchunder*, 3 W. R., P. C., 14; and so in a suit for land where the land was valued at less than Rs. 10,000, but the wasilat when added made it above Rs. 10,000, an appeal lay—*Gooroodoss Roy* vs. *Gholam Mowlah*, Marsh., 24; but costs of suits cannot be included—*Doorga Doss Chowdhry* vs. *Ramanath Chowdhry*, 8 Moore, 262; *Nilmadhub Doss* vs. *Bishumber Doss*, 13 Moore, 103; nor interest after decree—*Suteeschunder* vs. *Guneshchunder*, 3 W. R., P. C., 14.

As to valuation of a right to water see *Ajuas Koer* vs. *Luteefa*, 18 W. R., 21.

Directly or Indirectly.—If there are two or more suits, each less than Rs. 10,000 in value, in which separate judgments have been given, they cannot be consolidated. Each judgment when pronounced is final and conclusive—*Mohummud Ubdoollah* vs. *Moteechand*, 5 W. R., P. C., 34; but if there are several suits, the aggregate amount of which is more than Rs. 10,000, and the decision of one governs them all, the appeal will be allowed—*Ko Khine* vs. *Madden*, L. R., 2 P. C., 50; *Khajah Ahsanulla* vs. *Karoonamoyi*, 4 C. L. R., 125; *Joogulkishore* vs. *Tagore*, I. L. R., 8 Cal., 210. And where of six suits heard on the same evidence and concluded by the same judgment, five were appealable as of right, and in the sixth there was an important point of law not raised in the other five, a certificate was granted—*Byjnath* vs. *Graham*, I. L. R., 11 Cal., 740.

Affirms the Decision of the Court Below.—See *Ashgar Reza* vs. *Hyder Reza*, I. L. R., 16 Cal., 287, p. 298.

Substantial Question of Law.—The meaning of this clause is not that the appeal *necessarily* depends on some question of law, but includes cases where, if the appeal be allowed, questions of law will be raised in the argument as well as questions of fact—*Gopinath* vs. *Goluck Chunder*, I. L. R., 16 Cal., 292. See in connection with this matter the remarks of their Lordships of the Privy Council in *Durga* vs. *Jewahir*, 15 Ind. App., 122; I. L. R., 18 Cal., 23, pp. 25, 30; *Munnalal* vs. *Gajraj*, I. L. R., 17 Cal., 247.

Neglecting to record a judgment in the manner required by section 574 is not a substantial question of law—*Sundar Bibi* vs. *Bisheshar*, I. L. R., 9 Alla., 93.

Bar of certain appeals.

597. Notwithstanding anything contained in section 595,

no appeal shall lie to Her Majesty in Council from the judgment of one Judge of a High Court established under the twenty-fourth and twenty-fifth of Victoria, Chapter 104,

or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court, constituted by two or more Judges of such High Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being;

and no appeal shall lie to Her Majesty in Council from any decree which, under section 586, is final.

Act VI of 1874, section 6.
See section 575, *ante*—*Gridhariji* vs. *Purushotum*, I. L. R., 10 Cal., 814.

Application to Court whose decree complained of.

598. Whoever desires to appeal under this Chapter to Her Majesty in Council must apply by petition to the Court whose decree is complained of.

In appeal to the Privy Council three motions are required, (1) that the petition be received, read and filed, (2) that the recognizances be entered into or deposit made, (3) that the petition be allowed—*Hurrosoondry Dossee* vs. *Cowar Kistonath*, Fulton, 10.

The Court cannot receive any appeal without the security bond duly registered, as provided by rule—*Saheb Pershad Sein* vs. *Rajendro Kishore*, 7 W. R., 338.

Forma Pauperis.—An application to appeal to the Privy Council in *formâ pauperis* may be made to the High Court on unstamped paper, accompanied by certificate of counsel that there is a reasonable ground for appeal; the usual security for costs and costs of translation must be given—*Jowad Ali*, Appellant, 8 W. R., 48; *In re Gour Surn Duss*, 19 W. R., 305. A separate application should also be made to the Privy Council—*Munni Ram* vs. *Sheo Churn*, 4 Moore, 114.

Representation.—Pending appeal the appellant died, and the Sudder Dewany directed the Zillah Court to take evidence and determine the right of succession. Evidence was taken and the Sudder Court entered the name of A. It was held that the validity of the order directing substitution could not be questioned in appeal, and the only remedy was by review—*Kasi Pershad Narain* vs. *Kawalbasi*, 5 Moore, 163.

599. Repealed by Act VII of 1888, s. 57.

Certificate as to value or fitness.

600. Every petition under section 598 must state the grounds of appeal, and pray for a certificate, either that, as regards amount or value and nature, the case fulfils the requirements of section 596, or that it is otherwise a fit one for appeal to Her Majesty in Council.

Upon receipt of such petition, the Court may direct notice to be served on the opposite party to shew cause why the said certificate should not be granted.

Costs.—If a respondent appears and does not object, his costs will not be allowed, though if he objects, and on his objection the petition be amended, he will obtain his costs—*Mitter* vs. *Dossee*, Fulton, 400.

Non-Prosecution.—If the petitioner does not prosecute his petition, his application may be struck off for non-prosecution—*Moorajee* vs. *Vuranjee*, I. L. R., 12 Cal., 658; but it may be re-admitted—*Shankar* vs. *Hardeo*, I. L. R., 16 Cal., 397.

Appeal.—No appeal lies from the order of a Judge of the High Court granting or refusing a certificate to the effect that the subject-matter of a suit is of the value of Rs. 10,000—*Amirrunnissa* vs. *Baboo Behari Lall*, 25 W. R., 529; *Tara Chand* vs. *Radha Jeebun*, 24 W. R., 148; *Manly* vs. *Patterson*, 9 C. L. R., 166; I. L. R., 7 Cal., 339; and see the cases in *Kishen Persad* vs. *Tiluckdhari*, I. L. R., 18 Cal., 182.

Effect of refusal of certificate.

601. If such certificate be refused, the petition shall be dismissed :

Provided that, if the decree complained of be a final decree passed by a Court other than a High Court, the order refusing the certificate shall be appealable to the High Court to which the fomer Court is subordinate.

The words "within thirty days from the date of the order" have been repealed by Act VII of 1888, section 57.

Security and deposit required on grant of certificate.

602. If the certificate be granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date—

(*a*) give security for the costs of the respondent, and

(*b*) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to Her Majesty in Council a correct copy of the whole record of the suit except—

(1) formal documents directed to be excluded by any order of Her Majesty in Council in force for the time being ;

(2) papers which the parties agree to exclude ;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included, and

(4) such other documents as the High Court may direct to be excluded :

and when the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in the first clause of this section, deposit the amount required to defray the expense of printing such copy.

Motion for security of costs should, in all cases, be made before the appeal has been admitted—*Hurrosoondry Dossee* vs. *Cowar Kistonath*, Fulton, 89.

Six Months.—Under section 599 repealed, application should have been ordinarily made within six months from date of decree. It was held that the six months were exclusive of the day on which the decree was pronounced or dated—*Re Ramaoogra Narain*, 13 W. R , P. C., 17 ; and see *Anderson* vs. *Periasami*, I. L. R., 15 Mad., 169. Judgment was delivered in June 1870. In July 1871, a review was applied for and rejected in September, and when rejecting it, the Judicial Commissioner gave leave to appeal to the Privy Council. It was held that the permission was *ultra vires*, as the petition to appeal was not presented within six months of the judgment complained of—*Gajadhur Pershad* vs. *The Widows of Emam Ali*, 15 B. L. R., 221.

Struck Off.—A petition presented in time and admitted, if struck off for default, can be re-admitted after six months—*In the matter of Radha Binode Misser*, B. L. R., (F. B.), 730 ; *Shankar* vs. *Hardeo*, I. L. R., 16 Cal., 397 ; 16 Ind. App., 71.

Quære.—If an application may be made on the first opening day if the Court is closed and the period has expired—*Raj Kishen* vs. *Huro Soondurt*, 15 W. R., 255, and the cases there referred to ; see also *Luchmun Chunder* vs. *Kalee Churn*, 12 W. R., 293.

Petitioner applied for leave to appeal on the last day of the six months allowed to appeal, and deposited the estimated costs of translating and transmiting the record, but not the cost of printing, as required by Rule IV. The omission was not amended till after the six months, and his application was dismissed—*In the matter of Gour Surn Dass*, 19 W. R., 305.

Costs and Expenses and Security.—The Court has power to enlarge the period —*Fazulunnissa* vs. *Mulo*, I L. R., 6 Alla., 250; *Burjore* vs. *Bhagana*, L. R., 11 Ind. App., 7; I. L. R., 10 Cal., 557; *Rangasayi* vs. *Mahalkshmamma*, I. L. R., 14 Mad., 391.

Security-bonds require a stamp—*Soonjharee Koonwar* vs. *Ramessur Panday*, 5 W. R., Mis., 47.

Appeal.—No appeal is allowed from the order of a single Judge granting a certificate—*Manly* vs. *Paterson*, I. L. R., 7 Cal., 339; *Lutfali* vs. *Asgur Reza*, I. L. R., 17 Cal., 455; nor from an order refusing to extend time to furnish security and striking off the application—*Kishen Pershad* vs. *Tiluckdari*, I. L. R., 18 Cal., 182. See, also *Hurrish Chunder* vs. *Kalisunderi*, I. L. R., 9 Cal., 482.

As to realization of the security, see section 610, *post*.

Admission of appeal and procedure thereon.

603. When such security has been completed and deposit made to the satisfaction of the Court, the Court may—

(*a*) declare the appeal admitted, and

(*b*) give notice thereof to the respondent, and shall then

(*c*) transmit to Her Majesty in Council, under the seal of the Court, a correct copy of the said record, except as aforesaid, and

(*d*) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

Act VI of 1874, section 12.

Right to Appeal when Perfected.—There is no right to appeal to the Privy Council until the petition is admitted and allowed. If the petition is not prosecuted within a reasonable time, the Court has power to remove it from the file—*Thakoor Kapilnath* vs. *The Government*, I. L. R., 1 Cal., 142; *Moorajee* vs. *Vishranjee*, I. L. R., 12 Cal., 658.

If the order admitting an appeal is void, because given after the time allowed to do so has expired, this objection should be taken as early as possible before the Privy Council; for, if the case is called on and the arguments entered on, their Lordships will give special leave to appeal if the appellant has a good case—*Gajadhur Pershad* vs. *The Widows of Emam Ali*, 15 B. L. R., 221; *Ram Sabuk* vs. *Kaminee Koomaree*, 14 B. L. R., 394.

Review.—If the appeal has been admitted the High Court cannot review its order—*Gopinath* vs. *Goluck Chunder*, I. L. R.,16 Cal., 292.

See note under section 606, *post*.

Revocation of acceptance of security.

604. At any time before the admission of the appeal the Court may, upon cause shewn, revoke the acceptance of any such security, and make further directions thereon.

Power to order further security or payment.

605. If at any time after the admission of the appeal, but before the transmission of the copy of the record, except as aforesaid, to Her Majesty in Council, such security appears inadequate,

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

Documents.—Unnecessary documents should not be inserted in the transcript, and all expenses occasioned by their insertion will be allowed—*Tarakant Bannerjee* vs. *Puddomoney Dossee*, 10 Moore, 476; and in a case where the High Court could not determine whether certain books and accounts were material or relevant, it declined to put the appellant to the cost of printing them, but gave the respondent the option of printing and translating them at his own expense, with a view to their being sent to England as an appendix to the record—*Rajcoomar Baboo Deb Nundun*, Petitioner, 7 W. R., 90.

Razeenamahs, safeenamahs and security connected with appeals need not be translated into English if presented before the transmission of the appeal—*Meer Mahomed Tuhee* vs. *Luchmeeput Singh*, 7 W. R., 291.

Review.—When an appeal has been filled from an order of the High Court on review, the papers relating to an application for review, if the application has been rejected, should not be transmitted with the record to the Privy Council—*Fukeerooddeen Mahomed* vs. *Nujmoonissa*, 11 W. R., 145.

Judgment.—The Letters Patent creating the High Court (of Madras), provides, that the reasons given by the Judges on appeal should be transmitted with the record for the information of the Privy Council at the hearing—*Katchekaeyana Rungappa* vs. *Kachivijaya Rungappa*, 12 Moore, 495; *Rajah Enaet Hossein* vs. *Ranee Rowshun Jehan*, 10 W. R. (F. B.), 1.

Effect of failure to comply with order.

606. If the appellant fail to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of Her Majesty in Council,

and in the meantime execution of the decree appealed against shall not be stayed.

A widow's interest in her husband's property should not be taken as security—*Phool Koer* vs. *Dabee Pershad*, 12 W. R., 187.

Where no security was given within the time limited by section 602, *ante*, the proceedings were stayed and the appeal struck off the file—*Kapilnath* vs. *The Government*, I. L. R., 1 Cal., 142. So where an applicant deposited the estimated sum, but less the cost of transcription, on the last day of the six months, his application was stayed—*In the matter of Gour Surn Dass*, 19 W. R., 305; and see *Moorajee* vs. *Vishranjee*, I. L. R., 12 Cal., 658.

Extend Time.—The High Court has the power to restore an appeal dismissed for default, or for any other reason removed from the file, after six months have expired—*In the matter of the petition of Radha Binode Misser*, B. L. R. (F. B.), 730.

Appeal.—No appeal lies from an order refusing to extend the time for furnishing security—*Kishen Pershad* vs. *Tiluckdhari*, I. L. R., 18 Cal., 182.

Refund of balance of deposit.

607. When the copy of the record, except as aforesaid, has been transmitted to Her Majesty in Council, the appellant may obtain a refund of the balance, if any, of the amount which he has deposited under section 602.

Powers of Court pending appeal.

608. Notwithstanding the admission of any appeal under this Chapter, the decree appealed against shall be unconditionally enforced, unless the Court admitting the appeal otherwise directs.

But the Court may, if it thinks fit, on any special cause shown by any party interested in the suit, or otherwise appearing to the Court,

(*a*) impound any moveable property in dispute or any part thereof, or

(*b*) allow the decree appealed against to be enforced, taking such security from the respondent as the Court thinks fit for the due performance of any order which Her Majesty in Council may make on the appeal, or

(*c*) the stay execution of the decree appealed against, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed against, or of any order which Her Majesty in Council may make on the appeal, or

(*d*) place any party seeking the assistance of the Court under such conditions, or give such other direction respecting the subject matter of the appeal, as it thinks fit.

Admission of any Appeal.—Security cannot be demanded before the application has been considered and the appeal admitted—*In the matter of Burra Lall*, 16 W. R., 289.

Stay Execution.—It is essential to support an application to stay execution that irreparable injury will result to the applicant unless the delay be granted, and, secondly, that he has promptly made the application—*Sidhee Nuzur Ally Khan* vs. *Ojoodhyaram*, 1 Ind. Jur., N. S., 185. See also *Inder Kumari* vs. *Jaipal*, I. L. R., 14 Cal., 290. The applicant must prove special circumstances which go to show that the appeal, if successful, would be nugatory—*Wilson* vs. *Church*, 12 C. D., 454; *Polini* vs. *Grey*, 13 C. D., 411. The application should be made on notice—*Repub. of Peru* vs. *Weguelien*, 24 W. R., 297; and if the applicant has not an affidavit showing special circumstance, probably his application should be dismissed, and he should not be allowed time to produce further affidavits—*Barker* vs. *Lavory*, 14 Q. B. D., 769.

A appealed to the Privy Council from a decree given against him; in a second suit he obtained a decree, and an order was issued against him to stay execution "until further orders." *Held*, if the party obtaining the decree against which A had appealed to, the Privy Council attempted to execute it, the order restraining A might be modified, and the restraint withdrawn—*Dwarkanath Roy* vs. *Wooma Soondaree*, 14 W. R., 329.

A rule suspending execution pending an appeal to the Privy Council ceases to have effect when judgment is delivered and limitation begins to run—*Gunesh Dutt Singh* vs. *Mungree Ram*, 19 W. R., 186.

The exercise of such jurisdiction is not a matter of right, but of discretion, and security will not be required unless it has been shown that the party in possession is making waste, or is so embarrassed by debt that the estates are likely to be seized by creditors in satisfaction of their claims, or some such good cause—*Sooruj Monee* vs. *Sudanund*, 12 W. R., 296; *Jarutool Butool* vs. *Hoseinee Begum*, 10 Moore, 196; *Nagalutchmee* vs. *Gopoo Nadaraja*, 6 Moore, 309; but see *In the matter of Burra Lall*, 16 W. R., 289; *Juggo Lall* vs. *Jankee Bebee*, 17 W. R., 521.

Partial Execution.—Security can be demanded after execution has issued in regard to part of the decree—*Inder Kumari* vs. *Jaipal*, I L. R., 14 Cal., 290, p. 293, or has been completed—*Jairutool Butool* vs. *Hoseinee Begum*, 10 Moore, 196; *Sooruj Monee* vs. *Sudanund*, 12 W. R., 296; and execution may be stayed after partial completion, though whether restitution can be ordered is doubtful—*Khajah Ashanulla* vs. *Karoonamoyi*, 4 C. L. R., 125. See also the case of *Joynarain Pattur* vs. *Russeek Mohun*, 8 W. R., 144, decided under Regulation XVI of 1797. See also section 609, *post*.

Privy Council.—The Privy Council cannot stay execution. But when their Lordships admitted an appeal from an interlocutory order, they advised the appellant to petition the Court in India to stay execution—*Maharani* vs. *Maharani*, 14 Ind, App., 1.

Restitution.—See *Raj Kissen* vs. *Baroda*, 6 W. R., Mis., 111.

Construction of Bond.—See note under section 545, *ante*. Where a decree-holder wishing to execute a decree gave security, yet did not execute the decree for some reason or other, and the decree was set aside with costs in the Privy Council, it was held

that the terms of the security-bond did not render the surety liable for costs or anything else awarded by the Privy Council—*Nufer Chunder* vs. *Soorendro Nath*, 14 W. R., 410; and see *Ranee Brijobuttee* vs. *Pertab Sing*, 3 W. R., P. C., 36. The terms of the bail-bonds in these cases are not given, and probably they were to restore the property the decree-holder might take in execution.

Value of Security.—In practice, the security is calculated at three years' mesne profits of all lands the decree-holder may take possession of—*Ameeroonissa Khatoon* vs. *Dunne*, 14 W. R., 361.

Registration.—See note under section 545, *ante*. The security bond (if registration is necessary) need not be registered until the security has been accepted. Thus, the High Court directed a party to furnish security within two months, and on the last day allowed by the order the party tendered a dur putni mehal, and on the day following gave an unregistered security bond which the Judge refused. It was held that the Judge should have enquired into the sufficiency of the security, and that registration was not necessary until the security had been accepted—*Dunne* vs. *Ameeroonissa Khatoon*, 13 W. R., 41.

Reporting on Security.—In reporting on security a Judge should not transmit to the High Court all documents used to make out the title of the parties offering the security; but should confine himself to stating the particulars of the documents which have been produced and proved before him, and upon which the title of the surety appears to have been made out—*In the matter of Ameeroonissa Khatoon*, 14 W. R., 94.

A District Judge has no power to release a surety from security taken by the High Court in a Privy Council case, and no appeal lies from such an order. It is void—*Abedoonissa* vs. *Ameeroonissa*, 17 W. R., 464.

Quære—Has the Court power to order restitution of property already taken in execution of decree pending appeal to the Privy Council?—*Khajah Ashanulla* vs. *Karoonamoyi*, 4 C. L. R., 125.

Increase of security found inadequate.

609. If, at any time during the pendency of appeal, the security so furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

In default of such further security being furnished as required by the Court, if the original security was furnished by the appellant, the Court may, on the application of the respondent, issue execution of the decree appealed against as if the appellant had furnished no such security.

And, if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay all further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

Procedure to enforce orders of Queen in Council.

610. Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be inforced or executed, to the Court from which the appeal to Her Majesty was preferred.

Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order made direct, and

shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees.

In so far as the order awards costs to the respondent, it may be executed against a surety therefor, to the extent to which he has rendered himself liable, in the same manner as it may be executed against the appellant:

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.

When any moneys expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed by the Secretary of the State for India in Council, with the concurrence of Lords Commissioners of Her Majesty's Treasury, for the adjustment of financial transactions between the Imperial and the Indian Governments.

Act VI of 1874, section 19. The third and fourth paragraphs have been added by Act VII of 1888, section 58.

Limitation.—Twelve years, from the time when a right to enforce the judgment arises—Art. 180, Sched. II, Act XV, 1877—*Luchmun Pershad Sing* vs. *Kishen Pershad Sing*, I. L. R., 8 Cal., 218.

Execution.—The application for excution must be made to the Court from which the appeal has been preferred,—*i.e.*, the High Court, and proceedings commenced in any other Court are invalid—*Joy Narain Giree* vs. *Goluck Chunder Mytee*, 22 W. R., 102; *Lethbridge* vs. *R. Prohlad Sein*, 19 W. R., 301.

The original decree of the Privy Council is given to the successful party, and it is his duty to file the original for execution in the High Court, but this section does not limit the only possible evidence to a certified copy, and an uncertified copy is sometimes admissible—*Kalisoonderi* vs. *Hurrish Chunder*, L. R., 6 Cal., 594; *Hurrish Chunder* vs. *Kalisunderi*, 12 C. L. R., 311; 10 Ind. App., 4; I. L. R., 9 Cal., 482; but, as a rule, the decree-holder must produce a certified copy of the formal order—*Juggernath* vs. *Judoo Roy*, I. L. R., 5 Cal., 329; 4 C. L. R., 387; and a printed copy of the judgment cannot be treated ast he decree and executed—*Joy Narain Giree* vs. *Goluck Chunder*, 20 W. R., 444; but when the Privy Council remits a case with directions that the Zillah Court shall arrive at certian results by certain inquires, the object and reasons of those inquiries as set forth in the judgment are part of the record, and should be forwarded to the Zillah Court with the decree—*Goluck Chunder Dutt* vs. *Mohun Lall Sookul*, 5 W. R., 271. When the decree is filed, the High Court forwards it, as a rule, to the first Court, which is bound to execute it as if it were its own original decree—See *Gooro Surun* vs. *Hunooman Pershad*, 20 W. R., 419.

Interest.—Interest is not allowed without an express order—*Lakraj Roy* vs. *Mahtab Chand*, 21 W. R., 147; *Forester* vs. *The Secretary of State*, 4 Ind. App., 187; and where a decree gave interest on the principal only, and costs, no interest was allowed on the costs—*Ameeroonnissa* vs. *Meer Mahomed*, 18 W. R., 103; *Brojo Soondurse Debia* vs. *Anund Moyee*, 16 W. R., 302; but in one case where the Privy Council granted costs only and said nothing as to interest, it was held that the Indian costs, but not the English, carried interest at 6 per cent.—*Nil Madhub* vs. *Bissumbur*, 21 W. R., 411. If interest is given, but the rate is not determined, the rate granted in the lower Court should be allowed in execution—*Ameeroonnissa* vs. *Meer Mahomed* 18 W. R., 103.

Costs.—The word "costs" in Privy Council decrees means costs in England only—*Omatool Fatima* vs. *Azhur Ali*, 15 W. R., 356. Costs in India are not assessed by the Privy Council—*In the matter of Sharoda Pershad Mullick*, 18 W. R., 89. They include

the ordinary costs of translation and printing—*Ram Coomar* vs. *Prosunno*, I. L. R., 10 Cal., 106; unless there is a special order disallowing them in whole or in part—*Bishen Mun* vs. *Ld. Mort. Bank*, 12 Ind. App., 7. A refund of the costs, with interest at 6 per cent., will be granted on motion—*Dorab Aly* vs. *Abdool Azeez*, 3 C. L. R., 358; I. L. R., 4 Cal., 229.

Mesne Profits.—When the appeal was dismissed by the Privy Council, and no order made as to mesne profits, held, the respondent was entitled to mesne profits from the date of the decree—*Gogun Chunder Sirkar* vs. *Laidlay*, 5 C. L. R., 189.

Restitution.—Restitution carries mesne profits without any express order—*Gooroodoss Roy* vs. *Stephens*, 21 W. R., 195; *Leelanund* vs. *Lakhchmissar Sing*, 14 W. R. P. C., 23; and where a definite sum has been paid under the decree, restitution carries interest on it—*Rodgers* vs. *The Comptoir D'Escompte de Paris*, L. R., 3 P. C., 465.

Special Directions.—A judgment of the Privy Council ordered execution for mesne profits to issue against A, and, on failure to obtain satisfaction, against B, and it was held that, until all the assets of A had been exhausted, no process of any kind could issue against the property of B, and that in any case B should first be called on to show cause why execution should not issue against him on the ground that A's property had been exhausted—*Dhanput Sing* vs. *Forbes*, 22 W. R., 104.

The Privy Council, doubting whether the respondents to England were on the face of the plaint, entitled to the full amount claimed, left the matter to be determined by the High Court in execution, where it appeared that the doubt arose owing to the word *Shohodar* in the plaint having been wrongly translated "sons." The High Court allowed the respondents to take out execution for the whole amount—*Mazuffer Hossein* vs. *Ameer-oonnissa*, 17 W. R., 340.

A judgment was pronounced on the 20th of April 1870, and an appeal was allowed to the Privy Council on the 14th of May. A judgment on review was passed on the 29th August, and was sent with the papers; but no appeal was preferred against it. Their Lordships affirmed the first judgment without prejudice to the second judgment passed subsequent to the appeal—*Toondun Sing* vs. *Pokhnarain Singh*, 1 Ind. App., 345.

Where a minor withdrew an appeal on coming of age, the costs of his mother and guardian, who had carried on the case, were directed to be paid out of his estate—*Bistoopria Putmadaye* vs. *Nund Dhul*, 13 Moore, 602.

Executed against the Surety.—The addition to this section sets aside the effect of *Radha Pershad Sing* vs. *Phuljun*, I. L. R., 12 Cal., 402.

Rate of Exchange.—This means the rate of exchange when execution is taken out and not when the decree was passed—*Param Sukh* vs. *Ram Dayal*, I. L. R., 8 Alla., 650.

Appeal.—An appeal is allowed to the full Court from the decision of a single Judge refusing execution—*Kalliysoonderi* vs. *Hurrish Chunder*, I. L. R., 6 Cal., 594; I. L. R., 9 Cal., 482.

Appeal against order relating to execution.

611. The orders made by the Court which enforces or executes the order of Her Majesty in Council, relating to such enforcement or execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the enforcement or execution of its own decrees.

Act VI of 1874, section 20.

Power to make rules.

612. The High Court may, from time to time, make rules consistent with this Act to regulate—

(*a*) the service of notices under section 600;

(*b*) the grant or refusal of certificates, under sections 601 and 602, by Courts of final appellate jurisdiction subordinate to the High Court;

(*c*) the amount and nature of the security required under sections 602, 605 and 609;

(*d*) the testing of such security;

(*e*) the estimate of the cost of transcribing the record;

(*f*) the preparation, examination and certifying of such transcript;

(*g*) the revision and authentication of translations;

(*h*) the preparation of indices to transcripts of records, and of lists of the papers not included therein;

(*i*) the recovery of costs incurred in British India in connection with appeals to Her Majesty in Council;

and all other matters connected with the enforcement of this chapter.

All such rules shall be published in the local official Gazette, and shall thereupon have the force of law in the High Court and the Courts of final appellate jurisdiction subordinate thereto.

Publication of rules.

Act VI of 1874, section 22.

613. All rules heretofore made and published by any High Court relating to appeal to Her Majesty in Council, and in force immediately before the passing of this Act, shall, so far as they are consistent with this Act, be deemed to have been made and published hereunder.

Legalization of existing rules.

Act VI of 1874, section 22.

614. In sections 595 and 612, the expression "High Court" shall be deemed to include also the Recorder of Rangoon, but not so as to empower him to make rules binding on Courts other than his own Court.

Recorder of Rangoon.

Act VI of 1874, section 23.

615. The rules and restrictions referred to in Bengal Regulation III of 1828, section IV, clause *fifth*, shall be deemed to be the rules and restrictions applicable to appeals under this Code from the decisions of the High Court of Judicature at Fort William in Bengal.

Construction of Bengal Regulation III of 1828, section 4, clause 5.

Act VI of 1874, section 24.

616. Nothing herein contained shall be understood—

Saving of Her Majesty's pleasure.

(*a*) to bar the full and unqualified exercise of Her Majesty's pleasure in receiving or rejecting appeals to Her Majesty in Council. or otherwise howsoever, or

(*b*) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to Her Majesty in Council, or their conduct before the said Judicial Committee.

and of rules for conduct of business before Judicial Committee.

And nothing in this Chapter applies to any matter of Criminal or Admiralty or Vice-Admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

Act VI of 1874, section 1, 25.

The Privy Council is not bound by the Procedure Code—*Luchmeeput Singh* vs. *Khoobunnissa*, 14 W. R., 280; nor does it limit the prerogative of the Crown to admit appeals—*Rahimbhoy* vs. *Turner*, I. L. R., 15 Bom., 155.

Special Leave to Appeal.—The Privy Council can grant special leave to appeal, but they will not entertain it from a decree of the High Court when the subject-matter in suit is less than Rs. 10,000—*Mohun Lall* vs. *Bebee Doss*, 8 Moore, 492, unless the petitioner has applied to the High Court for a certificate, and has been refused—*Gungowa Kome* vs. *Erawa Korme*, 13 Moore, 433; and if the petition for leave contains a misstatement of facts, it is liable to be rescinded—*Mussoorie Bank* vs. *Raynor*, 9 Ind. App., 70. See, however, *Mabusawuna Jagavera* vs. *Vencataswara*, L. R., 1 P. C., 1.

Grounds Enlarged.—Where there has been great delay in making the application, the appellant will not get his costs—*Pattabhiramier* vs. *Vencata Row*, 15 W. R., P. C., 35. If, from any reason, the order giving leave to appeal is bad, and the appeal has been called on and arguments commenced, the Privy Council will give special sanction if appellant has a good case—*Gajadhur Pershad* vs. *The Widows of Emam Ali*, 15 B. L. R., 221; 2 Ind. App., 205 *Golam Ali* vs. *Kalikristo Tagore*, 18 W., 299; *East India Company* vs. *Syed Ali Khan*, 1 Knapp, 331.

Appeal Presented.—After appeal presented the High Court can not alter the decree or order appealed against—*Navivahoo* vs. *Turner*, 16 Ind. App., 156, p. 163.

Practice—In appeal from second appeal the findings of fact by the first Court are binding on their Lordships—*Anangamanjari* vs. *Tripura*, 14 Ind. App., 101, p. 110; *Munnalal* vs. *Gajraj*, I. L. R., 17 Cal., 246, unless special leave to appeal from the decision of the first Court has been given—*Luchman Singh* vs. *Puna*, I. L. R., 16 Cal., 753.

Substitution.—In cases of substitution, see as to the practice—*Haidar Ali* vs. *Tassadduk*, I. L. R., 16 Cal., 184; *Gaur Mohun* vs. *Tarasunderi*, I. L. R., 17 Cal., 693.

PART VII.

CHAPTER XLVI.

OF REFERENCE TO AND REVISION BY THE HIGH COURT.

617. If before or on the hearing of a suit or an appeal in which the decree is final, or if in the execution of any such decree, any question of law or usage having the force of law, or the construction of a document, which construction may affect the merits, arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such

Reference of question to High Court.

statement with its own opinion on the point for the decision of the High Court.

Act XXIII of 1861, section 28. This section applies to H. C. and P. S. C. C.

Form of Reference.—As to the form in which a Reference from a Presidency Small Cause Court should be made see *Ralli Brothers* vs. *Goculbhai*, I. L. R., 15 Bom., 376.

Small Cause Court.—See *Oakshott* vs, *The British India Coy.*, I. L. R,, 15 Mad., 179.

Final Decree.—This section only refers to matters arising in a litigation between parties—*Yashvant* vs. *De Souza*, I. L. R., 12 Bom., 78, and in suits or appeals in which a final decree or order has been passed: Returning a plaint is not a final decree—*Ramphul* vs. *Durga*, I. L. R , 7 Alla., 815.

And it has been held that this section only refers to cases which cannot come before the High Court in appeal—*Krishna Nath* vs. *Ram Kumar*, 7 C. L. R., 144; *The Secretary of State* vs. *Fazal Ali*, I. L. R., 18 Cal., 234; and no Reference can be made as to the amount of security that should be taken in staying execution as it is a matter to be decided under section 244, *ante*—*Ishwargar* vs. *Chudasama*, I. L. R., 12 Bom., 30, and see *Rangji* vs. *Bhaiji*, I. L. R., 11 Bom., 57.

It seems doubtful if this section applies to applications for review—*Bonomally Deo* vs. *Ram Sadoy*, 17 W. R., 95; but it would apply to an application for a new hearing—*Ishan Chunder* vs. *Haran Sirdar*, 11 W R., 525.

The Court cannot make a Reference on a point merely on the application of the parties, unless it entertains a reasonable doubt upon the matter—*Hurish Chunder Talaputter* vs. *O'Brien*, 14 W. R , 248; nor a point on which a Division Bench of the High Court has expressed an opinion—*Naru Koli* vs. *Chima*, I. L. R., 13 Bom., 54.

This section does not authorize a Reference in a matter of probate, though, when referred, the High Court may deal with the case under section 264 of the Succession Act—*In re Monohur Mookerjee*, I. L. R., 5 Cal., 756; 6 C. L. R., 228.

Court may pass decree contingent upon opinion of High Court.

618. The Court may either stay the proceedings or proceed in the case notwithstanding such Reference, and may pass a decree or order contingent upon the opinion of the High Court on the point referred;

but no execution shall be issued, property sold, or person imprisoned in any case in which such Reference is made until the receipt of a copy of the judgment of the High Court upon such Reference.

Act XXIII of 1861, section 29. This section applies to H. C. and P. S. C. C. Repealed in Ajmere and Marwara—Reg. 1 of 1877, section 2.

Judgment of High Court to be transmitted, and case disposed of accordingly.

619. The High Court shall hear the parties to the case in which the Reference is made, in person or by their respective pleaders, and shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the Reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

Act XXIII of 1861, sections 32, 33. This section applies to H. C. and P. S. C. C. Repealed in Ajmere and Marwara—Reg. 1 of 1877, section 2.

Review.—Where the Reference is made not by the Judge of a Court of Small Causes but by a Subordinate Judge, the High Court cannot review its own judgment—*Ramchandra* vs. *Sitaram*, I. L. R., 10 Bom., 68.

Costs of Reference to High Court.

620. Costs, if any, consequent on a Reference for the opinion of the High Court, shall be costs in the case.

Act XXIII of 1861, section 34. This section applies to P. S. C. C. Repealed in Ajmere and Marwara—Reg. 1 of 1877, section 2.

Power to alter, &c., decrees of Court making Reference.

621. When a case is referred to the High Court under this Chapter, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the Reference has passed in the case out of which the Reference arose, and make such order as it thinks fit.

This section applies to H. C. and P. S. C. C.

Power to call for record of cases not appealable to High Court.

622. The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity; and may pass such order in the case as the High Court thinks fit.

Act XXIII of 1861, section 35. In regard to the Andaman and Nicobar Islands, see Reg. 1 of 1884, section 4, and as to the Punjab, see Act XVIII of 1884, section 70, and Act XVI of 1887, section 3.

Court of Small Cause.—See section 25, Act IX of 1887.

If the Court.—This section applies to the Court of Small Causes in the Presidency towns—*Peary Mohun* vs. *Harran Chunder*, I. L. R., 11 Cal., 261; to a Mamlatdar's Court in Bombay—*Nana Bayaji* vs. *Pandurang*, I. L. R., 9 Bom., 97; but not to a Revenue Court in Madras—*Velli Periya* vs. *Moidin*, I. L. R., 9 Mad., 332; or in the North-West Provinces—*Ram Dayal* vs. *Ramadhin*, I. L. R., 12 Alla., 198.

Within Section—A decree by a Small Cause Court without evidence—*Shields* vs. *Wilkinson*, I. L. R., 9 Alla., 398; or based on an issue that does not arise in it—*Venkubai* vs. *Lakshman*, I. L. R., 12 Bom., 617; a decree dismissing a suit for want of parties after hearing the case on the merits—*Gobind* vs. *Chandar*, I. L. R., 9 Alla., 486; and see *Gorakh* vs. *Vithal*, 11 Bom., 435. An order of an Appellate Court confirming that of the first Court, dismissing a suit for want of jurisdcition—*Ramjiwan* vs *Chand Mal*, I. L. R., 7 Alla., 227; *Magniram* vs. *Jiwa Lal*, I. L. R., 7 Alla., 537; *Sundar Das* vs. *Mansa Ram*, I. L. R., 7 Alla., 407; or refusing to issue summonses for witnesses under section 150, *ante*—*Kaji Ahmed* vs. *Kaji Mahamed*, I. L. R., 9 Bom., 308; returning a plaint to be presented in a proper Court—*Budami Kuar* vs. *Dinu Rai*, I. L. R., 8 Alla., 111; *Vishvanath* vs. *Rambhat*, I. L. R., 15 Bom., 148; an order setting aside an award under Act X of 1870 on the ground that an assessor was biassed—*Kashinath* vs. *The Collector of Poona*, I. L. R., 8 Bom., 553; an order as to the amount of Court-fees—*Vithal* vs. *Balkrishna*, I. L. R., 10 Bom., 610; but see I. L. R., 12 Alla., 129; *Omrao Mirza* vs. *Jones*, 12 C. L. R., 148. An order under section 174 of the Bengal Tenancy Act, when the Judge accepted in deposit a Government Promissory Note instead of cash—*Rahim Bux* vs. *Nundo Lal*, I. L. R., 14 Cal., 321; *Lal Mohun* vs. *Bonomali*, I. L. R., 14 Cal., 636; an order under Act XIX of 1841 to take an inventory after it was decided that the parties should be referred to a regular suit—*Abdul Rahiman* vs. *Kutti*, I. L. R., 10 Mad., 68; or appointing a curator under section 5 of the same Act—*Papamma* vs. *The Collector of Godavari*, I. L. R., 12 Mad., 341; an order under section 335, *ante* - *Shooraj Singh* vs. *Banawari Dass*, I. L. R., 6 Alla., 172; an order improperly appointing an arbitrator under section 510, *ante* — *Pugardin* vs. *Moidinsa*, I. L. R., 6 Mad., 414; or refusing to file an award under section 525, *ante*—*Mana Vikrama* vs. *Mallichery*, I. L. R., 3 Mad., 68; an order directing a next friend to obtain a certificate under section 2, Act XX of 1864,

Bom.—*Nursingrao* vs. *Venkaji*, I. L. R., 8 Bom., 395; an order granting a certificate under section 10 of the Vatan Act—*The Collector of Thana* vs. *Bhaskar*, I. L. R., 8 Bom., 264; an order prohibiting execution until the decision of an appeal—*Gossain Money* vs. *Guru Pershad*, I. L. R., 11 Cal., 146; an order refusing to confirm a sale under the Code—*Birj Mohan* vs. *Rai Umanath*, 19 Ind. App., 154; an order filing an award—*Daydusa Tilakchand* vs. *Bhukan*, I. L. R., 9 Bom., 82; an order admitting an application to set aside an *ex-parte* decree when barred—*Har Prasad* vs. *Jafar Ali*, I. L. R., 7 Alla., 345; an order under section 135, *ante*—*Dhapi* vs. *Ram Pershad*, I. L. R., 14 Cal., 768; an order refusing to amend a decree under section 206, *ante*—*Balmakund* vs. *Sheo Jatan*, I. L. R., 6 Alla., 125; or an order making rateable distribution under section 295, *ante*—in favour of persons whose applications have been dissmissed — *Tiruchittambalu* vs. *Seshayyangar*, I. L. R., 4 Mad., 383; *Sew Bux* vs. *Shib Chunder*, I. L. R., 13 Cal., 225; but see *Venkataraman* vs. *Mahalingayyan*, I. L. R., 9 Mad, 508; and order under section 407, *ante*—*Muhammad Husain* vs. *Ajudhia*, I. L. R., 10 Alla., 467; an order of a District Judge setting aside the order of a Subordinate Judge passed under section 494, *ante*—*Luis* vs. *Luis*, I. L. R., 12 Mad., 186, is within the section.

Not Within the Section.—An order under section 18, Act XX of 1863, refusing permission to sue—*In re Venkateswara*, I. L. R , 10 Mad., 98; an order under section 232, *ante*, or 521, *ante*, setting aside an award—*Chattar Singh* vs. *Lekhraj Singh*, I. L. R., 5 Alla., 293; an order refusing to receive evidence—*Pichandi* vs. *Kundasami*, I. L. R., 7 Mad., 539; an order refusing the application of a person to be made a party to a suit—*Babbaba Khanam* vs. *Noorjahan*, I. L. R., 13 Cal., 90; *Baldeo* vs. *Gobind*, I. L. R., 7 Alla., 914; a decision wrong in law—*Court of Wards* vs. *Durmalinga*, I. L. R., 8 Mad., 2; an order admitting an appeal after time—*Vasudeva* vs. *Chenna*, I. L. R., 7 Mad., 584; an order rejecting an application to sue as a pauper—*Chattarpal Sing* vs. *Raja Ram*, I. L. R., 7 Alla., 661; see *Muhammad Husain* vs. *Ajudhia*, I. L. R., 10 Alla., 467; an order under section 206, *ante*—*Krishna Mohini* vs. *Kedarnath*, I. L. R., 15 Cal., 446; *Raghunath* vs. *Raj Kumar*, I. L. R., 7 Alla., 276; an order dismissing a suit under section 381, *ante*—*Williams* vs. *Brown*, I. L. R., 8 Alla., 108; an order passed under section 592, *ante*—*Harsaran Singh* vs. *Muhammad Raza*, I. L. R., 4 Alla., 91; or an order granting or refusing sanction to prosecute for an offence committed before the Court—*In re Madho Prasad*, I. L. R., 3 Alla., 508; decree in an action for trespass by the Presidency Small Cause Court—*Peary Mohun* vs. *Harran Chunder*, I. L. R., 11 Cal., 261; or an order amending a decree under section 206 *ante*—*Raghunath* vs. *Raj Kumar*, I. L. R., 7 Alla., 276; *Jivraji* vs. *Pragi*, I. L. R., 10 Mad., 51. See, however, *Gurta* vs. *Gunga*, I. L. R., 7 Alla., 411; *Raghunath Das* vs. *Raj Kumar*, I. L. R., 7 Alla., 276; *Dhan Singh* vs. *Basant*, I. L. R., 8 Alla., 519, is not within the section.

Time of making Application.—Applications under this section should be made without delay; *Durga Pershad* vs. *Sheo Churn*, I. L. R., 4 Alla., 154.—*Balmakund* vs. *Sheo Jatan*, I. L. R., 6 Alla., 125.

May Call For—In Bengal the High Court will only act on the application of the party aggrieved—*Mahomed Foyez* vs. *Goluck Dass*, 7 C. L. R., 191. The other High Courts do not follow this view, and have exercised their revisional powers on the application of a pre-emptor in regared to a sale—*Bisheshar* vs. *Hari Singh*, I. L. R., 5 Alla., 42; of a Collector in regard to an order under section 412, *ante*—*The Collector of Kanara* vs. *Krishnappa*, I. L. R., 15 Bom., 78; but see *Uora* vs. *Dandbhai*, I. L. R. 14 Bom., 371, and on the report of a District Judge—*Anthony* vs. *Dupont*, I. L. R., 4 Mad., 217.

No Appeal Lies—The Court cannot act where there is an appeal—*Ram Kristo* vs. *Tara Dass*, 12 C. L. R., 449; *Raynor* vs. *Mussoorie Bank*, I. L. R., 7 Alla., 680; *Nazar Hussen* vs. *Mal*, I. L. R., 12 Alla., 581; but see *Dhapi* v. *Ran Pershad*, I. L. R., 14 Cal., 768, such as an order rejecting a plaint—*Omrao Mirza* vs. *Jones*, 12 C. L. R., 148; or rejecting a memorandum of appeal as barred—*Gulab Rai* vs. *Mangei Lal*, I. L. R., 7 Alla., 42; but if an appeal be preferred, where no appeal lies, the Court may proceed to act under this section at the hearing—*Venkatamma* vs. *Chengalrayappa*, I. L. R., 7 Mad., 555; *Bhoyrub Chunder* vs. *Wajedunnissa*, 6 C. L. R., 234; otherwise—*Doorga Narain* vs. *Ram Lall*, I. L. R., 7 Cal., 330; *Durga Narain* vs. *Gorburdhun*, 9 C. L. R., 86.

Case was Decided—Interlocutory Orders—This section does not apply to interlocutory orders, and there is an appeal from the final decree—*Farid Ahmad* vs. *Dulari*, I. L. R., 6 Alla., 233; *Omrao Mirza* vs. *Jones*, 12 C. L. R., 148; *Chattar Singh* vs. *Lekhraj Singh*, I. L. R., 5 Alla., 293; *Harsaran Singh* vs. *Muhammad Raza*, I. L. R., 4 Alla., 91; *Farid Ahmad* vs. *Dulari*, I. L. R., 6 Alla., 233. *In re Nizam of Hyderabad*, I. L. R., 9 Mad., 256.

Jurisdiction.—The term jurisdiction is used in different senses. In one sense it means jurisdiction over the subject-matter of the suit itself, and it is used in this sense when it is said that the decree of a Court of competent jurisdiction upon the parties legally before it, cannot be questioned in a Court of co-ordinate jurisdiction on the ground of irregularity or error of law in the proceedings—*Bandon* vs. *Beecher*, 3 Clk & Fin., 479; *Bowen* vs. *Evans*, 2 H. L. Cas., 257; *Kolasherri* vs. *Kolasherri*, I. L. R., 4

Mad., 131. Their Lordships of the Privy Council have used the word in this sense in several cases as opposed to irregularity in procedure—*Ledgard* vs. *Bull*, 13 Ind. App., 134; *Pillai* vs. *Pillai*, 2 Ind. App., 219, p. 233; and the term seems to bear the same meaning in section 5, Act VIII of 1859, (corresponding to section 11, *ante*)—*Hurronath Roy* vs. *Scott*, B. L. R. (F. B.), 636. There is another principle, that whenever jurisdiction is given to a Court by an enactment, and such jurisdiction is only given on certain specified terms contained in the enactment itself, these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise—*Nasserwanjee* vs. *Mynoodeen*, 6 Moore, 134, p. 155. Thus, as an illustration of the first kind of jurisdiction, if the subject-matter of the litigation was not a suit, a Court of Appeal has no jurisdiction at all to entertain an appeal under section 540, *ante*—*Meenakshi* vs. *Subramaniya*, 14 Ind. App., 160; *Ladli* vs. *Raje*, I. L. R., 13 Bom., 651; and in regard to the second, a Court cannot give judgment on an award unless under the provision of section 321, *ante*, declaring that to be valid it must have been made within the period allowed by the Court,—*Har Narain* vs. *Chaudhrain*, 18 Ind. App., 55, nor admit a review after 90 days without being satisfied, there is sufficient cause as directed by the Limitation Act—*Luchman Singh* vs. *Shumshere*, 2 Ind. App.,, 58 or in violation of section 629, *post*, prohibiting the review of an order passed in review—*Muhammad Yusuf* vs. *Abdul*, 16 Ind. App., 104; the orders are without jurisdiction. And where the conditions required by this section did not exist, their Lord-ships of the Privy Council held that the Court had no jurisdiction in the case—Compare I. L. R., 7 Alla., 230; *Amir Hassan* vs. *Sheo Baksh*, 11 Ind. App., 237. See also *Shiva* vs. *Joyia*, I. L. R., 7 Bom., 341, p. 358; *Har Prasad* vs. *Jafar Ali*, I. L. R., 7 Alla., 345; *Dhan Singh* vs. *Basant*, I. L. R., 8 Alla., 519. In all these cases the proceedings are void and the defect cannot be cured by consent.—*Luchman Singh* vs. *Shumshere*, 2 Ind. App., 58; *Nasserwanjee* vs. *Mynoodeen*, 6 Moore, 134; *Ledgard* vs. *Bull*, 13 Ind. App., 134.

This section applies to a case in which a Judge has exercised a jurisdiction which he has no power to exercise, or in which, in the exercise of a jurisdiction that he has, he exceeds his jurisdiction—*In re Subjan Ostagor*, B. L. R (F. B.), 531; see also *Peary Mohun* vs. *Harran Chunder*, I. L. R., 11 Cal., 261; or has acted illegally or with material irregularity—*Muhomed Salaman* vs. *Fatima*, I. L. R., 9 Alla., 105. Where an appeal is heard by a Court that has no jurisdiction, this section applies—*In the matter of Rooknee Roy*, 14 W. R., 254; and if a second appeal is preferred from this decision, the High Court may proceed under this section—*Bhoyrub Chunder* vs. *Wajedunnissa*, 6 C. L. R., 234; *Shamrav* vs. *Niloji*, I. L. R., 10 Bom., 200; *Benode* vs. *Sharat Chunder*, I. L. R., 8 Cal., 837; but see *Durga Narain* vs. *Goburdhun*, 9 C. L. R., 86; see also *Doorga Narain* vs. *Ram Lall*, I. L. R., 7 Cal., 330, referred to above.

If a Judge hears an appeal from the order of Deputy Collector in a rent-suit under Rs. 100 in value—*Kristo Inder* vs. *Roopinee*, 6 W. R., Act X, 56, or hears a Small Cause Court case in which an appeal does not lie—*Bhowanee Pershad* vs. *Dhuram Narain*, 3 W. R., 24, the orders passed will be set aside. And where the first Court acted without jurisdiction in entering into a question, and the superior Court wrongly heard an appeal from it, both orders were set aside—*Annamali Chetti* vs. *Muthulinga*, 6 Mad., 360.

Their Lordships of the Privy Council have, so far as I can find, have been slow to decide that the violation of any section of the Code bearing on the *ordinary* course of a suit from institution, to final execution affects jurisdiction, or is more than an irregularity.

There are only two cases, one in regards to arbitration—*Har Narain* v. *Bhagwant*, 18 Ind. App., 55, and the other in connection with admitting a review after time—*Luchmun Singh* v. *Shumshere*, 2 Ind. App., 58, and it may be doubted if either falls within ordinary procedure from plaint to final disposal. See "POWER TO REVIEW," section 623, *post*.

Negative Words.—The words "shall be determined by order of the Court executing the decree, and not by separate suit" in Act XXIII of 1861, section 11, corresponding to section 244, *ante*, only relate to procedure—*Chowdhry Wahed Ali* vs. *Musst. Jamaee*, 11 B. L. R., 149; *Purmessuree* vs. *Jankee Koer*, 19 W. R., 90; *Azizuddin* vs. *Ramanugra*, I. L. R., 14 Cal., 605.

And where a sale took place within 30 days in contravention of the words, "the sale shall not take place until after the expiration of at least thirty days" in section 249 of Act VIII of 1859 (corresponding to section 290, *ante*), their Lordships of the Privy Council reversing the order of the High Court of Allahabad, held that the irregularity was cured by the certificate of sale—*Balkrishna* vs. *Masuma*, I. L. R., 5 Alla., 142, p. 157; and compare *In re Southekul Krishna*, 14 Ind. App., 154, p. 159; but see on the same point—*Bhekraj Koeri* vs. *Genah Lal*, I. L. R., 5 Cal., 878; *Ganga Prasad* vs. *Jag Lal*, I. L. R., 11 Alla., 333; *Venkata* vs. *Sama*, I. L. R., 14 Mad., 227; *Nana* vs. *Golam*, I. L. R., 18 Cal., 423; *Bagal* vs. *Rameshur*, I. L. R., 18 Cal., 496. See also *Lamb* vs. *Bijoy Kissen*, 8 Moore, 427.

Positive Words.—A violation, of the "words may be payable" in section 11, Act XXIII of 1861, corresponding to section 244, *ante*, is a mere irregularity if the Court has general jurisdiction over the subject-matter of the suit—*Pillai* vs. *Pillai*, 2 Ind. App., 219; nor does a violation of section 139, Act VIII of 1859; section 146, *ante*, commanding the framing of issues—*Mitna* vs. *Fuzl Rab*, 13 Moore, 573, or of section 246, *ante*, which directs that execution shall only issue for the difference of the two amounts in cross-

decrees—*Rewa Mahton* vs. *Ram Kishen Singh*, I. L. R., 13 Ind. App., 106, or of the provision of section 286, *ante;* directing that the sale-proclamation shall specify the revenue on an estate sold in execution of decree—*Girdhari Singh* vs. *Hurdeo Narain*, 3 Ind. App., 230; *Olpherts* vs. *Mahabir Pershad*, 10 Ind. App., 25, or of such portion of section 355, Act VIII of 1859, (corresponding to section 568, *ante*) as requires the Court to record its reasons for admitting new evidence rank higher—*Gunga Gobind* vs. *The Collector of 24-Perghunnahs*, 11 Moore, 345, p. 368. The nearest approach to the idea that any section describing the ordinary procedure in a suit is mandatory, is to be found in the case of *Ram Dayal* vs. *Mahtab Singh*, I. L. R., 7 Alla., 506; but even here the matter is treated as an irregularity before their Lordships of the Privy Council. See, however, *Sant Lal* vs. *Umraounnissa*, I. L. R., 12 Alla., 96; *Rameshur Singh* vs. *Sheodin*, I. L. R., 12 Alla., 510; *Ganga Prasad* vs. *Jag Lal*, I. L. R., 11 Alla., 333.

Failed to Exercise Jurisdiction.—This section extends to the case of a Judge refusing to act through a misconception of his authority—*Shiva* vs. *Joma*, I. L. R., 7 Bom., 341, p. 352. If a Judge should refuse restitution on the ground that it must be sought in a suit—*Gobind Koomar Chowdry*, Petitioner, B. L. R. (F. B.), 714; *Nilmoni Singh* vs. *Taranath*, I. L.R., 9 Cal., 295, pp. 297, 299, or to execute a decree on the ground that the had no jurisdiction—*id.; Shamrav* vs. *Niloji*, I. L. R., 10 Bom., 200; or dismisses a suit holding there was no cause of action—*Rama* vs. *Kunji*, I. L. R., 9 Mad., 375, or refuses to listen to a charge of fraud as a ground for setting aside a sale—*Subbaji* vs. *Srinivasa*, I. L. R., 2 Mad., 264 (compare *Birj Mohun* vs. *Rai Umanath*, 19 Ind. App., 454), or wrongly thinks section 544 does not apply to an appeal in which it does apply—*Seshadri* vs. *Krishnan*, I. L. R., 8 Mad., 192, or declines to investigate a complaint under section 278, *ante*, *Jumeda* vs. *Luchmun*, 4 C. L. R., 74; his order may be set aside. But if a Judge exercises jurisdiction, though in an erroneous manner, this portion of the section does not apply—*Rabbaba Khanum* vs. *Noorjehan*, I. L. R., 13 Cal., 90; *In re Bagram*, 20 W. R., 10; *Amir Hassan* vs. *Sheo Baksh*, 11 Ind. App., 238; and see *Krishna Mohini* vs. *Kedarnath*, I. L. R., 15 Cal., 446; *Amritrab* vs. *Balkrishna*, I. L. R., 11 Bom., 489.

Acting Illegally.—The meaning to be attached to this portion of the section is not settled. A Judge would act illegally although he posessed jurisdiction over the subject-matter if he heard any suit or other proceeding in which he was a party or personally interested, or if he heard an appeal against a decree or order passed by himself in another capacity—Act VII of 1887, section 38, or, possibly, if he imported into the case his own knowledge of particular facts—*Hurpurshad* vs. *Sheo Dyal*, 3 Ind. App., pp. 285-6; see "PERSONAL KNOWLEDGE," note to section 204, *ante;* but he cannot be said to have acted illegally if he merely errs in his final decision—*Amir Hassan* vs. *Sheo Baksh*, 11 Ind. App., 237; see, however, *Manisha* vs. *Siyali*, I. L. R., 11 Mad., 220, p. 229; but it has been held that if the decision has been arrived at by travelling beyond the issues—*Gorakh* vs. *Vithal*, I. L. R., 11 Bom., 435, or is unsupported by proof—*Shields* vs. *Wilkinson*, I. L. R., 9 Alla., 398, or it declares that by reason of a particular statute the suit does not lie—*Jugobundhu* vs. *Jadu Ghose*, I. L. R., 15 Cal., 47, that the Judge has acted illegally within this section. The application of the words "acting illegally" to procedure within jurisdiction is not easy. For if the law violated is mandatory, the violation affects jurisdiction, and if not, it is only an irregularity. It has, however, been used in the former sense by the Calcutta High Court, and the language has been approved of by their Lordships of the Privy Council—*Luchmun Singh* vs. *Shumshere*, 2 Ind. App., 58, p. 59; and see *Muhammad Yusuf* vs. *Abdul*, 16 Ind. App., 104; *Manisha* vs. *Siyali*, I. L. R., 11 Mad., 220, p. 229; *Shri Vishvambhar* vs. *Shri Vasudev*, I. L. R., 16 Bom., 708.

Material Irregularity.—This means an irregularity in procedure which has produced error or defect in the decision of the case upon the merits—*Badami Kuar* vs. *Denu Rai*, I. L. R., 8 Alla., 111; *Sew Bux* vs. *Shib Chunder*, I. L. R., 13 Cal., 225; but see *Manisha* vs. *Siyali*, I. L. R., 11 Mad., 220.

Facts.—As to whether the Court will consider the findings of fact arrived at by the Court below, see *Mahammad* vs. *Syed Husain*, I. L. R., 3 Alla., 203; *Shields* vs. *Wilkinson*, I. L. R., 9 Alla., 398; *Manisha* vs. *Siyali*, I. L. R., 11 Mad., p. 236, and compare the cases on the same point at home in connection with the issue of a writ of prohibition—*The Liverpool Gas Co.* vs. *Everton*, L. R., 6 C. P., 414; *Bristowe* vs. *Rose*, 4 Q. B. D., 4.

Such Order as the High Court thinks fit—Form of Order.—The words in section 35, Act XXIII of 1861, were, "and the Sudder Court may set aside the decision passed on appeal in such case by the Subordinate Court, or may pass such other order in the case as such Sudder Court may seem right." Under this section it was held that where the lower Appellate Court exceeded its jurisdiction, the proper order was to set aside that portion of the order which was in excess of jurisdiction, and if the Court had not jurisdiction, the proper order was to set aside the decision altogether, and if thought proper refer the appeal to the Court which had jurisdiction, even if it were too late to prefer a fresh appeal to that Court—*In re Subjan Ostagar*, B. L. R. (F. B.), 531, p. 535; but if the original order was not subject to appeal, the Court in setting aside the decision on appeal, of a Court not possessed of jurisdiction, should not enter into the question of the merits in order to determine if the first order were correct or not—*In re Docowri*

Kazi, B. L. R. (F. B.), 517; see also *Giridhari Singh* vs. *Hurdeo Narain*, 3 Ind. App., 230, p. 238. And where the order of the Full Court of a Small Cause Court was set aside under this Code for material irregularity, the Court thought the proper order was to remit the case to the Full Court to dispose of the case according to law—*Ralli* vs. *Parmanand*, I. L. R., 13 Bom., 642, and see *Seshadri* vs. *Krishnan*, I. L. R., 8 Mad., 192. In the North-West it has been decided that the High Court may, under this section, pass any order which it might pass on second appeal—*Muhammad* vs. *Syed Husain*, I. L. R., 3 Alla., 203; see, however, *Shira* vs. *Joma*, I. L. R., 7 Bom., p. 354; *In re Dacosta*, B. L. R. (F. B.), 432; *Har Prasad* vs. *Jafar Ali*, I. L. R., 7 Alla., p. 349; and where the decisions of both the Courts were without jurisdiction, the Court set aside both decisions and returned the plaint—*Sarnam* vs. *Sakina*, I. L. R., 3 Alla., 418. So where the Court after considering the evidence came to the conclusion that it was sufficient to justify the Judge in allowing the case to go to a Jury, it set aside the decree and dismissed the suit—*Shields* vs. *Wilkinson*, I. L. R., 9 Alla., 398.

No Order.—See *Subbaya* vs. *Yellama*, I. L.R., 9 Mad., 130; *Lengamma* vs. *Venkatammal*, I. L. R., 6 Mad., 227; *Doorga Narain* vs. *Ram Lall*, I. L. R., 7 Cal., 330; *Ram Sahai* vs. *Manram*, I. L. R., 5 Cal., 807; *Sotish Chunder* vs. *Nil Comul*, I. L. R., 11 Cal., 45.

Case.—Compare *Chatterpal* vs. *Raja Ram*, I. L. R., 7 Alla., 661; *Dhapi* vs. *Ram Pershad*, I. L. R., 14 Cal., 768, and *Hazari Lal* vs. *Kheru*, I. L. R., 3 Alla., 576, with *Meenakshi* vs. *Subramaniya*, 14 Ind. App., 160; and *Balkaran* vs. *Gobindnath*, I. L. R., 12 Alla., 129, p. 157; and see *Sundar Das* vs. *Mansa Ram*, I. L. R., 7 Alla., 407; *Sheo Prasad* vs. *Kastura*, I. L. R., 10 All., 119.

PART VIII.

CHAPTER XLVII.

OF REVIEW OF JUDGMENT.

Application for review of judgment.

623. Any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is hereby allowed, but from which no appeal has been preferred;

(*b*) by a decree or order from which no appeal is hereby allowed; or

(*c*) by a judgment on a Reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him,

may apply for a review of judgment to the Court which passed the decree or made the order, or to the Court, if any, to which the business of the former Court has been transferred.

A party who is not appealing from a decree may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except when the ground of such appeal is common to the applicant and the appellant,

or when, being a respondent, he can present to the Appellate Court the case on which he applies for the review.

Act VIII of 1859, section 376. This section applies to H. C. and P. S. C. C.

Power to Review.—Does not exist save by Statute and of an order properly made —*Drew* vs. *Willis*, Q. B. (1891), 452.

Does not Apply.—It does not apply to proceedings before the Special Commissioner under the Deccan Agriculturist's Relief Act—*Babaji* vs. *Babaji*, I. L. R., 15 Bom., 650.

Review of Judgment.—A review is perfectly distinct from an appeal; the primary intention of granting a review was a reconsideration of the same question by the same Judge, as contradistinguished to an appeal which is a hearing before another tribunal. We do not say that there might not be cases in which a review might take place before another and a different Judge; because death or some other unexpected or unavoidable cause might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only *ex-necessitate*. We do say that, in all practicable cases, the same Judge ought to review—*Moheshur Sing* vs *Bengal Government*, 7 Moore, 283, p. 304. See also *In re Appa Rao*, I. L. R., 10 Mad., 73; 13 Ind. App., 755; and I. L. R., 14 Mad., 439. The spirit of the decision in 7 Moore is embodied in section 624, *post*.

Section 206, *Ante*.—An application under section 206 *ante*, to rectify a clerical mistake is not properly an application for review—*Joykishen* vs. *Ataoor Rohoman*, I. L. R., 6 Cal., 22.

Any Person Considering Himself Aggrieved.—Review can only be granted by a person who is a party to the suit, and aggrieved by it, if any other person is aggrieved he must bring a regular suit. See "WHO MAY APPEAL," section 540, *ante*.

Decree or Order.—The old law referred only to decrees. But it was held that under it a Judge had power to review an order passed confirming a sale in execution of decree—*Girdhari Singh* vs. *Hardeo Narain*, 3 Ind. App., 230, and where a Judge rejected an application for registration under section 76 of the Registration Act of 1871, their Lordships of the Privy Council decided that the order being a final adjudication between the parties was so far in the nature of a "decree" as to fall within the sections of Act VIII of 1859 providing for review—*Reasut* vs. *Abdoollah*, *id*, 221, p. 227. So a review was admissible in proceedings under Act XXVII of 1860, Bengal, though not in Madras—*Poona Koer*, Petitioner, I. L. R., 1 Cal, 101; *Rumkun*, Petitioner, I. L. R., Alla., 287.

Ex-parte Decree.—An ex-parte decree is subject to review—*Amir Hasan* vs. *Ahmad*, I. L. R, 9 Alla., 36, although the case may be heard under sections 108 and 109, *ante*, *Mutto* vs. *Ilahi Begam*, I. L. R., 6 Alla, 65; *Hari Har* vs. *Buldeo*, 13 C. L. R., 254. See also *Poresh Nath* vs. *Khettro Monee*, 26 W. R., 284.

Order.—The order must be one passed in a suit or proceeding of a civil nature—*Meenkashi* vs. *Subramaniya*, 14 Ind. App., 160, p. 166; *Smith* vs. *The Secretary of State*, I. L. R., 3 Cal., 340, p. 346. An order under section 5 of the Court-Fees Act is not a decree or order under this section—*Balkaran* vs. *Gobindnath*, I. L. R., 12 Alla., 129, 157; but an order under section 409, *ante*,—*Adarji* vs. *Manikji*, I. L. R., 4 Bom., 414, an order *ex-parte*, admitting an appeal after time—*Venkatrayuda* vs. *Nagada*, I. L. R., 9 Mad, 450, an order under section 596, *ante*—*Gopinath* vs. *Goluckchunder*, I. L. R., 16 Cal., 292, and an order under section 62, Act II of 1874 is subject to review—*Smith* vs. *The Secretary of State*, I. L. R., 3 Cal., 340.

Appeal Allowed; but not Preferred.—After an appeal has been preferred no review can be admitted—*Navivahoo* vs. *Turner*, 16 Ind. App., 157; I. L. R., 13 Bom., 520. But if the review has been applied for in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding on the application for review by the subsequent presentation of an appeal, but is bound to come to a decision upon it—*Bharat Chunder* vs. *Ramgunga*, B. L. R. (F. B.), 362; *Thacoor Prasad* vs. *Baluck Ram*, 12 C. L. R., 64.

Appeal by some other Party.—Where the grounds of review are common to all and one appeals on this ground the Appellate Court can modify the decree in regard to all, and if this is not so, the decree can be modified on review—*Pegoo* vs. *Waizooddeen* 18 W. R., 464.

Withdrawal of Appeal.—If an appeal is withdrawn either party may apply for review in the lower Court—*Pandu* vs. *Devji*, I. L. R., 7 Bom., 287.

Court of Small Causes.—The provisions of section 17, of the Provincial Small Cause Court Act are only directory—*Ramasami* vs. *Kurisu*, I. L. R., 13 Mad., 178; not

followed *Jogi Ahir* vs. *Bishen Dayal*, I. L. R., 18 Cal., 83. The Court of a Subordinate Judge invested with the powers of a Small Cause Court Judge does not fall within clause (c)—*Ramchundra* vs. *Sitaram*, I. L. R., 10 Bom., 68.

New and Important Matter or Evidence.—In 1874 A sued B to recover money paid for land and got a decree. B appealed to the Privy Council. Subsequently A sued again on account of a second payment and recovered on the strength of the former decree. Their Lordships of the Privy Council reversed the first decree and it was held that their Lordships' decision was "new and important matter" on which to apply for review of the second decree—*Waghela* vs. *Masludin*, I. L. R., 13 Bom., 330, but see *Amrit Lal* vs. *Madho*, I. L. R., 6 Alla., 292.

The new evidence must be relevant, clear and conclusive—*Heera Lal* vs. *Ram Taruck*, 23 W. R., 323. It need not be sufficient *per se* to show that the previous decision is wrong or that it must be such as to cause an overpowering balance of evidence in favour of the applicant—*Sahebjan* vs. *Sufdur Ali*, 22 W. R., 288; but it must be material and of such a character that if it had been brought forward in the suit it might have altered the judgment—*Hosking* vs. *Ferry*, 15 Moore (P.C.), 598; *In re Appa Rao*, I. L. R., 10 Mad., 73; 13 Ind. App., 155.

Special Appeal.—New evidence is not a ground for review in special appeal—*Bhyrub Nath* vs. *Kally Chunder*, 16 W. R., 112; *Jackammal* vs. *Palneappa*, 5 Mad., 464, and in Bombay the practice has been to allow the appellant to withdraw his appeal and then apply for a review to the lower Court—*Pandu* vs. *Devji*, I. L. R., 7 Bom., 287.

When the Decree was Passed.—It must be shown that the new matter or evidence was not within the knowledge of the applicant, or if within his knowledge could not be produced by him at the time the decree was passed—*Dwarkanath* vs. *Kishenlall*, Marsh., 553; *Omrao* vs. *Gocool*, 16 W. R., 7.

Error of Law Apparent on the Face of the Record.—It is not an universal rule that no point can be raised on application for a review which has been already discussed and decided at the hearing, or that no new point which has not been raised at the hearing of the case can be argued on the application for a review—*Chintaman Pal* vs. *Pyari Mohun*, 6 B. L. R., 126; *Kalu* vs. *Vishram*, I. L. R., 1 Bom., 543; but see *Sheo Ratan* vs. *Lappa Kuar*, I. L. R., 5 Alla., 14; but if the basis of the review was raised but abandoned at the hearing of the appeal, it should not be allowed to prevail—*Satapathi* vs. *Subraya*, I. L. R., 2 Mad., 58. Nor is it an objection that the error was brought to notice by a new decision—*Villaya* vs. *Jaganatha*, I. L. R., 7 Mad., 307; *Jonmenjoy* vs. *Dassmoney*, I. L. R., 8 Cal., 700; if the application has been made regularly within time—*Harihar* vs *Madhab Chundra*, 8 B. L. R. (P.C.), 566, p. 580. See also *Muhammad Yusuf* vs. *Abdul*, 16 Ind. App., 104; but see *Ellem* vs. *Basheer*, I. L. R., 1 Cal., 185. Where a Judge gives wrong reasons for rejecting material evidence—*Reasut* vs. *Abdoollah*, I. L. R., 2 Cal., 130, p. 140, or omit to consider the effect of important evidence—*Mahadeva* vs *Sappani*, I. L. R., 1 Mad., 396; or is misled as to the contents of a document—*Gopal Chandra* vs. *Solomon*, I. L. R., 13 Cal., 62; or applies a wrong rule in valuation—*Kalu* vs. *Vishram*, I. L. R., 1 Bom., 543, or omits to try a material issue—*Hassan Ali* vs. *Nassirooddeen*, 16 W. R., 136, or has made an error in calculation—*Mirza Akbar* vs. *Mullick Makdoom*, 25 W. R., 63. The proper remedy is by review and not by special appeal.

In the North-West Provinces a review will not be allowed on grounds that would support an appeal—*Sheo Ratan* vs. *Lappa Kuar*, I. L. R., 5 Alla., 14; though in a later case a review was allowed on the grounds, that the order had been passed *ex-parte*, and without jurisdiction—*Amir Hasan* vs. *Ahmad*, I. L. R., 9 Alla., 36.

Other Sufficient Reason.—In the case of *Reasut* vs. *Abdoollah*, I. L. R., 2 Cal., p. 140, 3 Ind. App., 221, their Lordships of the Privy Council state "they are not prepared to say that there is an absolute defect of jurisdiction whenever the parties have failed to show that there was either positive error in law, or new evidence to be brought forward which could not be brought forward on the first hearing. They do not consider the case in the *Indian Jurist* (*Nasiruddin Khan* vs. *Indronarayan*, 1 Ind. Jur., 147) and the other cases cited, *limit the discretion of the Court* in saying what reason is good and sufficient, or what may be so far requisite to the ends of justice as to support an application for review. Upon an appeal, where an appeal lies, it may be open to the Court of Appeal to say that a Judge ought not to have admitted a review; that is a different thing from ruling that he has acted wholly without jurisdiction. In the first case the Appellate Court reverses the order, because the Judge has erred in the mode in which he has exercised a judicial discretion; in the latter case it quashes the order because he has no discretion at all to be exercised." A misapprehension at trial of all parties as to the contents of a document provided its purport could not be known by the exercise of due deligence—*Gopal Chandra* vs. *Solomon*, I. L. R., 13 Cal., 62, p. 64; or if material, omitting to consider it—*Mahadeva* vs. *Sappani*, I. L. R., 1 Mad., 396; discrediting without inspection a document, or declaring a Commissioner unworthy of credit, because he was a mohurir of the Court—*Abdool* vs. *Bacha* I. L. R., 1 Alla., 363; raising a point for the first time in delivering judgment—*Gunga Pershad* vs. *Maharani*,

12 Ind. App., 47, p. 51; *Sulleman* vs. *The Oriental Bank*, I. L. R., 15 Bom., 267 p. 276, is sufficient reason within the section. And see in regard to discretion the remarks of Brett, M. R., in the case of *The Manchester Building Society*, 24 C. D., p. 497. See also in regard to a compromise by a minor's guardian—*Mirali* vs. *Rehmoobhoy*, I. L. R., 15 Bom., 594.

624. Except upon the ground of the discovery of such new and important matter or evidence as aforesaid, or of some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it.

To whom applications for review may be made.

This section is new. It applies to H. C. and P. S. C. C.

See section 623, *ante*, and section 629, *post*.

Effect of this Section.—In the case of *Moheshur Sing* vs. *The Bengal Government*, 7 Moore, 304, their Lordships of the Privy Council pointed out the distinction between a review and an appeal. The present section embodies the spirit of that decision, and enacts that, except on the ground of (1) new or important matter or evidence, or (2) clerical error, no Judge outside the High Court can admit a review of the judgment of another Judge, whether he is the Judge of the Court which passed the decree or of that substituted for it—*Sarungaparav* vs. *Narayanasami*, I. L. R., 8 Mad., 567. Thus, he cannot do so on the ground of supposed errors of judgment in the previous decision —*Behari Lall* vs. *Mungolonath*, I. L. R., 5 Cal., 111, nor becausethe order was passed in the absence of the petitioner and without giving him notice of the hearing—*Khema* vs. *Dhanji*, I. L. R., 14 Bom., 101.

Important Matter.—A decision of the Privy Council passed subsequent to decree, between the same parties in regard to the same issue is new and important matter—*Waghela* vs. *Masludin*, I. L. R., 13 Bom., 330; but see *Amrit Lal* vs. *Madho*, I. L. R., 6 Alla., 292.

Shall be Made.—It is sufficient if after presentation the Judge issues notice on the opposite party—*Ramasami* vs. *Kurisu*, I. L. R., 13 Mad., 178; *Karoo Singh* vs. *Deo Narain*, I. L. R., 10 Cal., 80; 13 C. L R., 261; or directs the fees for service of notice should be deposited—*Fazel Biswas* vs. *Jamadar Sheik*, I. L. R., 13 Cal., 231; but see the case of *Cheru* vs. *Cheru*, I. L. R., 12 Mad., 509. In the North-West it has been held that under this section it is not sufficient that the application has been presented to the same Judge, it must be heard and determined by him—*Punchan* vs. *Jhinguri*, I. L. R., 4 Alla., 278.

625. The rules herein before contained as to the form of making appeals shall apply, *mutatis mutandis*, to applications for review.

Form of applications for review.

This section is new. It applies to H. C. and P. S. C. C.

Practice.—A petition for review must be in the form of a memorandum of appeal and accompanied with a copy of the order—*Adarji Edulji* vs. *Manikji*, I. L. R., 4 Bom., 414, and if it requires a certificate the proper persons to certify are those pleaders who argued the case—*Toog Oung* vs. *The British Steam Navigation Co.*, 24 W. R., 430.

If the ground be new matter or evidence, the petition and affidavit must set out the nature of the evidence relied on, and state when it was discovered. Thus, in regular appeal in the High Court, the affidavit should state whether it was discovered after the decree of the first Court, or after the decree of the High Court—*Dhunsook* vs. *Hurry*, Bourke, O. C., 115; *Dwarkanath* v. *Kishenlall*, Marsh., 553. See "STRICT PROOF," section 626, *post*. See section 541, *ante*.

626. If it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application when rejected.

If the Court be of opinion that the application for the review should be granted, it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion.

Application when granted.

Proviso. Provided that—

(*a*) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree, a review of which is applied for; and

(*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him, when the decree or order was passed, without strict proof of such allegation; and

(*c*) an application made under section 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (*a*) to this section, be disposed of by his successor.

Act VIII of 1859, section 378. This section applies to H. C. and P. S. C. C., and the last paragraph has been added by Act VII of 1888, section 59.

This section does not apply to judgments on review; but only to orders admitting or rejecting reviews—*Apcar* vs. *Howah Bye*, 1 Ind. Jur., N. S., 237.

Judgment.—The Judge should record his reasons for admitting the review; but if he omits to do so, the act is not void as done without jurisdiction—*Ashrufoonissa* vs. *Enayet Hossein*, 13 W. R., 439; *Gunesh Ram* vs. *Rohinee*, 14 W. R., 236; and the proper procedure would be, to deal with it on the same principle on which cases of unrecorded judgments are dealt with, and to remand the suit with a direction that the Judge should record his reasons.

Notice.—Before a suit can be reviewed, notice should be served on the opposite party appointing a day on which he may appear in support of the original decree—*Huro Mohun* vs. *Mohendronath*, 16 W. R., 135; and the case should not be re-heard until cause has been shown and the review granted—*Rajendro Protab* vs. *Bhowabul*, 14 W. R., 105.

But where an application was made to review an order rejecting a special appeal, and it was opposed on the ground that no notice had been given, the Court held that the application to appeal being *ex-parte*, notice was not necessary—*Joy Koomar* vs. *Esharee Nund*, 18 W. R., 475. It is worthy of notice that clause (*a*) only mentions decrees; orders are not referred to in it.

New Matter.—This section contemplates, first, a decision on the matter referred to in (*b*); and secondly, an order admitting the appeal. Both may be recorded in the same proceeding—*Aujoniissa Bibee* vs. *Soorjo Kant*, 11 W. R., 56.

Strict Proof—The applicant must satisfy the Court by strict proof unless the other side does not object—*Ram Joy* vs. *Jugodessuree*, 22 W. R., 399, that the new evidence has come to the knowledge of the applicant and his agents for the first time since the period at which he could have made use of it in the suit and could not by reasonable diligence have discovered it sooner or that he could not adduce it—*Land Credit Co.* vs. *Lord Fermoy*, L. R., 5 Ch., 768, note; *Nissa Bibee* vs. *Abdoor Rohman*, 18 W. R., 413; *Goor Dyal* vs. *Deka Noonya*, 22 W. R., 446; and if the application is based on the discovery of new evidence, and the Judge has admitted it without proof, the order cannot be supported on the ground that, he admitted it for sufficient reason—*Khelat Chunder* vs. *Pran Kristo*, 12 W. R., 461; *Omrao Thakoor* vs. *Gocool*, 16 W. R., 7. An affidavit that the applicant did not know of the existence of the new evidence, but not stating that he had used diligence and made inquiries, is insufficient — *Seetanath Ghose* vs. *Shama Soonduree*, 14 W. R., 26.

An applicant applying for a review on the ground of error in construing a document is entitled to file new evidence to show the Court that an error has been committed and the objection that he did not produce it previously will not prevail—*Gunesh Ram* vs. *Rohinee*, 14 W. R., 236.

627. If the Judge, or Judges, or any one of the Judges, who passed the decree or order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause, for a period of six months next after the application, from considering the decree or order to which the application refers, such Judge or Judges, or any of them, shall hear the application, and no other Judge or Judges of the Court shall hear the same.

Application for review in Court consisting of two or more Judges.

This section applies to H. C. and P. S. C. C.

Attached to the Court—Where a Judge of the High Court was absent on leave and another was appointed to officiate for him *Held*, he was not attached to the Court within the meaning of this section—*Aubhoy Churn* vs. *Shamont*, I. L. R., 16 Cal., 788.

No other Judge shall hear—An application for review must be made to the Judges or the sole remaining Judge of the Bench which decided the case, and if admitted by two Judges it must still be disposed of by the sole remaining Judge. The Chief Justice cannot appoint a Bench to hear it—*Jardine Skinner* vs. *Dhun Kishen*, 13 W. R., 82; *Aubhoy Churn* vs. *Shamont*, I. L. R., 16 Cal., 788. And where a District Judge transferred an application for review pending before a Subordinate Judge to his own Court for trial, his order was set aside as passed without jurisdiction—*Ram Nath* vs. *Gowhur*, 2 Alla., 230.

628. If the application for a review be heard by more than one Judge and the Court be equally divided, the application shall be rejected. If there be a majority, the decision shall be according to the opinion of the majority.

Application when rejected.

Act VIII of 1859, section 379. This section applies to H. C. and P. S. C. C.

629. An order of the Court for rejecting the application shall be final; but whenever such application is admitted, the admission may be objected to on the ground that it was—

(*a*) in contravention of the provisions of section 624,

(*b*) in contravention of the provisions of section 626, or

(*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be made at once by an appeal against the order granting the application, or may be taken in any appeal against the final decree or order made in the suit.

Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file and, if it be proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court may order it to be restored to

Order of rejection final. Objections to admission.

the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

No order shall be made under this section unless the applicant has served the opposite party with notice in writing of the latter application.

No application to review an order passed on review or on an application for a review shall be entertained.

This section is new. It applies to H. C. and P. S. C. C.

Order Rejecting Final—An order rejecting a review is final, even if passed by a single Judge on the Original Side of the High Court—*Achaya* vs. *Ratnavelu*, I. L. R., 9 Mad., 253; *Aubhoy Churn* vs. *Shamont*, I. L. R., 16 Cal., 788. There is no subsequent decree that can be appealed. Thus where a pleader was allowed to withdraw a case, and an application subsequently made to re-admit it, on the ground that the pleader had not been authorised to withdraw it, was refused: *Held*, no appeal lay from the order—*Modhoomutty* vs. *Dhunput Singh*, 13 W R., 167.

Review Refused.—Where an issue was fixed by the Judge and sent down for trial without objection a review was refused—*Bose* vs. *Wise*, 12 W. R., 409

Where an applicant applied on the ground of new evidence; but he knew previously where to find it—*Brojendro Coomar* vs. *Wise*, 19 W. R., 130; and where the affidavit in support of the application did not show that the evidence was relevant and was not within applicant's knowledge, and could not be adduced by him previously—*Ram Dhun* vs. *Joy Narain*, 12 W. R., 536; *Dwarkanath* vs. *Kishenlall*, Marsh., 553, the applications were refused.

Effect of Order.—Nothing in the judgment rejecting the application can affect the previous decree—*Ramhurry* vs. *Mothoor Mohun*, 20 W. R., 450.

Second Application.—Though the order rejecting is final, it does not prohibit the admission of a subsequent application for review on a different ground—*Nasiruddin Khan* vs. *Indronarayan*, B. L. R., (F. B.), p. 370; *Gobind Ram* vs. *Bholanath*, I. L. R., 15 Cal., 432. In Madras no second application is allowed—*Vencama* vs. *Pamoo*, 25 Mad., 325

Review of Order passed in Review.—A, a Judge made an order under section 622, *ante*. His successor discharged the order, on the strength of a decision passed by their Lordships of the Privy Council. Subsequently the matter came before A who set aside the second order, and it was held that he had no power to do so—*Muhammad Yusuf* vs. *Abdul*, 16 Ind. App., 104.

Admission—*Appeal from Order*—An order admitting a review is not a judgment within the Letters Patent—*Aubhoy Churn* vs. *Shamont*, I. L. R., 16 Cal., 788. A first appeal lies, but only on the grounds set forth in this section—*Bom. Steam Navigation Co.* vs. "*The Zuari*," I. L. R., 12 Bom., 171; and there is not a second appeal—*Gopal Dass* vs. *Ala Khan*, I. L. R., 11 Alla., 383; *Jhan Singh* vs. *Chundun Singh*, I. L. R., 11 Cal., 296; *Papayya* vs. *Chelamayya*, I. L. R., 12 Mad., 125; but see the distinction referred to in the case of *Bala Natha* vs. *Bhiva Tha*, I. L. R., 13 Bom., 496.

Revision.—An order of a Small Cause Court Judge admitting is subject to revisio under Act IX of 1887, section 25—*Ramasami* vs. *Karisu*, I. L. R., 13 Mad., 178.

Appeal from Final Decree.—When an application has been admitted within time the order can not be set aside as wholly without jurisdiction; but if an appeal lies from the final decree, the Appellate Court can reverse the order on the ground that the Judge admitting the review erred in the mode in which he exercised his judicial discretion—*Reasut* vs. *Abdoollah*, 3 Ind., App., 221; *Madho Das* vs. *Rukman*, I. L. R., 2 Alla., 287. If the Judge had materials on which he could act and acted regularly the order cannot be questioned in second appeal—*Sahebjan* vs. *Safdur Ali*, 22 W. R., 288; but it can be attacked in second appeal if the procedure adopted in admitting the review was of the nature described in section 584, cl. (*c*), *ante*,—*Bhyrub Chunder* vs. *Madhub Ram*, 20 W. R., 84. So if a Judge admits a review on the ground that by going through the evidence he might come to a different conclusion—*Chunder Churn* vs. *Soodunram*, 25 W. R., 324, or to have the case re-argued—*Kolesemoodeen* vs. *Heerun*, 24 W. R., 186, the order may be set aside on special appeal.

After Time has Expired.—There is a great difference between reviews granted on application made before and those made on applications after the period of limitation has expired. In the former case the Court has jurisdiction, whether the Judge is the same or not, provided section 624 is not violated, and his order can only be set aside in appeal—*Reasut* vs. *Abdoollah*, 3 Ind. App., 221, but see *Raman* vs. *Karunath*, I. L. R., 2 Mad., 11, and where the Judges of the High Court had, in the opinion of their Lordships of the Privy Council, improperly admitted a review, their Lordships considered

it would not be right to exclude the new evidence from their consideration—*Lukhee Dabea* vs. *Gokool Chunder*, 13 Moore, 226; but see *Pran Nath* vs. *Sree Kant*, 2 C.L.R., 257. But where the order admitting a review of judgment after the expiration of the period of limitation does not state that there was or that it had been shown to the satisfaction of the Judge that there was sufficient cause for not having made the application within time, the review and all proceedings under are invalid and must be set aside—*Luchman Singh* vs. *Shumshere*, 2 Ind. App., 58, p. 69, and this may be done in regular or in special appeal—*Gour Pershad* vs. *Anjub Ali*, 24 W. R., 294; *Shama Churn* vs. *Bindabun*, 9 W. R., 181, or in revision for want of judisdiction—*In re Sreenath Chowdhry*, 18 W. R., 286.

Limitation.—Where a decision is unquestioned by appeal, its finality should be left in doubt no longer than the requisites of justice imperatively demand—*Moheshur Sing* vs. *The Bengal Government*, 7 Moore, 304; but under section 5, Act XV of 1877, an application for review of judgment may be admitted after the prescribed period of limitation for sufficient cause. A new exposition of the law is not sufficient cause—*Shama Churn* vs. *Bindabun*, 9 W. R., 181; *Amrit Lal* vs. *Madho*, I. L. R., 6 Alla., 292, but this rule does not apply where the review will not interfere with previous decisions between the parties and justice requires it should be admitted—*Jonmenjoy* vs. *Dausmoney*, I. L. R., 8 Cal., 700. The pendency of a second appeal though it may have been dismissed for want of jurisdiction—*Gulam Husen* vs. *Sayad Musa*, I. L. R., 8 Bom., 260; the withdrawal of an appeal so as to deprive the applicant of the benefit of cross-objections—*Chudasama* vs. *Ishwargar*, I. L. R., 16 Bom., 249; ignorance of the effect of a judgment—*id*; or of the proper stamp to be paid—*Munro* vs. *The Cawnpore Municipal Board*, I. L. R., 12 Alla., 57, of the contents of a document on the record—*Gopal Chandra* vs. *Solomon*, I. L. R., 13 Cal., 62, or of the existence of evidence which could have been adduced in proper time is insufficient—*Madho Das* vs. *Rukman*, I. L. R., 2 Alla., 287, apparently even if the applicant was a minor during the whole or most of the litigation—*Gopal Narhar* vs. *Hanmant*, I. L. R., 6 Bom., 107; *In re Appa Rao*, I. L. R., 10 Mad., 73; but see *Houghton* vs. *Fiddey*, L. R., 18 Eq., 573.

Time.—The period is ninety days except in the High Court, Original Side where the period is twenty. The time occupied in prosecuting an appeal should not be deducted—*Gulam Husen* vs. *Sayad Musa*, I. L. R., 8 Bom., 260.

Court-Fees.—In computing the period within which an application for review may be presented on payment of half the fee leviable on the plaint or memorandum of appeal—Art. 5 of Sch. I of the Court-Fees Act—the time during which the Court is closed for vacation can not be excluded—*In re Kota*, I. L. R., 9 Mad., 134.

Registry of application granted, and order for re-hearing.

630. When an application for a review is granted, a note thereof shall be made in the register, and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

This section applies to H. C. and P. S. C. C.

Extent of Review: Hearing.—In Bombay, when a review is granted, the whole case is re-opened—*Satnal* vs. *Dullabh*, 10 Bom., 360; in Bengal only to the extent allowed in the rule granting the review—*Dhuronidhur* vs. *The Agra Bank*, I. L. R., 5 Cal., p. 89; but the Court may at the hearing allow the applicant to enlarge his grounds, even on oral application, if satisfied that there is a proper case on the merits for so doing—*Hurbans Sahye* vs. *Thakoor Purshad*, I. L. R., 9 Cal., 209; 13 C. L. R., 285; *Thacoor Prosad* vs. *Baluck Ram*, 12 C. L. R., 64. In short, the Court possesses a discretion as to the extent the review should be carried. In each case it must consider whether the review is necessary to correct any error or omission, or is otherwise requisite for the ends of justice, and there is no rule that no point can be raised on review which has already been discussed and decided at the original hearing, or that no new point which has not been raised at the hearing can be argued on review—*Chinta Monee* vs. *Pearee Mohun*, 15 W. R. (F. B.), 1.

Re-hear.—A review re-opens the case, an appeal lies, and limitation runs from the final order, on re-hearing which is a decree whatever may be the result: but if the application is rejected time runs from the original decree, though, probably, the existence of an application for review pending would be looked upon as sufficient reason for not appealing sooner—*Soudaminee Dossee* vs. *Dheraj Mohatab*, B. L. R. (F. B.), 585. And hence reviews for clerical mistakes should be dismissed with leave to apply under section 206, *ante*—*Joykishen* vs. *Ataoor Rahman*, I. L. R., 6 Cal., 22.

Interpretation.—If the procedure laid down by the Code were strictly followed, there would be three distinct applications, and three distinct stages in the proceedings on review; first, the application *ex-parte*; then if the Court thought fit, notice to come in and show cause why a review should not be granted; and lastly, the re-hearing.

In practice these separate stages are not always kept distinct, but are often combined, and so it may be sometimes difficult to determine whether the final order is an order on re-hearing or not—*Lekhraj Roy* vs. *Kanhya Singh*, 18 W. R., 494. See also *Bhaire Din* vs. *Ram Sahai*, I. L. R., 3 Alla., 316.

Effect of Order.—Where a party obtained a review on the ground that, upon the record, he was entitled to the full relief he sought, the other side was not allowed to adduce new evidence—*Banee Madhub* vs. *Shahzada*, 20 W. R., 225.

PART IX.

CHAPTER XLVIII.

SPECIAL RULES RELATING TO THE CHARTERED HIGH COURTS.

Chapter to apply only to certain High Courts.

631. This Chapter applies only to High Courts which are or may hereafter be established under the twenty-fourth and twenty-fifth of Victoria, Chapter 104 (*An Act for establishing High Courts of Judicature in India*).

Application of Code to High Courts.

632. Except as provided in this Chapter the provisions of this Code apply to such High Courts.

Section 629 applies to the High Court—*Achaya* vs. *Ratnavelu*, I. L. R., 9 Mad., 253.

High Court to record judgments according to its own rules.

633. The High Court shall take evidence, and record judgments and orders in such manner as it by rule from time to time directs.

This section empowers the Court to determine whether the judgments should be given orally or in writing, and where rules have been made the rules, and not section 574 apply—*Sundar Bibi* vs. *Bisesbar*, I. L. R., 9 Alla., 93.

Power to order execution of decree before ascertainment of costs, and

634. Whenever a High Court considers it necessary that a decree made in the exercise of its ordinary original civil jurisdiction should be enforced before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

Execution for costs subsequently.

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

Unauthorized persons not to address Court.

635. Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its ordinary original civil jurisdiction, or to examine witnesses, except

when the Court shall have in the exercise of the power conferred by its Charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

See *In re the Pleaders of the High Court*, I. L. R., 8 Bom., 105, p. 134.

Who may serve process of High Court.

536. Notices to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the ordinary or extraordinary original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants issued under section 64, writs of execution, and notices under section 553, may be served by the attorneys in the suit, or by persons employed by them, or by such other persons as the High Court, by any rule or order, from time to time, directs.

Non-judicial acts may be done by Registrar.

637. Any non-judicial or quasi-judicial act, which this Code requires to be done by a Judge, and any act which may be done by a Commissioner appointed to examine and adjust accounts under section 394, may be done by the Registrar of the Court, or by such other officer of the Court as the Court may direct to do such act.

The High Court may, from time to time, by rule declare what shall be deemed to be non-judicial and quasi-judicial acts within the meaning of this section.

Sections not applying to High Court in original civil jurisdiction.

638. The following portions of this Code shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely, sections 16, 17 and 19 sections 54, clauses (*a*) and (*b*), 57, 119, 160, 182 to 185 (both inclusive), 1 7, 189, 190, 191, 192 (to far as relates to the manner of taking evidence), 198 so 206 (both inclusive), and so much of section 409 as relates to the making of a memorandum ;

and section 579 shall not apply to the High Court in the exercise of its appellate jurisdiction.

Code not to affect High Court in exercise of insolvent jurisdiction.

Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court.

Ordinary or Extraordinary Civil Jurisdiction—Ordinary jurisdiction embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it; and it is opposed to extraordinary jurisdiction which the Court may assume at its discretion upon special circumstances and on special orders

—*Navivahoo* vs. *Turner*, I. L. R., 13 Bom., 520; 16 Ind. App., 156. Thus a judgment entered up in the name of the Official Assignee against the insolvent is entered up in the ordinary jurisdiction of the High Court—*id.*: but the appointment of a member of a committee under section 10, Act XX, 1863, is not a matter of ordinary civil jurisdiction of a District Court—*Meenakhsi* vs. *Subramaniya*, 14 Ind. App., 160.

Power to frame forms.

639. The High Court may, from time to time, frame forms for any proceeding in such Court, and may make rules as to the books, entries and accounts to be kept by its officers.

PART X.

CHAPTER XLIX.

MISCELLANEOUS.

Exemption of certain women from personal appearance.

640. Women, who according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court.

But nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

Act VIII of 1859, section 21. This section applies to H. C. and P. S. C. C. The words after "civil process" have been introduced by Act VI of 1888, section 6.

Women.—An unmarried girl of twelve years of age is a woman—*Mainath Singh* vs. *Moorta Kooer*, 24 W. R., 375. The privilege is limited to the class of persons described in this section—women who, according to the customs and manners of the country, ought not to be compelled to appear in public. It cannot be claimed by all women of rank—*Davis* vs. *Middleton*, 8 W. R., 282; but, out of respect to the customs of this country, the invariable practice has been to allow respectable females, who are not accustomed to appear generally before the public, to be examined in their palkis—*Kistomohun Mookerjee* vs. *Adarmoney Dabee*, 2 Hyde, 88; 1 B. L. R., S. N., v. See also *Zohurutoollah Chowdhry* vs. *Assalooddeen*, 15 W. R., 129.

Where an application was made under this section on the following grounds (1) that A had lost her husband ten months previous, and according to Parsi customs she did not leave her house for two years from her husband's death; (2) that B was fifty-eight years of age, sickly and unable to attend; (3) that C wanted to go up-country, the application was refused—*Rustomji* vs. *Banoobai*, I. L. R., 14 Bom., 584.

There is no appeal from an order refusing to summon a person under this section—*Bibee Solendra* vs. *Roy Kaliha Sahoy*, W. R., 1864, Mis., 23.

Local Government may exempt certain persons from personal appearance.

641. The Local Government may, by notification in the official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption, and may, by like notification, withdraw such privilege.

List of names of persons exempted to be kept in Court.

The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government, and a list of such persons shall be kept in

such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

Costs of commission rendered necessary by claiming privilege

When any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission unless the party requiring his evidence pays such costs.

Act VIII of 1859, sections 22, 23. This section applies to H. C. and P. S. C. C.

The exemption is absolute, and not limited to cases in which the party claiming it has been summoned by the opposite party. A Rajah instituted a suit under Act X of 1859 through an agent appointed in that behalf. The Deputy Collector, not being satisfied with the information which the agent could give, adjourned the hearing to a subsequent day, and required the personal appearance of the Rajah. The Rajah claimed to be exempted; but the Deputy Collector refused the application, and dismissed the case. It was held that the Rajah was not bound to attend, and the suit was wrongly dismissed —*Jaggut Inder* vs. *Soorjcoomar Chowdhree*, Marsh., 627.

Persons exempt from arrest under civil process.

642. No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

And, except as provided in section 337A, sub-section (5), and sections 256 and 643, where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtárs, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

This section has been modified by Act VI of 1888, section 7. It applies to H. C. and P S. C. C.

Compare *The Empress of India* vs. *Harakh Nath*, I. L. R., 4 Alla., 27, with the present law. See also 2 Taylor, 1155; 2 Tay. and Bell, 234.

The privilege granted to witnesses is not for the personal benefit of the individual, but for the furthering of the public interests and the better administration of justice. And if there is not a *bonâ fide* belief that his attendance was required, he has no privilege—*Wooma Churn Dhole* vs. *Teil*, 14 B. L. R., App., 13

In the case of *John* vs. *Carter*, 4 B. L. R., O J., 91, the defendant Carter, while proceeding to Court to hear his case, was arrested under an order issued against him for contempt in the suit, and it was decided that he had no privilege. And where an insolvent who was wrongly imprisoned was arrested on his release, it was held he could not claim privilege—*Samarapuri* vs. *Parry & Co.*, I. L. R., 13 Mad., 150.

But in a suit under Chapter XXXIX, where the defendant is not allowed to defend without obtaining leave, a defendant appearing in Court for that purpose is privileged—*In the matter of Soórendro Nath Roy*, I. L. R., 5 Cal., 106; and where plaintiff, a resident of Bengal, went to Madras, on the 24th of October, to attend a case, which was adjourned for seven weeks on the 27th of October, and he was arrested on the 10th of November: *Held*, he was privileged—*In the matter of Siva Bux*, I. L. R., 4 Mad., 317.

The Small Cause Court of Calcutta is a Court of inferior jurisdiction. Where a prisoner was brought up to the High Court on a writ of *habeas corpus*, and the return of the jailor stated that the prisoner was detained under a warrant of the Small Cause Court, it was held that the prisoner was entitled to go behind the return and show that he was exempted from arrest at the time he was taken into custody—*In the matter of Omritolall Dey*, I. L. R., 1 Cal., 78; *In the matter of Juggessur Roy*, 5 C. L. R., 170.

Procedure in case of certain offences.

643 When in a case pending before any Court there appears to the Court sufficient ground for sending for investigation to the Magistrate a charge of any such offence as is described in section 193, section 196, section 199, section 200, section 205, section 206, section 207, section 208, section 209, section 210, section 463, section 471, section 474, section 475, section 476 or section 477 of the Indian Penal Code, which may be made in the course of any other suit or proceeding, or with respect to any document offered in evidence in the case, the Court may cause the person accused to be detained till the rising of the Court, and may then send him in custody to the Magistrate, or take sufficient bail for his appearance before the Magistrate.

The Court shall send to the Magistrate the evidence and documents relevant to the charge, and may bind over any person to appear and give evidence before such Magistrate.

The Magistrate shall receive such charge and proceed with it according to law.

Act XXIII of 1861, section 19. This section applies to H. C. and P. S. C. C.

Apparently the case must be pending—if it has been decided, no action can be taken under this section—and even then the Courts should only refer when they have come to some conclusion in respect of the guilt of the parties or the genuineness of the document, as the case may be—*Hurronath Roy*, Petitioner, 7 W. R., 482.; but an order referring a case to a Magistrate is not bad if the Judge does not hold a preliminary inquiry—*In the matter of Mutty Lall Ghose*, I. L. R., 6 Cal., 308; *Empress* vs. *Juala*, I. L. R., 5 Alla., 62; but is bad if the procedure followed by the Civil Court is wrong—*Reg.* vs. *Mutturaman*, I. L. R., 4 Mad., 325.

Use of forms in fourth schedule.

644. Subject to the power conferred on the High Court by section 639 and by the twenty-fourth and twenty-fifth of Victoria, Chapter 104, section 15, the forms set forth in the fourth schedule hereto annexed, with such variation as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

This section applies to H. C. and P. S. C. C.

Language of subordinate Courts.

645. The language which, when this Code comes into force, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Local Government otherwise orders;

but it shall be lawful for the Local Government, from time to time, to declare what language shall be the language of every such Court.

This section applies to H. C. and P. S. C. C.

645A. In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may if it thinks fit, and upon request of either party to such cause shall, summon to its assistance, in such manner as the Court may by rule, from time to time, direct, two competent assessors; and such assessors shall attend and assist accordingly.

Assessors in causes of salvage, &c.

Every such assessor shall receive such fees for his attendance as the Court by rule prescribes. Such fees shall be paid by such of the parties as the Court in each case may direct.

646. Whenever the Registrar of a Court of Small Causes has any doubt upon any question of law or usage having the force of law, or as to the construction of a document, which construction may affect the merits of the decision, he may state a case for the opinion of the Judge; and all the provisions herein contained relative to the stating of a case by the Judge shall apply, *mutatis mutandis*, to the stating of a case by the Registrar.

Power of Registrars of Small Cause Courts to state cases.

Act XI of 1865, section 42. This section applies to H. C. and P. S. C. C.

646A. (1) If at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of a Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

Power to refer to High Court questions as to jurisdiction in small causes.

(2) On receiving the record and statement the High Court may order the Court either to proceed with the suit or to return the plaint for presentation in such other Court as it may in its order declare to be competent to take cognizance of the suit.

Act VII of 1888, section 60.

646B. (1) If it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement the High Court may pass such order in the case as it thinks fit.

(3) With respect to any proceeding subsequent to decree in any case submitted to the High Court under this section, the High Court may make such order as in the circumstances appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this section.

Act VII of 1888, section 60.

If Required by a Party Shall.—The Judge is bound to make a Reference if one of the parties requires him to do so—*Simson* vs. *McMaster*, I. L. R., 13 Mad., 344. Not so, the word "shall" is merely directory, and the Judge should not make a Reference unless he is of opinion that the judgment of the subordinate Court is erroneous—*Madan Gopal* vs. *Bhagwan Dass*, I. L. R., 11 Alla., 304.

Reasons.—If the Judge does not give his reasons, the Court may return the Reference—*Id.*

Miscellaneous proceedings.

647. The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals.

Admission of affidavits as evidence.

The High Court may, from time to time, make rules to provide for the admission, in such proceedings, of affidavits as evidence of the matters to which such affidavits respectively relate; and such rules, on being published in the local official Gazette, shall have the force of law.

Explanation.—This section does not apply to applications for the execution of decrees, which are proceedings in suits.

Act XXIII of 1861, section 38: the last paragraph has been added by Act VI of 1892. This section applies to H. C. and P. S. C. C.

Proceedings other than Suits or Appeals.—Proceedings under section 38, Act XXIII of 1861, embraced all proceedings, not being regular suits or appeals for which no procedure was expressly provided, and included proceedings in execution of decree. So that a Court of Appeal could, pending appeal, stay an order passed in execution—*In the matter of Harshankar*, I. L. R., 1 Alla., 178; and see *Tara Chand* vs. *Anund*, 10 W. R., 450; otherwise *Jodoo Monee*, Petitioner, 11 W. R., 494; and a District Court could transfer, to itself proceedings in execution pending in a subordinate Court—*Gaya Pershad* vs. *Singh*, I. L. R., 1 Alla., 180; not followed in *Kishori Mohun* vs. *Gul Mohamed*, I. L. R., 15 Cal., 177. So a Civil Court could apply to execution-proceedings the following sections of Act VIII of 1859, section 110—*Raj Pal* vs. *Chooraman*, 4 N. W. R., 10, section 119—*Seetul* vs. *Mahomed*, 5 N. W.-R., 164, section 170—*Deshan* vs. *Khodeja*, 8 W. R., 64, section 372; *Tara Chand* vs. *Anund*, 10 W. R., 450. So it has been held by virtue of 647, Act X of 1877, that the District Judge could under section 25 of that Act withdraw an application for execution of a decree from a subordinate Court and dispose of it himself or transfer it to another subordinate Court competent to deal with it—*Balaji* vs. *Mohanlal*, I. L. R., 5 Bom., 681, or transfer a claim registered under section 331, *ante*—*Sithalakshmi* vs. *Vythilinga*, I. L. R., 8 Mad., 549, that sections 98 and 99, *ante*, applied to a case where a petition asking security for costs was struck off—*Lakhmi* vs. *Gatto*, I. L. R., 7 Alla., 542;

that sections 102 and 103, *ante*, applied to a proceeding taken under section 311, *ante*—*Ningappa* vs. *Gangawa*, I. L. R., 10 Bom., 433, that in Allahabad, though not in Calcutta, section 374, *ante*, was applicable to an application for execution—*Kiayatali* vs. *Ram Singh* I. L. R., 7 Alla., 359, (but now see section 375A, *ante*); *Bunko Behary* vs. *Nil Madhub*, I. L. R., 18 Cal. 635, and that section 623, *ante*, applied to a decision under section 244, *ante*—*Fakaruddin* vs. *Official Trustee*, I. L. R., 10 Cal., 539. Under the Code as it now stands, this section does not apply to applications in execution.

Other Laws.—The Privy Council held that by virtue of section 38, Act XXIII of 1861, Act VIII of 1859, applied to proceedings before the Judge under the Registration Act of 1871, and the Judge could admit a review—*Reasut* vs. *Abdoollah*, I. L. R., 2 Cal., 131, and so it governed proceedings under section 171 of Act XXV of 1861—*The Collector of Tirhoot*, 14 W. R., 390, and applications under Regulation II of 1827—*Nagappa*, Petitioner, 5 Bom. (A. C)., 215, and it has been decided that the Code of 1877 applied to proceedings under the Divorce Act of 1869, and a review could be granted—*King* vs. *King*, I. L. R., 6 Bom., 416; followed in *Stephen* vs. *Stephen*, I. L. R., 17 Cal., 570; and to proceedings of the Revenue Courts of the North-West where there is no special provision—*Madho* vs. *Murli*, I. L., 5 Alla., 406; but see *Fahimunnissa* vs. *Ajudhia*, I.L.R., 6 Alla., 170.

Appeal.—But an appeal must be given by Statute or an authority equivalent to it, and in deciding whether an appeal lies the nature of the order must be regarded—*Meenakshi* vs. *Subramaniya*, 14 Ind. App., 160, and it has been held that section 38, Act XXIII of 1861, did not give an appeal from a summary order passed by a District Judge under Regulation I of 1798—*Hureenath* vs. *Modhoo*, 19 W. R., 122, nor an appeal lie from an order passed under section 5 or 10 of Act XX of 1863, subject to appeal or revision, —*In re Venkateswarra*, I. L. R., 10 Mad., 98; *Meenakshi* vs. *Subramaniya*, 14 Ind. App., 160; nor can a judgment-debtor under cl. 8, section 588, *ante*, appeal against an order dismissing under section 102, *ante*, his application to have a sale set aside—*Ningappa* vs. *Gangawa*, I. L. R., 10 Bom., 433, though an appeal will lie under section 588, cl. 9, against an order passed *ex parte* by a Judge hearing cases under Act X of 1870—*Poresh Nath* vs. *The Secratary of State*, I. L. R., 16 Cal., 31. Neither does an appeal lie from an order passed under section 5 of the Court-Fees Act—*Balkaran* vs. *Gobind*, 12 Alla., 157; nor does the word suit in section 586, *ante*, cover an application in execution—*Nazar Husain* vs. *Kisri*, I. L. R., 12 Alla., 581.

Procedure when person to be arrested or property to be attached is outside district.

648. Where any Court desires that any person shall be arrested or that any property shall attached under any provision of this Code not relating to the execution of decrees, and such person resides or property is situate outside the local limits of its jurisdiction, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant ororder of the arrest or attachment:

and the Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or (where the case is one under Chapter XXXIV) for satisfying any decree that

may be passed against him by that Court in either of which cases the Court making the arrest shall release him.

Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras of Bombay, or of the Court of the Recorder of Rangoon, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

This section applies to H. C., and, so far as relates to arrests, to P. S. C. C. The last two paragraphs have been inserted by Act VII of 1888, section 61.

Resides.—Where an officer whose regiment was in Burmah, proceeding on leave to England, resided a few days at Madras: *Held*, he was liable to arrest under this section—*Everet* vs. *Frere*, I. L. R., 8 Mad., 255.

See "ACTUALLY AND VOLUNTARILY RESIDES," section 16, *ante*.

Rules applicable to all civil process for arrest, sale or payment.

649. The rules contained in Chapter XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a Civil Court in any civil proceeding.

In the same Chapter, the expression "Court which passed a decree," or words to that effect, shall, unless there is something repugnant in the context, be deemed to include, where the decree to be executed is passed in appeal, the Court which passed the decree against which the appeal was preferred, and, where the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making application for execution of the decree, would have jurisdiction to try such suit.

Act VIII of 1859, section 296.

This section applies to H. C. and P. S. C. C.

CIVIL COURT.—Chapter XIX applies to an Insolvency Court realising assets—*In re Bhagowan Das*, I. L. R., 8 Bom., 511.

"*Ceased to exist or to have Jurisdiction to execute it.*"—See *Hurro Proshad Roy Chowdhry* vs. *Bhupendro Narain Dutt*, 7 C. L. R., 79; I. L. R., 6 Cal., 201; *Vishnu* vs. *Krishna Rao*, I. L. R., 11 Bom., 153.

Where a mortgage-decree was passed, and, before any application for execution was made, the property was transferred to another munsifee: *Held*, application could be made to either Court—*Luckmun* vs. *Muddu*, 7 C. L. R., 521; I. L. R., 6 Cal., 513.

Application of rules as to witnesses.

650. The provisions of Chapters XIV and XV relating to witnesses shall apply to all persons required to give evidence or to produce documents in any proceeding under this Code.

650A. Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts: Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor-General in Council, or that the Governor-General in Council has, by notification in the *Gazette of India*, declared the provisions of this section to apply to such Courts.

Service of foreign summonses.

The Governor-General in Council may, by like notification, cancel any notification made under this section, but not so as to invalidate the service of any summons served previous to such cancellation.

This section applies to H. C. and P. S. C. C. The words "or continued" have been inserted by Act VII of 1888, section 62.

651. Repealed by Act X of 1886, section 24.

652. The High Court may, from time to time, make rules consistent with this Code to regulate any matter connected with its own procedure or the procedure of the Courts of Civil Judicature subject to its superintendence. All such rules shall be published in the local official Gazette, and shall thereupon have the force of law.

Power to make subsidiary rules of procedure.

A High Court not established under the Statute 24 & 25 Victoria, Chapter 104 (*an Act for establishing High Courts of Judicature in India*) may, from time to time, with the previous sanction of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might under section 15 of that Statute make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a presidency-town. Rules so made shall be published in the same manner, and shall thereupon have the same force, as rules made and published under this section for the regulation of matters connected with procedure.

This section applies to H. C. and P. S. C. C. The second paragraph has been added by Act VII of 1888, section 63.

653. (1) At any time after a warrant of arrest has been issued under this Code, the Court may cancel it on the ground of the serious illness of the person against whom the warrant was issued.

Release on ground of illness of judgment-debtor.

(2) When a judgment-debtor has been arrested under this Code the Court may release him if in its opinion he is not in a fit state of health to undergo imprisonment.

(3) When a judgment-debtor has been committed to jail, he may be released therefrom—

(*a*) by the Local Government, on the ground of his suffering from any infectious or contagious disease, or

(*b*) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his imprisonment shall not in the aggregate exceed that prescribed in section 342 or section 481, as the case may be.

Added by Act VII of 1888, section 8.

THE FIRST SCHEDULE.—(*See section* 3).

ACTS REPEALED.

Number and year.	Subject or title.	Extent of repeal.
X of 1877	The Code of Civil Procedure.	So much as has not been repealed
XII of 1879	Amending Act X of 1877, &c.	Sections one to one hundred and three (both inclusive).
VII of 1880	Merchant Shipping ...	Section eighty-five.

THE SECOND SCHEDULE.—(*See section* 5.)

REVISED BY ACT X OF 1888.

Chapters and Sections of this Code extending to Provincial Courts of Small Causes.

PRELIMINARY: Sections 1, 2, 3 and 5.

CHAPTER I. ... Of the Jurisdiction of the Courts and *Res Judicata*, except section 11 and the last paragraph of section 14.

CHAPTER II. ... Of the Place of Suing, except section 20, paragraph 4, and sections 22 to 24 (both inclusive).

CHAPTER III. ... Of Parties and their Appearances, Applications and Acts.

CHAPTER IV.	... Of the Frame of the Suit, except section 42 and section 44, rule *a*.
CHAPTER V.	... Of the Institution of Suits.
CHAPTER VI.	... Of the Issue and Service of Summons, except section 77.
CHAPTER VII.	... Of the Appearance of the Parties and Consequence of Non-appearance.
CHAPTER VIII.	... Of Written Statements and Set-off.
CHAPTER IX.	... Of the Examination of the Parties by the Court, except section 119.
CHAPTER X.	... Of Discovery and the Admission, &c., of Documents.
CHAPTER XII.	... Section 155, first paragraph, Judgment where either party fails to produce his evidence.
CHAPTER XIII.	... Of Adjournments.
CHAPTER XIV.	... Of the Summoning and Attendance of Witnesses.
CHAPTER XV.	... Of the Hearing of the Suit and Examination of Witnesses, except sections 182 to 188 (both inclusive).
CHAPTER XVI.	.. Of Affidavits.
CHAPTER XVII.	... Of Judgment and decree except sections 204, 207, 211, 212, 213, 214 and 215.
CHAPTER XVIII.	... Of Costs, sections 220, 221 and 222.
CHAPTER XIX.	... Of the execution of Decrees, sections 223 to 236 (both inclusive), 239 to 258 (both inclusive), 259 (except so far as relates to the recovery of wives), 266 (except so far as relates to immoveable property), 267 to 272 (both inclusive), 273 (so far as relates to decrees for moveable property), 275 to 283 (both inclusive), 284 (so far as relates to moveable property), 285, 286, 287, 288, 289, 290 (so far as relates to moveable property), 291, 292, 293 (so far as relates to re-sales under 297), 294 to 303 (both inclusive), 328 to 333 (both inclusive, so far as relates to moveable property), 336 to 343 (both inclusive).
CHAPTER XX.	... Section 360, Power to invest certain Courts with Insolvency-jurisdiction.
CHAPTER XXI.	... Of the Death, Marriage and Insolvency of Parties.
CHAPTER XXII.	... Of the Withdrawal and Adjustment of Suits.
CHAPTER XXIII.	... Of Payment into Court.
CHAPTER XXIV.	... Of requiring Security for Costs.
CHAPTER XXV.	... Of Commissions, except section 336.
CHAPTER XXVI.	... Suits by Paupers.
CHAPTER XXVII.	... Suits by and against Government or Government Servants.
CHAPTER XXVIII.	... Suits by Aliens and by and against Foreign and Native Rulers.
CHAPTER XXIX	... Suits by and against Corporations and Companies.
CHAPTER XXX.	... Suits by and against Trustees, Executors and Administrators.
CHAPTER XXXI.	... Suits by and against Minors and Persons of unsound mind.

CHAPTER XXXII. ... Suits by and against Military Men.
CHAPTER XXXIII. ... Interpleader.
CHAPTER XXXIV. ... Of Arrest and Attachment before Judgment except as regards Immoveable Property.
CHAPTER XXXVI. ... Appointment of Receivers.
CHAPTER XXXVII. ... Reference to Arbitration.
CHAPTER XXXVIII. ... Of Proceedings on Agreement of Parties.
CHAPTER XLVI. ... Reference to and Revision by High Court.
CHAPTER XLVII. ... Of Review of Judgment, sections 623, 626 and 630.
CHAPTER XLIX. ... Miscellaneous.

THE THIRD SCHEDULE.

(*See section* 7.)

Bombay Enactments.

Bombay Regulation XXIX, 1827.
" " VII, 1830.
" " I, 1831.
" " XVI, 1831.
Act XIX of 1835.
" XIII of 1842.

THE FOURTH SCHEDULE.

(*See section* 644.)

FORMS OF PLEADINGS AND DECREES.

A.—PLAINTS. PART I.

No. 1.
FOR MONEY LENT.

IN THE COURT OF , AT

Civil Suit No. .

A. B. of
against
C. D. of

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , he lent the defendant rupees, repayable on demand [*or* on the day of].

2. That the defendant has not paid the same, except rupees paid on the day of 18 .

[*If the plaintiff claims exemption from any law of limitation*], *say* :—

3. The plaintiff was a minor [*or* insane] from the day of till the day of .

The plaintiff prays judgment for rupees, with interest at per cent. from the day of 18 .

[NOTE.—The object of stating when the debt is to be repaid, is merely to fix a date for interest. If, therefore, interest is not claimed, the statement may be omitted.]

No. 2.

FOR MONEY RECEIVED TO PLAINTIFF'S USE.

(*Title.*)

A. B. and *C. H.*, the above-named plaintiffs, state as follows :—

1. That on the day of 18 , at , the defendant received rupees [*or* a cheque on the Bank for rupees] from one *E. F.* for the use of the plaintiffs.
2. That the defendant has not paid [*or* delivered] the same accordingly.
3. The plaintiffs pray judgment for rupees, with interest at per cent. from the day of 18 .

No. 3.

FOR PRICE OF GOODS SOLD BY A FACTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , he and *E. F.*, since deceased, delivered to the defendant [*one thousand barrels of flour, five hundred maunds of rice, or as the case may be*] for sale upon commission.
2. That on the day of 18 , [*or* on some day unknown to the plaintiff, before the day of 18], the defendant sold the said merchandise for rupees.
3. That the commission and expenses of the defendant thereon amount to rupees.
4. That, on the day of 18 , the plaintiff demanded from the defendant the proceeds of the said merchandise.
5. That he has not paid the same.

[*Demand of judgment.*]

No. 4.

FOR MONEY RECEIVED BY DEFENDANT THROUGH THE PLAINTIFF'S MISTAKE OF FACT.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.
2. That the plaintiff procured the said bars, to be assayed by one *E. F.*, who was paid by the defendant for such assay, and that the said *E. F.* declared each of the said bars to contain 1,500 tolas of fine silver, and that the plaintiff accordingly paid the defendant rupees annas therefor.
3. That each of the said bars did contain only 1,200 tolas of fine silver.
4. That the defendant has not repaid the sum so overpaid.

[*Demand of judgment.*]

[NOTE.—A demand of repayment is not necessary, but it may affect the question of interest or the costs.]

No. 5.

FOR MONEY PAID TO A THIRD PARTY AT THE DEFENDANT'S REQUEST.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at at the request [*or* by the authority] of the defendant, the plaintiff paid to one *E. F.* rupees.
2. That in consideration thereof, the defendant promised [*or* became bound] to pay the same to the plaintiff on demand [*or as the case may be.*]
3. That [on the day of 18 , the plaintiff demanded payment of the same from the defendant, but] he has not paid the same.

[*Demand of judgment.*]

[NOTE.—If the request or authority is implied, the plaint should state facts raising the implication.]

No. 6.

FOR GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , *E. F.*, of deceased, sold and delivered to the defendant [one hundred barrels of flour, *or* the goods mentioned in the schedule hereto annexed *or* sundry goods].
2. That the defendant promised to pay rupees for the said goods on delivery [*or* on the day of *some day before the plaint was filed*].
3. That he has not paid the same.
4. That the said *E. F.*, in his lifetime, made his will, whereby he appointed the plaintiff executor thereof.
5. That on the day of 18 , the said *E. F.* died.
6. That on the day of probate of the said will was granted to the plaintiff by the Court of .
7. The plaintiff as executor as aforesaid.

[*Demand of judgment.*]

[NOTE.—If a day was fixed for payment, it should be stated as furnishing a date for the commencement of interest.]

No. 7.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff sold and delivered to the defendant [sundry articles of house-furniture], but no express agreement was made as to the price.
2. That the same were reasonably worth rupees.
3. That the defendant has not paid the same.

[*Demand of judgment.*]

[NOTE.—The law implies a promise to pay so much as the goods are reasonably worth.]

No. 8.

FOR GOODS DELIVERED TO A THIRD PARTY AT DEFENDANT'S REQUEST AT A FIXED PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff sold to the defendant [one hundred barrels of flour] and, at the request of the defendant, delivered the same to one *E. F.*
2. That the defendant promised to pay to the plaintiff rupees therefor.
3. That he has not paid the same.

[*Demand of judgment.*]

No. 9.

FOR NECESSARIES FURNISHED TO THE FAMILY OF DEFENDANT'S TESTATOR WITHOUT HIS EXPRESS REQUEST, AT A REASONABLE PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff furnished to [*Mary Jones*] the wife of [*James Jones*] deceased, at her request, sundry articles of [*food and clothing*], but no express agreement was made as to the price.
2. That the same were necessary for her.
3. That the same were reasonably worth rupees.
4. That the said *James Jones* refused to pay the same.
5. That the defendant is the executor of the last will of the said *James Jones*.

[*Demand of judgment.*]

No. 10.

FOR GOODS SOLD AT A FIXED PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff sold to *E. F.*, of , deceased [*all the crops the growing on his farm*].
2. That the said *E. F.* promised to pay the plaintiff rupees for the same.
3. That he did not pay the same.
4. That the defendant is administrator of the estate of the said *E. F.*

[*Demand of judgment.*]

No. 11.

FOR GOODS SOLD AT A REASONABLE PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , *E. F.*, of , sold to the defendant [*all the fruit growing in his orchard in*], but no express agreement was made as to the price.
2. That the same was reasonably worth rupees.
3. That the defendant has not paid the same.
4. That on the day of the High Court of Judicature at Fort William duly adjudged the said *E. F.* to be a lunatic, and appointed the plaintiff committee of his estate, with the usual powers for the management thereof.
5. The plaintiff as committee as aforesaid.

[*Demand of judgment.*]

[NOTE.—When the lunatic's estate is not subject to the ordinary original jurisdiction of a High Court, for paragraphs 4 and 5 substitute the following :—]

4. That on the day of the Civil Court of duly adjudged the said *E. F.* to be of unsound mind and incapable of managing his affairs, and appointed the plaintiff manager of his estate.
5. The plaintiff as manager as aforesaid.

[*Demand of judgment.*]

No. 12.

FOR GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , *E. F.*, of , agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that the said *E. F.* should pay for the same upon the delivery thereof rupees.
2. That the plaintiff made the said goods, and on the day of 18 , offered to deliver the same to the said *E. F.*, and has ever since been ready and willing so to do.
3. That the said *E. F.* has not accepted the said goods or paid for the same.
4. That on the day of 18 , the High Court of Judicature at Fort William duly adjudged the said *E. F.* to be a lunatic, and appointed the defendant committee of his estate.
5. The plaintiff prays judgment for rupees, with interest from the day of , at the rate of per cent. per annum, to be paid out of the estate of the said *E. F.*, in the hands of the defendant.

No. 13.

FOR DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION].

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff put up at auction sundry [*articles of merchandise*], subject to the condition that all goods not paid for and removed by the purchaser thereof within [*ten days*] after the sale, should be re-sold by auction on his account, of which condition the defendant had notice.

No. 13—(*contd.*)

2. That the defendant purchased [*one crate of crockery*] at the said auction at the price of rupees.

3. That the plaintiff was ready and willing to deliver the same to the defendant on the said day and for [*ten days*] thereafter, of which the defendant had notice.

4. That the defendant did not take away the said goods purchased by him, nor pay therefor, within [*ten days*] after the sale, nor afterwards.

5. That on the day of 18 , at , the plaintiff re-sold the said [*crate of crockery*], on account of the defendant, by public auction, for rupees.

6. That the expenses attendant upon such re-sale amounted to rupees.

7. That the defendant has not paid the deficiency thus arising, amounting to rupees.

[*Demand of judgment.*]

[NOTE to § 4.—Unless the seller agreed to deliver, the purchaser must fetch the goods; see Act IX of 1872, section 93.]

No. 14.

FOR THE PURCHASE-MONEY OF LANDS CONVEYED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff sold and [conveyed] to the defendant [the house and compound No. , in the, city of , or a farm known as , in *or* a piece of land lying, *&c.*]

2. That the defendant promised to pay the plaintiff rupees for the said [house and compound, *or* farm, *or* land].

3. That he has not paid the same.

[*Demand of judgment.*]

[NOTE.—Where there has been no actual conveyance, say, in § 1, "sold to the defendant the house, &c., and placed him in possession of the same."]

No. 15.

FOR THE PURCHASE-MONEY OF IMMOVEABLE PROPERTY CONTRACTED TO BE SOLD, BUT NOT CONVEYED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff [the house No. , in the town of *or* one hundred bighās of land in , bounded by the East Indian railroad, and by other lands of the plaintiff] for rupees.

2. That on the day of 18 , at , the plaintiff tendered [*or* was ready and willing, and offered to execute] a sufficient instrument of conveyance of the said property to the defendant, on payment of the said sum, and still is ready and willing to execute the same.

3. That the defendant has not paid the said sum.

[*Demand of judgment.*]

No. 16.

FOR SERVICES AT A FIXED PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows —

1. That on the day of 18 , at , the defendant [hired plaintiff as a clerk, at the salary of rupees per year].

2. That from the [said day] until the day of 18 , the plaintiff served the defendant as his [clerk].

3. That the defendant has not paid the said salary.

[*Demand of judgment*].

No. 17.

FOR SERVICES AT A REASONABLE PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That between the day of 18 , and the day of 18 , at , plaintiff [executed sundry drawings, designs and diagrams] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.
2. That the said services were reasonably worth rupees.
3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 18.

FOR SERVICES AND MATERIALS AT A FIXED PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff [furnished the paper for and printed one thousand copies of a book called] for the defendant, a his request [and delivered the same to him].
2. That the defendant promised to pay rupees therefor.
3. That he has not paid the same.

[*Demand of judgment.*]

No. 19.

FOR SERVICES AND MATERIALS AT A REASONABLE PRICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff built a house [known as No. , in], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the price to be paid for such work and materials.
2. That the said work and materials were reasonably worth rupees.
3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 20.

FOR RENT RESERVED IN A LEASE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant entered into a contract with the plaintiff, under their hands, a copy of which is hereto annexed.

[*Or state the substance of the contract.*]

2. That the defendant has not paid the rent of the [month] ending on the day of 18 , amounting to rupees.

[*Demand of judgment.*]

Another Form.

1. That the plaintiff let to the defendant a house, No. 27, Chowringhee, for seven years, to hold from the day of 18 , at rupees a year, payable quarterly.
2. That of such rent quarters are due and unpaid.

[*Demand of judgment.*]

No. 21.

FOR USE AND OCCUPATION AT A FIXED RENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at the defendant hired from the plaintiff [the house No. , street], at the rent of rupees, payable on the first day of .

2. That the defendant occupied the said premises from the day of 18 to the day of 18 .

3. That the defendant has not paid rupees, being the part of said rent due on the first day of 18 .

[*Demand of judgment.*]

No. 22.

FOR USE AND OCCUPATION AT A REASONABLE RENT.

(*Title.*)

A. B., the above-named plaintiff, executor of the will of *X. Y.*, deceased, states as follows :—

1. That the defendant occupied the [house No. , street], by permission of the said *X. Y.*, from the day of 18 , until the day of 18 , and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth rupees.

3. That the defendant has not paid the same.

4. The plaintiff as such executor as aforesaid prays judgment for rupees.

No. 23.

FOR BOARD AND LODGING.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That from the day of 18 , until the day of 18 , the defendant occupied certain rooms in the house [No. , street], by permission of the plaintiff, and was furnished by the plaintiff, at his request, with meat, drink, attendance, and other necessaries.

2. That, in consideration thereof, the defendant promised to pay [*or* that no agreement was made as to payment for such meat, drink, attendance or necessaries, but the same were reasonably worth] the sum of rupees.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 24.

FOR FREIGHT OF GOODS.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff transported in [his barge, *or otherwise*] [one thousand barrels of flour, *or* sundry goods], from to , at the request of the defendant.

2. That the defendant promised to pay the plaintiff the sum of [one rupee per barrel] as freight thereon [*or* that no agreement was made as to payment for such transportation, but such transportation was reasonably worth rupees].

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 25.

FOR PASSAGE-MONEY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , plaintiff conveyed the defendant [in his ship, called the], from to at his request.

2. That the defendant promised to pay the plaintiff rupees therefor [*or* that no agreement was made as to the price of the said passage, but the said passage was reasonably worth rupees].

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 26.

ON AN AWARD.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant, having a controversy between them concerning [a demand of the plaintiff for the price of ten barrels of oil, which the defendant refused to pay], agreed to submit the same to the award of *E. F.* and *G. H.*, as arbitrators [*or*, entered into an agreement, a copy of which is hereto annexed].

2. That on the day of 18 , at , the said arbitrators awarded that the defendant should [pay the plaintiff rupees].

3. That the defendant has not paid the same.

[*Demand of judgment.*]

[NOTE. This will apply where the agreement to refer is not filed in Court.

No. 27.

ON A FOREIGN JUDGMENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , in the State [*or* Kingdom] of , the Court of that State [*or* Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff rupees, with interest from the said date.

2. That the defendant has not paid the same.

[*Demand of judgment.*]

PLAINTS UPON INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY.

No. 28.

ON AN ANNUITY BOND.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant by his bond became bound to the plaintiff in the sum of rupees to be paid by the defendant to the plaintiff, subject to a condition that if the defendant should pay to the plaintiff rupees half-yearly on the day of and the day of in every year during the life of the plaintiff, the said bond should be void.

2. That afterwards, on the day of 18 , the sum of rupees for of the said half-yearly payments of the said annuity, became due to the plaintiff and is still unpaid.

[*Demand of judgment.*]

No. 29.

PAYEE AGAINST MAKER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, by his promissory note, now overdue, promised to pay to the plaintiff rupees [days] after date.

2. That he has not paid the same [except rupees paid on the day of 18].

[*Demand of judgment.*]

[NOTE.—*Where the note is payable after notice, for paragraphs* 1 *and* 2 *substitute*—]

1. That on the day of 18 , at , the defendant by his promissory note promised to pay to the plaintiff rupees months after notice.

2. That notice was afterwards given by the plaintiff to the defendant to pay the same months after the said notice.

3. That the said time for payment has elapsed, but the defendant has not paid the same.

[*Where the note is payable at a particular place, say*—]

1. That on the day of 18 , at , the defendant, by his promissory note, now overdue, promised to pay to the plaintiff [at Messrs. *A. & Co.'s*, Madras] rupees months after date.

2. That the said note was duly presented for payment [at Messrs. *A. & Co.'s*] aforesaid, but has not been paid.

Written Statement of the Defendant.

IN THE COURT, &c.

C. D., the above-named defendant, states as follows :—

1. The defendant made the note sued upon under the following circumstances :—The plaintiff and defendant had for some years been in partnership as indigo-manufacturers, and it had been agreed between them that they should dissolve partnership, that the plaintiff should retire from the business, and that the defendant should take over the whole of the partnership-assets and liabilities and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership-books and inquire into the state of the partnership-assets and liabilities; and he did accordingly examine the said books and make the said inquiries, and he thereupon represented to the defendant that the assets of the firm exceeded Rs. 1,00,000, and that the liabilities of the firm were less than Rs. 30,000, whereas the fact was that the assets of the firm were less than Rs. 50,000, and the liabilities of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the second paragraph of this statement induced the defendant to make the note now sued on, and there never was any other consideration for the making of such note.

No. 30.

FIRST INDORSEE AGAINST MAKER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, by his promissory note, now overdue, promised to pay to the order of *E. F.*, [*or* to *E. F.* or order] rupees [days after date].

2. That the said *E. F.* indorsed the same to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 31.

SUBSEQUENT INDORSEE AGAINST MAKER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. [*As in the last preceding Form.*]

No. 31—(*contd.*)

2. That the same was, by the indorsement of the said *E. F.* and of *G. H.* and *I. J.* [*or* and others] transferred to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 32.

FIRST INDORSEE AGAINST FIRST INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That *E. F.*, on the day of 18 , at , by his promissory note, now overdue, promised to pay to the defendant or order rupees months after date.

2. That the defendant indorsed the same to the plaintiff.

3. That on the day of 18 , the same was duly presented for payment, but was not paid.

[*Or state facts excusing want of presentment.*]

4. That the defendant had notice thereof.

5. That he has not paid the same.

[*Demand of judgment.*]

No. 33.

SUBSEQUENT INDORSEE AGAINST FIRST INDORSER; THE INDORSEMENT BEING SPECIAL.

(*Title.*)

A. B., the above named plaintiff, states as follows:—

1. That the defendant indorsed to one *E. F.* a promissory note, now overdue, made [*or* purporting to have been made] by one *G. H.*, on the day of 18 , at , to the order of the defendant, for the sum of rupees [payable days after date].

2. That the same was, by the indorsement of the said *E. F.*, [and others], transferred to the plaintiff [*or* that the said *E. F.* indorsed the same to the plaintiff].

3, 4 and 5. [*Same as* 3, 4 *and* 5 *of the last preceding Form.*]

[*Demand of judgment.*]

No. 34.

SUBSEQUENT INDORSEE AGAINST HIS IMMEDIATE INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant indorsed to him a promissory note, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , to the order of one *G. H.*, for the sum of rupees [payable days after date], and indorsed by the said *G. H.* to the defendant.

2, 3 and 4. [*Same as in* 3, 4 *and* 5 *in Form No.* 33.]

[*Demand of judgment.*]

No. 35.

SUBSEQUENT INDORSEE AGAINST INTERMEDIATE INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That a promissory note, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , to the order of one *G. H.*, for the sum of rupees [payable days after date], and indorsed by the said *G. H.* to the defendant, was, by the indorsement of the defendant [and others], transferred to the plaintiff.

2, 3 and 4. [*As in No.* 33.]

[*Demand of judgment.*]

No. 36.

SUBSEQUENT INDORSEE AGAINST MAKER, AND FIRST AND SECOND INDORSER.

IN THE COURT OF AT

Civil Suit No.

A. B. of
against
C. D. of
E. F. of
and
G. H. of

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant *C. D.*, by his promissory note, now overdue, promised to pay to the order of the defendant *E. F.*, rupees [months after date.]

2. That the said *E. F.* indorsed the same to the defendant *G. H.*, who indorsed it to the plaintiff.

3. That on the day of 18 , the same was presented [*or state facts excusing want of presentment*] to the said *C. D.* for payment, but was not paid.

4. That the said *E. F.* and *G. H.* had notice thereof.

5. That they have not paid the same.

[*Demand of judgment.*]

No. 37.

DRAWER AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , by his bill of exchange, now overdue, the plaintiff required the defendant to pay to him rupees [days after date, *or* sight, thereof].

2. That the defendant accepted the said bill. [*If the bill is payable at a certain time after sight, the date of acceptance should be stated; otherwise it is not necessary.*]

3. That he has not paid the same.

4. That by reason thereof the plaintiff incurred expenses in and about the presenting and noting of the bill, and incidental to the dishonour thereof.

[*Demand of judgment.*]

[NOTE.—*Where the bill is payable to a third party, for paragraphs* 1, 2, 3 *say*—]

1. That on, &c., at &c., by his bill of exchange, now overdue, directed to the defendant, the plaintiff required the defendant to pay to *E. F.* or order rupees months after date.

2. That the plaintiff delivered the said bill to the said *E. F.* on .

3. That the defendant accepted the said bill, but did not pay the same, whereupon the same was returned to the plaintiff.

No. 38.

PAYEE AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , the defendant accepted a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , requiring the defendant to pay to the plaintiff rupees after sight thereof.

2. That he has not paid the same.

[*Demand of judgment.*]

No. 39.

FIRST INDORSEE AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , the defendant accepted a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.* on the

No. 39—(*contd.*)

day of 18 , at , requiring the defendant to pay to the order of one *G. H.* rupees after sight thereof.

2. That the said *G. H.* indorsed the same to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 40.

SUBSEQUENT INDORSEE AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. [*As in the last preceding Form to the end of article* 1.]

2. That by the indorsement of the said *G. H.* [and others], the same was transferred to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 41.

PAYEE AGAINST DRAWER FOR NON-ACCEPTANCE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, by his bill of exchange, directed to *E. F.*, required the said *E. F.* to pay to the plaintiff rupees [days after sight].

2. That on the day of 18 , the same was duly presented to the said *E. F.* for acceptance, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[*Demand of judgment.*]

No. 42.

FIRST INDORSEE AGAINST FIRST INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to the plaintiff a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , requiring one *G. H.* to pay to the order of the defendant rupees [days] after sight [*or* after date, *or* at sight] thereof [and accepted by the said *G. H.* on the day of 18].

2. That on the day of 18 , the same was presented to the said *G. H.* for payment, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[*Demand of judgment.*]

No. 43.

SUBSEQUENT INDORSEE AGAINST FIRST INDORSER; THE INDORSEMENT BEING SPECIAL.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to one *E. F.* a bill of exchange, now overdue, made [*or* purporting to have been made] by one *G. H.*, on the day of at , requiring one *I. J.* to pay to the order of the defendant rupees days after sight thereof [*or otherwise*], and accepted by the said *I. J.* on the day of 18 . [*This clause may be omitted if not according to the fact.*]

2. That the same was, by the indorsement of the said *E. F.* [and others], transferred to the plaintiff.

No. 43—(*contd.*)

3. That on the day of 18 , the same was presented to the said *I. J.* for payment, and was dishonoured.
4. That the defendant had due notice thereof.
5. That he has not paid the same.

[*Demand of judgment.*]

No. 44.

SUBSEQUENT INDORSEE AGAINST HIS IMMEDATE INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to plaintiff a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , requiring one *G. H.* to pay to the order of *I. J.* rupees days after sight thereof [*or otherwise*], [accepted by the said *G.H.*] and indorsed by the said *I. J.* to the defendant.
2. That on the day of 18 , the same was presented to the said *G. H.* for payment, and was dishonoured.
3. That the defendant had due notice thereof.
4. That he has not paid the same.

[*Demand of judgment.*]

No. 45.

SUBSEQUENT INDORSEE AGAINST HIS IMMEDIATE INDORSER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , requiring one *G. H.* to pay to the order of one *I. J.* rupees days after sight thereof [*or otherwise*], [accepted by the said *G. H.*] and indorsed by the said *I. J.* to the defendant, was, by the indorsement of the defendant [and others], transferred to the plaintiff.
2. That on the day of 18 , the same was presented to the said *G. H.* for payment, and was dishonoured.
3. That the defendant had due notice thereof.
4. That he has not paid the same.

[*Demand of judgment.*]

No. 46.

INDORSEE AGAINST DRAWER, ACCEPTOR AND INDORSER.

IN THE COURT OF , AT

Civil Suit No.

A. B. of
against
C. D. of
E. F. of
and
G. H. of

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at the defendant *C. D.*, by his bill of exchange, now overdue, directed to the defendant *E. F.*, required the said *E. F.* to pay to the order of the defendant *G. H.* rupees [days after sight thereof].
2. That on the day of 18 , the said *E. F.* accepted the same.
3. That the said *G. H.* indorsed the same to the plaintiff.
4. That on the day of 18 , the same was presented to he said *E. F.* for payment, and was dishonoured.

No. 46—(*contd.*)

5. That the other defendants had due notice thereof.
6. That they have not paid the same.

[*Demand of judgment.*]

No. 47.

PAYEE AGAINST DRAWER FOR NON-ACCEPTANCE OF A FOREIGN BILL.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, by his bill of exchange, drawn in Calcutta, required one *E. F.* to pay to the plaintiff, in [London] pounds sterling [sixty days] after sight thereof.
2. That on the day of 18 , the same was presented to the said *E. F.* for acceptance, and was dishonoured, and was thereupon duly protested.
3. That the defendant had due notice thereof.
4. That he has not paid the same.

[5. That the value of pounds sterling, at the time of the service of notice of protest on the defendant, was rupees annas.]

Wherefore the plaintiff demands judgment against the defendant for rupees. with [ten per centum] compensation and interest from the day of 18

48.

PAYEE AGAINST ACCEPTOR.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , one *E. F.* by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff rupees after date [*or* days after sight] thereof.
2. That on the day of 18 , the defendant accepted the said bill.
3. That he has not paid the same.

[*Demand of judgment.*]

No. 49.

ON A MARINE OPEN] POLICY, ON VESSEL LOST BY PERILS OF THE SEA, &c.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff was the owner of [*or* had an interest in] the ship at the time of her loss, as hereinafter mentioned.
2. That, on the day of 18 , at , the defendants, in consideration of rupees to them paid [*or* which the plaintiff then promised to pay], executed to him a policy of insurance upon the said ship, a copy of which is hereto annexed [*or* whereby they promised to pay to the plaintiff, within days after proof of his loss and interest, all loss and damage accruing to him by reason of the destruction or injury of the said ship, during her next voyage from to , whether by perils of the sea or by fire, or by other causes therein mentioned, not exceeding rupees].
3. That the said ship, while proceeding on the voyage mentioned in the said policy, was, on the day of 18 , totally lost by the perils of the sea [*or otherwise*].
4. That the plaintiff's loss thereby was rupees.
5. That on the day of 18 , he furnished the defendants with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.
6. That the defendants have not paid the said loss.

[*Demand of judgment.*]

No. 50.

ON CARGO, LOST BY FIRE:—VALUED POLICY.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That plaintiff was the owner of [*or* had an interest in [one hundred bales of cotton] on board the ship at the time of her loss as hereinafter mentioned.

2. That on the day of 18 , at , the defendants, in consideration of rupees which the plaintiff then paid [*or* promised to pay], executed to him a policy of insurance upon the said goods, a copy of which is hereto annexed [*or* whereby they promised to pay to the plaintiff rupees in case of the total loss, by fire or other causes mentioned, of the said goods before their landing at ; *or* in case of partial loss, such damage as the plaintiff might sustain thereby, provided the same should not exceed per centum of the whole value of the goods].

3. That on the day of 18 , at while proceeding on the voyage mentioned in the said policy, the said goods were totally destroyed by fire (*or* as the case may be).

4. 5 and 6. [*As in paragraphs* 4, 5 *and* 6 *of the last preceding Form.*]

[*Demand of judgment*].

No. 51.

ON FREIGHT:—VALUED POLICY.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the plaintiff had an interest in the freight to be earned by the ship on her voyage from to , at the time of her loss as hereinafter mentioned and that a large quantity of goods was shipped upon freight in her at that time.

2. That on the day of 18 , at , the defendant, in consideration of rupees to him paid, executed to the plaintiff a policy of insurance upon the said freight, a copy of which is hereto annexed [*or state its tenor, as before.*]

3. That the said ship, while proceeding upon the voyage mentioned in the said policy, was, on the day of 18 , totally lost by [the perils of the sea.]

4. That the plaintiff has not received any freight from the said ship, nor did she earn any on the said voyage, by reason of her loss as aforesaid.

5 and 6. [*As in Form No.* 49.]

[*Demand of judgment.*]

No. 52.

FOR A LOSS BY GENERAL AVERAGE.

(*Title.*)

A. B., the above-named plaintiff, states as folows:—

1. That plaintiff was the owner of [*or* had an interest in] [one hundred bales of cotton] shipped on board a vessel called the *Y. Z.*, from to , at the time of the loss hereafter mentioned.

2. That, on the day of 18 , at , in consideration of rupees [which the plaintiff then promised to pay], the defendant executed to the plaintiff a policy of insurance upon his said goods, a copy of which is hereto annexed [*or state its tenor, as before*].

3. That on the day of 18 , while proceeding on the voyage mentioned in the said policy, the said vessel was so endangered by perils of the sea that the master and crew thereof were compelled to, and did, cast into the sea a large part of her rigging and furniture.

4. That plaintiff was, by reason thereof, compelled to, and did, pay a general average loss of rupees.

5. That on the day of 18 , he furnished the defendant with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendant has not paid the the said loss.

[*Demand of judgment.*]

No. 53.

FOR A PARTICULAR AVERAGE LOSS.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1 and 2. [*As in the last preceding Form.*]

3. That on the day of 18 , while on the high seas, the sea-water broke into the said ship and damaged the said [cotton] to the amount of rupees.

4 and 5. [*As in paragraphs* 5 *and* 6 *of the last preceding Form.*]

[*Demand of judgment.*]

No. 54.

ON A FIRE-INSURANCE POLICY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff [was the owner of, *or*] had an interest in a [dwelling-house, known as No. , street, in the city of ,] at the time of its destruction [*or* injury] by fire as hereinafter mentioned.

2. That on the day of 18 , at , in consideration of rupees [to them paid], the defendants executed to the plaintiff a policy of insurance on the said [premises], a copy of which is hereto annexed [*or state its tenor*].

3. That on the day of 18 , the said [dwelling-house] was totally destroyed [*or* greatly damaged] by fire.

4. That the plaintiff's loss thereby was rupees.

5. That on the day of 18 , he furnished the defendants with proof of his said loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendants have not paid the said loss.

[*Demand of judgment.*]

No. 55.

AGAINST SURETY FOR PAYMENT OF RENT.

(*Title.*

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , one *E. F.* hired from the plaintiff, for the term of years, the [house No. , street,], at the annual rent of rupees, payable [monthly].

2. That [at the same time and place] the defendant agreed, in consideration of the letting of the said premises to the said *E. F.*, to guarantee the punctual payment of the said rent.

3. That the rent aforesaid for the month of 18 , amounting to rupees, has not been paid.

[*If, by the terms of the agreement, notice is required to be given to the surety, add* :—

4. That on the day of 18 , the plaintiff gave notice to the defendant of the non-payment of the said rent, and demanded payment thereof.

5. That he has not paid the same.

[*Demand of judgment.*]

B.—PLAINTS FOR COMPENSATION FOR BREACH OF CONTRACT.

No. 56.

FOR BREACH OF AGREEMENT TO CONVEY LAND.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. The on the day of 18 , at , the plaintiff and defendant entered into an agreement, under their hands, of which a copy is hereto annexed.

No. 56—(*contd.*)

[*Or*, That on, &c., the defendant agreed with the plaintiff that, in consideration of a deposit of rupees then paid, and of the further sum of [ten thousand] rupees payable as hereinafter mentioned, he would, on the day of 18 , at , execute to the plaintiff a sufficient conveyance of the house No. , street, in the city of , free from all incumbrances; and the plaintiff agreed to pay [ten thousand] rupees for the same on delivery thereof.

2. That on the day of 18 , the plaintiff demanded the conveyance of the said property from the defendant and tendered rupees to the defendant [*or* that all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part].

3. That the defendant has not executed any conveyance of the said property t the plaintiff [*or* that there is a mortgage upon the said property made by to , for rupees, registered in the office of , on the day of 18 , and still unsatisfied, *or any other defect of title*].

4. That the plaintiff has thereby lost the use of the money paid by him as such deposit as aforesaid and of other moneys provided by him for the completion of the said purchase, and has lost the expenses incurred by him in investigating the title of the defendant and in preparing to perform the agreement on his part, and has incurred expense in endeavouring to procure the performance thereof by the defendant.

5. The plaintiff prays judgment for rupees compensation.

No. 57.

FOR BREACH OF AGREEMENT TO PURCHASE LAND.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant entered into an agreement, under their hands, of which a copy is hereto annexed.

[*Or*, That on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighás of land in the village of for rupees.]

2. That on the day of 18 , at , the plaintiff, being then the absolute owner of the said property [and the same being free from all incumbrances, as was made to appear to the defendant], tendered to the defendant a sufficient instrument of conveyance of the same [*or* was ready and willing, and offered, to convey the same to the defendant by a sufficient instrument], on the payment by the defendant of the said sum.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 58.

Another Form.

FOR NOT COMPLETING A PURCHASE OF IMMOVEABLE PROPERTY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

(1.) That by an agreement dated the day of 18 , it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant and the defendant should purchase from the plaintiff a house and land at the price of rupees, upon the terms and conditions following (that is to say) :—

(*a*) That the defendant should pay the plaintiff a deposit of rupees in part of the said purchase-money on the signing of the said agreement, and the remainder on the day of 18 , on which day the said purchase should be completed.

(*b*) That the plaintiff should deduce and make a good title to the said premises on or before the day of 18 , and on payment of the said remainder of the said purchase-money as aforesaid should execute to the defendant a proper conveyance of the said premises, to be prepared at the defendant's expense.

No. 58—(*contd.*)

2. That all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part, yet the defendant did not pay the plaintiff the remainder of the said purchase-money as aforesaid on his part.

3. That the plaintiff has thereby lost the expense which he incurred in preparing to perform the said agreement on his part, and has been put to expense in endeavouring to procure the performance thereof by the defendant.

[*Demand of judgment.*]

No. 59.

FOR NOT DELIVERING GOODS SOLD.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff [on the day of 18], and that the plaintiff should pay therefor rupees on delivery.

2. That on the [said] day the plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the said goods.

3. That the defendant has not delivered the same, whereby the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[*Demand of judgment.*]

No. 60.

FOR BREACH OF CONTRACT TO EMPLOY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, *or* in the capacity of foreman, *or as the case may be*], and that the defendant should employ the plaintiff as such, for the term of [one year], and pay him for his services rupees [monthly].

2. That on the day of 18 , the plaintiff entered upon the service of the defendant as aforesaid, and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year, whereof the defendant always has notice.

3. That on the day of 18 , the defendant wrongfully discharged the plaintiff, and refused to permit him to service as aforesaid, or to pay him for his services.

[*Demand of judgment.*]

No. 61.

FOR BREACH OF CONTRACT TO EMPLOY WHERE THE EMPLOYMENT NEVER TOOK EFFECT.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. [*As in last preceding Form.*]

2. That on the day of 18 , at , the plaintiff offered to enter upon the service of the defendant, and has ever since been ready and willing so to do.

3. That the defendant refused to permit the plaintiff to enter upon such service, or to pay him for his services.

[*Demand of judgment.*]

No. 62.

FOR BREACH OF CONTRACT TO SERVE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at and

No. 62—(*contd.*)

[annual] compensation of rupees, and the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. That the plaintiff has always been ready and willing to perform his part of the said agreement [and on the day of 18 , offered so to do].

3. That the defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards, on the day of 18 , he refused to serve the plaintiff as aforesaid.

[*Demand of judgment.*]

No. 63.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant entered into an agreement, of which a copy is hereto annexed.

[*Or state the tenor of the contract.*]

[2. That the plaintiff duly performed all the conditions of the said agreement on his part.]

3. That the defendant [built the house referred to in the said agreement in a bad and unworkman like manner].

[*Demand of judgment.*]

No. 64.

BY THE MASTER AGAINST THE FATHER OR GUARDIAN OF AN APPRENTICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant entered into an agreement, under his hand and seal,* a copy of which is hereto annexed.

[*Or state the tenor of the contract*].

2. That after the making of the said agreement the plaintiff received the said [*apprentice*] into his service as such apprentice for the term aforesaid, and has always performed and been ready and willing to perform all things in the said agreement on his part to be performed.

3. That on the day of 18 , the said [*apprentice*] wilfully absented himself from the service of the plaintiff, and continues so to do.

[*Demand of judgment.*]

No. 65.

BY THE APPRENTICE AGAINST THE MASTER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant entered into an agreement with the plaintiff and his [father], *E. F.*, under their hands and seals, a copy of which is hereto annexed.

2. That after the making of the said agreement the plaintiff entered into th service of the defendant with him after the manner of an apprentice to serve for the term mentioned in the said agreement, and has always performed all things in the said agreement contained on his part to be performed.

3. That the defendant has not [instructed the plaintiff in the business of , *or state any other breach, such as cruelty, failure to provide sufficient food, or other ill-treatment.*]

[*Demand of judgment.*]

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* The Form given in Act XIX of 1850 requires the seal of the father or guardian.

No. 66.

ON A BOND FOR THE FIDELITY OF A CLERK.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , plaintiff employed one *E. F.* as a clerk.

2. That on the day of 18 , at , the defendant agreed with the plaintiff that if the said *E. F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff, for all moneys, evidences of debt, or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[*Or*, 2. That at the same time and place, the defendant bound himself to the plaintiff, by a writing under his hand, in the penal sum of rupees, conditioned that if the said *E. F.* should faithfully perform his duties as clerk and cashier to the plaintiff, and should justly account to the plaintiff for all moneys, evidences of debt, or other property which should be at any time held by him in trust for the plaintiff, the same should be void, but not otherwise.]

[*Or*, 2. That at the same time and place the defendant executed to the plaintiff a bond, a copy of which is hereto annexed.]

3. That between the day of 18 , and the day of 18 , the said *E. F.* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which he has not accounted to him, and the same still remains due and unpaid.

[*Demand of judgment.*]

No. 67.

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, by an instrument in writing, let to the plaintiff [the house No. , street], for the term of years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof, for the said term.

2. That all conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. That on the day of during the said term, one *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. That the plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving and lost the custom of *G. H.* and *I. J.* by such removal.]

[*Demand of judgment.*]

No. 68.

FOR BREACH OF WARRANTY OF MOVEABLES.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant warranted a steam engine to be in good working order, and thereby induced the plaintiff to purchase the same of him, and to pay him rupees therefor.

2. That the said engine was not then in good working order, whereby the plaintiff incurred expense in having the said engine repaired, and lost the profits which could otherwise have accrued to him while the engine was under repair.

[*Demand of judgment.*]

No. 69.

ON AN AGREEMENT OF INDEMNITY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant, being partners in trade under the firm of *A. B.* and *C. D.*, dissolved the said

No. 69—(*contd.*)

partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm, and idemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the said firm.

2. That the plaintiff duly performed all the conditions of the said agreement on his part.

3. That on the day of 18 [a judgment was recovered against the plaintiff and defendant by one *E. F.*, in the High Court of Judicature at upon a debt due from the said firm to the said *E. F.*, and on the day of 18], the plaintiff paid rupees [in satisfaction of the same].

4. That the defendant has not paid the same to the plaintiff.

[*Demand of judgment.*]

No. 70.

BY SHIPOWNER AGAINST FREIGHT OR FOR NOT LOADING.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the plaintiff and defendant entered into an agreement, a copy of which is hereto annexed.

[*Or* 1. That on , at , the plaintiff and defendant agreed by charter-party that the defendant should deliver to the plaintiff's ship , at , on the day of 18 , five hundred tons of merchandise, which she should carry to , and there deliver on payment of freight ; and that the defendant should have days for loading, days for discharge, and days for demurrage, if required, at rupees per day.]

2. That at the time fixed by the said agreement, the plaintiff was ready and willing, and offered to receive [the said merchandise, *or* the merchandise mentioned in the said agreement] from the defendant.

3. That the period allowed for the loading and demurrage has elapsed, but the defendant has not delivered the said merchandise to the said vessel.

Wherefore, the plaintiff demands judgment for rupees for demurrage and rupees additional for compensation.

C—.PLAINTS FOR COMPENSATION UPON WRONGS.

No. 71.

FOR TRESPASS ON LAND.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the defendant entered upon certain land of the plaintiff, known as [and depastured the same with cattle, trod down the grass, cut the timber, and otherwise injured the same.]

[*Demand of judgment.*]

No. 72.

FOR TRESPASS IN ENTERING A DWELLING-HOUSE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant entered a dwelling-house of the plaintiff called and made a noise and disturbance therein for a long time, and broke open the doors of the said dwelling-house and removed, took and carried away the fixtures and goods of the plaintiff therein, and disposed of the same to the defendant's own use, and expelled the plaintiff and his family from the possession of the said dwelling-house, and kept them so expelled for a long time.

2. That the plaintiff was thereby prevented from carrying on his business, and incurred expense in procuring another dwelling-house for himself and family.

[*Demand of judgment.*]

No. 73.

FOR TRESPASS ON MOVEABLES.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant broke open ten barrels of rum belonging to the plaintiff, and emptied their contents into the street [*or* seized and took the plaintiff's goods, that is to say, iron, rice, and household furniture, *or as the case may be*, and carried away the same and disposed of them to his own use]:

or seized and took the plaintiff's cows and bullocks, and impounded them and kept them impounded for a long time.

2. That the plaintiff was thereby deprived of the use of the cows and bullocks during that time, and incurred expense in feeding them and in getting them restored to him ; and was also prevented from selling them at fair, as he otherwise would have done ; and the said cows and bullocks are diminished in value to the plaintiff [*otherwise, state the injury according to the facts*].

[*Demand of judgment.*]

No. 74.

FOR THE CONVERSION OF MOVEABLE PROPERTY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , plaintiff was in possession of certain goods described in the schedule hereto annexed [*or* of one thousand barrels of flour].

2. That on that day, at , the defendant converted the same to his own use, and wrongfully deprived the plaintiff of the use and possession of the same.

[*Demand of judgment.*]

The Schedule.

No. 75.

AGAINST A WAREHOUSEMAN FOR REFUSAL TO DELIVER GOODS.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, in consideration of the payment to him of rupees [*or* rupees per barrel, per month, &c.], agreed to keep in his godown [one hundred barrels of flour], and to deliver the same to the plaintiff on payment of the said sum.

2. That thereupon the plaintiff deposited with the defendant the said [hundred barrels of flour]

3. That on the day of 18 , the plaintiff requested the defendant to deliver the said goods, and tendered him rupees [*or* the full amount of storage due thereon], but the defendant refused to deliver the same.

4. That the plaintiff was thereby prevented from selling the said goods to *E. F.*, and the same are lost to the plaintiff.

[*Demand of judgment.*]

No. 76.

FOR PROCURING PROPERTY BY FRAUD.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities.]

2. That the plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees.

3. That the said representations were false [*or state the particular falsehoods*], and were then known by the defendant to be so.

4. That the defendant has not paid for the said goods. [*Or if the goods were not delivered*, That the plaintiff, in preparing and shipping the said goods and procuring their restoration, expended rupees.]

[*Demand of judgment.*]

No. 77.

FOR FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant represented to the plaintiff that one *E. F.* was solvent and in good credit, and worth rupees over all his liabilities [*or* that *E. F.* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit].

2. That the plaintiff was thereby induced to sell to the said *E. F.* [rice] of the value of rupees [on months' credit].

3. That the said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [*or* to deceive and injure the plaintiff].

4. That the said the *E. F.* [did not pay for the said goods at the expiration of the credit aforesaid, *or*] has not paid for the said rice, and the plaintiff has wholly lost the same by reason of the premises.

[*Demand of judgment.*]

No. 78.

FOR POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That he is, and at all the times hereinafter mentioned was, possessed of certain land called and situate in , and of a well therein, and of water in the said well, and was entitled to the use and benefit of the said well and of the said water therein, and to have certain springs and streams of water which flowed and ran into the said well to supply the same to flow or run without being fouled or polluted.

2. That on the day of 18 , the defendant wrongfully fouled and polluted the said well and the said water therein and the said springs and streams of water which flowed into the said well.

3. That by reason of the premises, the said water in the said well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the said well and water.

[*Demand of judgment.*]

No. 79.

FOR CARRYING ON A NOXIOUS MANUFACTURE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called situate in .

2. That ever since the day of 18 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the said lands.

3. That thereby the trees, hedges, herbage, and crops of the plaintiff growing on the said lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the said lands became unhealthy, and divers of them were poisoned and died.

4. That by reason of the premises, the plaintiff was unable to depasture the said lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the said lands as he otherwise would have had.

[*Demand of judgment.*]

No. 80.

FOR OBSTRUCTING A WAY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of].

No. 80—(*contd.*)

2. That he was entitled to a right of way from the said [house] over a certain field to a public highway and back again from the said highway over the said field to the said house, for himself and his servants [with vehicles, *or* on foot] at all times of the year.

3. That on the day of 18 , defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, *or* on foot, *or* in any manner] along the said way [and has ever since wrongfully obstructed the same].

4. [*State special damage, if any.*]

[*Demand of judgment.*]

Another Form.

1. That the defendant wrongfully dug a trench and heaped up earth and stones in the public highway, leading from to so as to obstruct it.

2. That thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [*or* into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[*Demand of judgment.*]

No. 81.

FOR DIVERTING A WATERCOURSE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the , in the village of , district of .

2. That by reason of such possession the plaintiff was entitled to the flow of the said stream for working the said mill.

3. That on the day of 18 , the defendant, by cutting the bank of the said stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. That by reason thereof, the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day.

[*Demand of judgment.*]

No. 82.

FOR OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and was at the time hereinfter mentioned, possessed of certain lands situate, &c., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. That, on the day of the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[*Demand of judgment.*]

No. 83.

FOR WASTE BY A LESSEE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , the defendant hired from him [the house No. , street] for the term of .

2. That the defendant occupied the same under such hiring.

3. That during the period of such occupation, the defendant greatly injured the premises [defaced the walls, tore up the floors, and broke down the doors; *or otherwise specify the injuries as far as possible.*]

The plaintiff prays judgment for rupees compensation.

No. 84.

FOR ASSAULT AND BATTERY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

That on the day of 18 , at , the defendant assaulted and beat him.

The plaintiff prays judgment for rupees compensation.

No. 85.

FOR ASSAULT AND BATTERY, WITH SPECIAL DAMAGE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant assaulted and beat him until he became insensible.

2. That the plaintiff was thereby disabled from attending to his business for [six weeks thereafter], and was compelled to pay rupees for medical attendance, and, has been ever since disabled [from using his right arm]. [*Or otherwise state the damage as the case may be.*]

[*Demand of judgment.*]

No. 86.

FOR ASSAULT AND FALSE IMPRISONMENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant assaulted the plaintiff and imprisoned him for days [*or* hours]; [*state special damage, if any, thus* :—]

2. That by reason thereof, the plaintiff suffered great pain of body and mind, and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business and from providing for his family by his personal care and attention, and incurred expense in obtaining his liberation from the said imprisonment [*or otherwise as the case may be.*]

[*Demand of judgment.*]

No 87.

FOR INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , the defendants were common carriers of passengers by railway between and .

2. That on that day, the plaintiff was a passenger in one of the carriages of the defendants on the said road.

3. That while he was such passenger, at [*or* near the station of ; *or* between the stations of and], a collision occurred on the said railway, caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, &c., *and state the special damage, if any, as*], and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a sa esman].

[*Demand of judgment.*]

[*Or thus* :—2. That on that day the defendants, by their servants, so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto, upon and along the defendants' railway, which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, &c. *as in* § 3.]

No 88.

FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is a shoemaker, carrying on business at

The defendant is a merchant of

No. 88—(*contd.*)

2. On the [23rd May, 1875], the plaintiff was walking eastward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Harrington Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's drawn by two horses, under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Harrington Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

The plaintiff claims rupees damages.

(*Title.*)

Written Statement of Defendant.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, or that it was under the charge or control of the defendant's servants. The carriage belonged to [Messrs. *E. F.* and *G. H.*] of Street, Calcutta, livery stable-keepers, employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said [Messrs. *E. F.* and *G. H.*]

2. The defendant does not admit that the said carriage was turned out of Harrington Street either negligently, suddenly or without warning, or at a rapid or dangerous pace.

3. The defendant says, that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements of the third paragraph of the plaint.

No. 89.

FOR LIBEL; THE WORDS BEING LIBELLOUS IN THEMSELVES.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant published in a newspaper, called the [*or* in a letter addressed to *E. F.*], the following words concerning the plaintiff :—

[*Set forth the words used.*]

2. That the said publication was false and malicious.

[*Demand of judgment.*]

NOTE.—If the libel was in a language of the Court, set out the libel *verbatim* in the foreign language in which it was published, and then proceed thus :—" Which said words being translated into the language, have the meaning and effect following, and were so understood by the persons to whom they were so published, that is to say [*here set out a literal translation of the libel in the language of the Court*].

No. 90.

FOR LIBEL; THE WORDS NOT BEING LIBELLOUS IN THEMSELVES.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff [is, and] was, on and before the day of 18 a merchant doing business in the city of .

2. That on the day of 18 , at ,the defendant published in a newspaper, called the [*or* in a letter addressed to *E. F.*, *or otherwise how published*], the following words concerning the plaintiff :—

[" *A. B.*, of this city, has modestly retired to foreign lands. It is said that creditors to the amount of rupees are anxiously seeking his address."]

3. That the defendant meant thereby that [the plaintiff had absconded to avoid his creditors, and with intent to defraud them].

4. That the said publication was false and malicious.

[*Demand of judgment.*]

No. 91.

FOR SLANDER; THE WORDS BEING ACTIONABLE IN THEMSELVES.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant falsely and maliciously spoke, in the hearing of *E. F.* [*or* sundry persons], the following words concerning the plaintiff : ["He is a thief."]

2. That in consequence of the said words, the plaintiff lost his situation as in the employ of .

[*Demand of judgment.*]

No. 92.

FOR SLANDER; THE WORDS NOT BEING ACTIONABLE IN THEMSELVES.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant falsely and maliciously said to one *E. F.* concerning the plaintiff : ["He is a young man of remarkably easy conscience."]

2. That the plaintiff was then seeking employment as a clerk, and the defendant meant by the said words, that the plaintiff was not trustworthy as a clerk.

3. That, in consequence of the said words [the said *E. F.* refused to employ the plaintiff as a clerk].

[*Demand of judgment.*]

No. 93.

FOR MALICIOUS PROSECUTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant obtained a warrant of arrest from [a Magistrate of the said city, *or as the case may be*], on a charge of , and the plaintiff was arrested thereon, and imprisoned for [days *or* hours, and gave bail in the sum of rupees to obtain his release.]

2. That in so doing, the defendant acted maliciously and without reasonable or probable cause.

3. That on the day of 18 , the said Magistrate dismissed the complaint of the defendant, and acquitted the plaintiff.

4. That many persons, whose names are unknown to the plaintiff, hearing of the said arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him; *or* that, in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E. F.*, *or* that, by reason of the premises, the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[*Demand of judgment.*]

D.—PLAINTS IN SUITS FOR SPECIFIC PROPERTY.

No. 94.

BY THE ABSOLUTE OWNER FOR THE POSSESSION OF IMMOVEABLE PROPERTY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That *X. Y.* was the absolute owner [of the estate, *or* the share of the estate called , situate in the district of , the Government-revenue of which is rupees, and the estimated value rupees, *or* of the house No. , street, in the town of Calcutta, the estimated value of which is rupees].

2. That on the day of 18 , Z illegally dispossessed the said *X. Y.* of the said estate [*or* share *or* house].

No. 94—(*contd.*)

3. That the said *X. Y.* has since died intestate, leaving the plaintiff, the said *A. B.* his heir, him surviving.

4. That the defendant withholds the possession of the estate [*or* share *or* house] from the plaintiff.

The plaintiff prays judgment:

(1) for the possession of the said premises;

(2) rupees compensation for withholding the same.

Another Form.

A. B., the above-named plaintiff, states as follows:—

1. On the day of the plaintiff, by an instrument in writing, let to the defendant a house and premises [No. 52, Russell Street, in the] for a term of five years from the day of , at the monthly rent of 300 rupees.

2. By the said instrument the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said instrument also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for twenty-one days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the day of 18 a month's rent became due, and on the day of 18 another month's rent became due; on the day of 18 both had been in arrear for twenty-one days, and both are still due.

5. On the same day of 18 the house and premises were not, and are not now, in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value. The plaintiff claims—

(1) possession of the said house and premises;

(2) rupees for arrears of rent;

(3) rupees compensation for the defendant's breach of his covenant to repair;

(4) rupees for the occupation of the house and premises from the day of 18 to the day of recovering possession.

No. 95.

BY THE TENANT.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That one *E. F.* is the absolute owner of [a piece of land in the town of Calcutta , bounded as follows:], the estimated value of which is rupees.

2. That on the day of 18 , the said *E. F.* let the said premises to the plaintiff for years, from .

3. That the defendant withholds the possession thereof from the plaintiff.

[*Demand of judgment.*]

No. 96.

FOR MOVEABLE PROPERTY WRONGFULLY TAKEN.

(*Title.*)

A. B, the above-named plaintiff, states as follows:—

1. That on the day of 18 , plaintiff owned [*or* was possessed of] one hundred barrels of flour, the estimated value of which is rupees.

2. That on that day, at , the defendant took the same.

The plaintiff prays judgment:

(1) for the possession of the said goods, or for rupees, in case such possession cannot be had;

(2) for rupees compensation for the detention thereof.

No. 97.

FOR MOVEABLES WRONGFULLY DETAINED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , plaintiff owned [*or state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or describe the goods*], the estimated value of which is rupees.

2. That from that day, until the comencement of this suit, the defendant has detained the same from the plaintiff.

3. That before the commencement of this suit, to wit, on the day of 18 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

The plaintiff prays judgment :

(1) for the possession of the said goods, or for rupees, in case such possession cannot be had ;

(2) for rupees compensation for the detention thereof.

The Schedule.

No. 98.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at , the defendant [*C. D.*], for the purpose of inducing the plaintiff to sell him certain goods represented to the plaintiff that [he was solvent, and worth rupees over all his liabilities].

2. That the plaintiff was thereby induced to sell and deliver to the said *C. D.* [one hundred boxes of tea], the estimated value of which is rupees.

3. That the said representations were false, and were then known by the said *C. D.* to be so. [*Or* that, at the time of making the said representations, the said *C. D.* was insolvent, and knew himself to be so.]

4. That the said *C. D.* afterwards transferred the said goods to the defendant *E. F.* without consideration [*or* who had notice of the falsity of the representation].

The plaintiff prays judgment :

(1) for the possession of the said goods, or for rupees, in case such possession cannot be had ;

(2) for rupees compensation for the detention thereof.

E.—PLAINTS IN SUITS FOR SPECIAL RELIEF.

No. 99.

FOR RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , th defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained [ten bighas].

2. That the plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an instrument of agreement, of which a copy is hereto annexed. But no conveyance of the same has been executed to him.

3. That on the day of 18 , the plaintiff paid the defendant rupees as part of such purchase-money.

4. That the said piece of ground contained in fact only [five bighas].

The plaintiff prays judgment :

(1) for rupees, with interest from the day of 18

(2) that the said agreement of purchase be delivered up and cancelled.

No. 100.

FOR AN INJUNCTION RESTRAINING WASTE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is the absolute owner of [*describe the property*].

2. That the defendant is in possession of the same under a lease from the plaintiff.

3. That the defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

The plaintiff prays judgment, that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[*Pecuniary compensation might also be prayed.*]

No. 101.

FOR ABATEMENT OF A NUISANCE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No. , street, Calcutta].

2. That the defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street].

3. That on the day of 18 , the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

4. That [the plaintiff has been compelled, by reason of the premises, to abandon the said house, and has been unable to rent the same].

The plaintiff prays judgment, that the said nuisance be abated.

No. 102.

FOR AN INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

[*As in Form No.* 81.]

The plaintiff prays judgment, that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 103.

FOR RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather, which was executed by an eminent painter], and of which no duplicate exists [*or state any facts showing that the property is of a kind that cannot be replaced by money.*]

2. That on the day of 18 , he deposited the same for safe keeping with the defendant.

3. That on the day of 18 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. That the defendant refuses to deliver the same to the plaintiff, and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. That no pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

The plaintiff prays judgment :

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting];

(2) that he return the same to the plaintiff.

No. 104.

INTERPLEADER.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That before the date of the claims hereinafter mentioned, one *G. H.* deposited with the plaintiff [*describe the property*] for [safe keeping].

2. That the defendant *C. D.* claims the same [under an alleged assignment thereof to him from the said *G. H.*]

3. That the defendant *E. F.* also claims the same [under an order of the said *G. H.* transferring the same to him].

4. That the plaintiff is ignorant of the respective rights of the defendants.

5. That he has no claim upon the said property, and is ready and willing to deliver it to such persons as the Court shall direct.

6. That this suit is not brought by collusion with either of the defendants.

The plaintiff prays judgment :

(1) that the defendants be restrained by injunction from taking any proceeding against the plaintiff in relation thereto ;

(2) that they be required to interplead together concerning their claims to the said property.

3) that some person be authorized to receive the said property pending uch litigation ;]

4) that upon delivering the same to such [person], the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 105.

ADMINISTRATION BY CREDITOR.

(*Title.*

A. B., the above-named plaintiff, states as follows :—

1. *E. F.*, late of , was, at the time of his death, and his estate still is indebted to the plaintiff in the sum of [*here insert nature of debt and security if any.*]

2. The said *E. F.* made his will, dated the day of and thereof appointed *C. D.* executor [*or* devised his estate in trust, &c., *or* died intestate, *as the case may be.*]

3. The said will was proved by the said *C. D.* [*or* letters of administration were granted, &c.]

4. The defendant has possessed himself of the moveable [and immoveable, *or* the proceeds of the immoveable] property of the said *E. F.*, and has not paid the plaintiff his said debt.

5. The said *E. F.* died on or about the day of .

6. The plaintiff prays that an account may be taken of the moveable [and immoveable] property of the said *E. F.*, deceased, and that the same may be administered under the decree of the Court.

No. 106.

ADMINISTRATION BY SPECIFIC LEGATEE.

(*Title.*)

[*Alter Form No.* 105 *thus* :—]

[*Omit paragraph* 1 *and commence paragraph* 2] *E. F.*, late of , duly made his last will, dated the day of , and thereof appointed *C. D.* executor, and by such will bequeathed to the plaintiff [*here state the specific legacy*].

For paragraph 4, *substitute*—

The defendant is in possession of the moveable property of the said *E. F.* and amongst other things, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 6, *substitute*—

The plaintiff prays that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that, &c.

No. 107.

ADMINISTRATION BY PECUNIARY LEGATEE.

(*Title.*)

[*Alter Form No.* 105 *thus* :—]

[*Omit paragraph* 1 *and substitute for paragraph* 2] *E. E.*, late of , duly made his last will, dated the day of , and thereof appointed *C. D.* executor, and by such will bequeathed to the plaintiff a legacy of rupees.

In paragraph 4 *substitute*, "legacy" *for* "debt."

Another Form.

Between *E. F.* ... ... *Plaintiff*,
and
G. H. ... ... *Defendant.*

E. F., the above-named plaintiff, states as follows :—

1. *A. B.* of *K.*, in the , duly made his last will, dated the [first day of March, 1873], whereby he appointed the defendant and *M. N.* [who died in the testator's lifetime executors thereof, and bequeathed his property, whether moveable or immoveable to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The testator died on the [first day of July, 1878] and his will was proved by the defendant on the [fourth day of October, 1878]. The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property; he has sold some part of the immoveable property.

The plaintiff claims:

(1) to have the moveable and immoveable property of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken;

(2) such further or other relief as the nature of the case may require.

Between *E. F.* .. .. *Plaintiff*,
and
G. H. ... . *Defendant.*

Written Statement of Defendant.

1. *A. B.*'s will contained a charge of debts; he died insolvent; he was entitled at his death to some immoveable property which the defendants sold and which produced the nett sum of rupees , and the testator had some moveable property which the defendant got in, and which produced the nett sum of rupees.

2. The defendant applied the whole of the said sums and the sum of rupees which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the [tenth day of January, 1880], and offered the plaintiff free access to the vouchers to verify such acounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 108.

EXECUTION OF TRUSTS.

IN THE COURT OF , AT .
Civil Suit No. .
A. B. of ... *Plaintiff*,
against
C. D. of , the beneficiary [*or* one of the beneficiaries] ... *Defendant.*

A. B., the above-named plaintiff, states as follows :—

1. That he is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E. F.* and *G. H.*, the father and mother of the defendant [*or* an instrument of assignment of the estate and effects of *E. F.* for the benefit of *C. D.*, the defendant, and the other creditors of *E. F.*]

2. The said *A. B.* has taken upon himself the burden of the said trust, and is in possession of [*or* of the proceeds of] the moveable and immoveable property conveyed [*or* as signed] by the before-mentioned deed.

No. 108—(*contd.*)

3. The said *C. D.* claims to be entitled to a beneficial interest under the before-mentioned deed.

4. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, *or* of part of the said immoveable property, *or* moveable, *or* the proceeds of the sale of, *or* of part of, the said moveable property, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust-estate may be administered in the Court for the benefit of the said *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of the said *C. D.* and such other persons so interested as the Court may direct, or that the said *C. D.* may show good cause to the contrary.

[*N.B.—Where the suit is by a beneficiary, the plaint may be modelled*, mutatis mutandis, *on the plaint by a legatee.*]

No. 109.

FORECLOSURE OR SALE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. By a mortgage-deed, dated the day of 18 , a house with the garden and appurtenances situated within the jurisdiction of this Court, were conveyed by the defendant to him, the plaintiff, his heirs [*or* executors, administrators], and assigns, for securing the principal sum of Rs. , together with interest thereon at the rate of Rs. per centum per annum, subject to redemption upon payment by the said defendant of the said principal and interest at a day long since past.

2. There is now due from the defendant to the plaintiff the sum of Rs. for principal and interest on the said mortgage.

3. The plaintiff prays (*a*) that the Court will order the defendant to pay him the said sum of Rs. with such further interest as may accrue between the filing of the plaint and the day of payment, and also the costs of this suit, on some day to be named by the Court, and in default that the right to redeem the said mortgaged premises may be foreclosed and the plaintiff placed in possession of the same premises; or (*b*) that the said premises may be sold, and the proceeds applied in and towards the payment of the amount of the said principal, interest and costs; and (*c*) that if such proceeds shall not be sufficient for the payment in full of such amount, the defendant do pay to the plaintiff the amount of the deficiency with interest thereon at the rate of six per cent. per annum until realization; and (*d*) that for that purpose all proper directions may be given and accounts taken by the Court.

[There is no distinction between legal and equitable mortgages, and in either case the mortgagee can foreclose or sell—*Manekji* vs. *Framji*, I. L. R., 14 Bom., 269.]

No. 110.

REDEMPTION.

(*Title.*)

[*Alter Form No.* 109 *thus* :—]

Transpose parties and also the facts in paragraph 1.

For paragraph 2, *substitute*—

2. There is now due from the plaintiff to the defendant, for principal and interest on the said mortgage, the sum of Rs. , which the plaintiff is ready and willing to pay to the defendant, of which the defendant, before filing this plaint, had notice.

For paragraph 3, *substitute*—

The plaintiff prays that he may redeem the said premises, and that the defendant may be ordered to re-convey the same to him upon payment of the said sum of Rs. and interest, with such costs (if any), as the Court may order, upon a day to be named by the Court, and that the Court will give all proper directions for the preparation and execution of such re-conveyance and doing such other acts as may be necessary to put him into possession of the said premises, freed from the said mortgage.

No. 111.

SPECIFIC PERFORMANCE. (No. 1.)

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement, dated the day of , and signed by the above-named defendant *C. D.*, the said *C. D.* contracted to buy of [*or* sell to] him certain immoveable property therein described and referred to, for the sum of rupees.

No. 111—(*contd.*)

2. He has applied to the said *C. D.* specifically to perform the said agreement on his part, but he has not done so.

3. The said *A. B.* has been, and still is, ready and willing specifically to perform the agreement on his part, of which the said *C. D.* has had notice.

4. The plaintiff prays that the Court will order the said *C. D.* specifically to perform the said agreement and to do all acts necessary to put the said *A. B.* in full possession of the said property [*or* to accept a conveyance and possession of the said property], and to pay the costs of the suit.

[N.B.—*In suit for delivery up, to be cancelled, of any agreement omit paragraphs* 2 *and* 3, *and substitute a paragraph stating generally the grounds for requiring the agreement to be delivered up to be cancelled—such as that the plaintiff signed it by mistake, under duress, or by the fraud of the defendant—and alter the prayer according to the relief sought.*

No. 112.

SPECIFIC PERFORMANCE. (No. 2.)

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , the defendant was absolutely entitled to certain immoveable property described in the agreement hereto annexed.

2. That on the same day, the plaintiff and defendant entered into an agreement, under their hands, a copy of which is hereto annexed.

3. That on the day of 18 , the plaintiff tendered rupees to the defendant, and demanded a conveyance of the said property.

4. That on the day of 18 , the plaintiff again demanded such conveyance. [*Or* that the defendant refused to convey the same to the plaintiff.]

5. That the defendant has not executed such conveyance.

6. That the plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

The plaintiff prays judgment :

(1) that the defendant execute to the plaintiff a sufficient conveyance of the said property [*following the terms of the agreement*,]

(2) for rupees compensation for withholding the same.

No. 113.

PARTNERSHIP.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. He and the said *C. D.*, the defendant, have been, for the space of years [*or* months] last past, carrying on business together at , within the jurisdiction of this Court, under certain articles of partnership in writing, signed by them respectively, [*or* under a certain deed sealed and executed by them respectively, *or* under a verbal agreement between them, the said plaintiff and defendant].—

2. Divers disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the said business in partnership with advantage to the partners.

3. The plaintiff desires to have the said partnership dissolved, and he is ready and willing to bear his share of the debts and obligations of the partnership according to the terms of the said articles [*or* deed, *or* agreement].

4. The plaintiff prays the Court to decree a dissolution of the said partnership, and that the accounts of the said partnership-trading may be taken by the Court, and the assets thereof realized, and that each party may be ordered to pay into Court any balance due from him upon such partnership-account, and that the debts and liabilities of the said partnership may be paid and discharged, and that the costs of the suit may be paid, out of the partnership-assets, and that any balance remaining of such assets, after such payment and discharge, and the payment of the said costs, may be divided between the plaintiff and defendant, according to the terms of the said articles [*or* deed, *or* agreement], or that if the said assets shall prove insufficient, he the plaintiff and the said defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment and discharge of such debts, liabilities, and costs. And to give such other relief as the Court shall think fit.

No. 113.—(*contd.*)

This plaint was filed by of , pleader for the plaintiff, [*or* by .]

[N.B.—*In suits for winding-up of any partnership, omit the prayer for dissolution; but instead thereof insert a paragraph stating the fact of the partnership having been dissolved.*]

No. 114.

FORMS OF CONCISE STATEMENTS.

[Code of Civil Procedure, section 58.]

Money lent.	The plaintiff's claim is rs. for money lent [and interest].
Several demands.	The plaintiff's claim is rs. whereof rs. is for the price of goods sold, and rs. for money lent, and rs. for interest.
Rent.	The plaintiff's claim is rs. for arrears of rent.
Salary, &c.	The plaintiff's claim is rs. for arrears of salary as a clerk [*or as the case may be*].
Interest.	The plaintiff's claim is rs. for interest upon money lent.
General average.	The plaintiff's claim is rs. for general average contribution.
Freight, &c.	The plaintiff's claim is rs. for freight and demurrage.
Banker's balance.	The plaintiff's claim is rs. for money deposited with the defendant as a banker.
Fees, &c., 's pleader.	The plaintiff's claim is rs. for fees for work done [and rs. money expended] as a pleader.
Commission.	The plaintiff's claim is rs. for commission earned as [*state character—as* auctioneer, cotton-broker, &c.]
Medical attendance.	The plaintiff's claim is rs. for medical attendance.
Return of premium.	The plaintiff's claim is rs. for a return of premiums paid upon policies of insurance.
Warehouse rent.	The plaintiff's claim is rs. for the warehousing of goods.
Carriage of goods.	The plaintiff's claim is rs. for the carriage of goods by railway.
Use and occupation of house.	The plaintiff's claim is rs. for the use and occupation of a house.
Hire of goods.	The plaintiff's claim is rs. for the hire of [furniture].
Work done.	The plaintiff's claim is rs. for work done as a [surveyor].
Board and lodging.	The plaintiff's claim is rs. for board and lodging.
Schooling.	The plaintiff's claim is rs. for the [board, lodging and] tuition of *X. Y.*
Money received.	The plaintiff's claim is rs. for money received by the defendant as pleader [*or* factor, *or* collector, *or* &c.] of the plaintiff.
Fees of office.	The plaintiff's claim is rs. for fees received by the defendant under colour of the office of .
Money over-paid.	The plaintiff's claim is rs. for a return of money overcharged for the carriage of goods by railway.
	The plaintiff's claim is rs. for a return of fees overcharged by the defendant as .
Return of money by stake-holder.	The plaintiff's claim is rs. for a return of money deposited with the defendant as stake-holder.
Money won from stake-holder.	The plaintiff's claim is rs. for money entrusted to the defendant as stake-holder, and become payable to plaintiff.
Money entrusted to agent.	The plaintiff's claim is rs. for a return of money entrusted to the defendant as agent of the plaintiff.
Money obtained by fraud.	The plaintiff's claim is rs. for a return of money obtained from the plaintiff by fraud.
Money paid by mistake.	The plaintiff's claim is rs. for a return of money paid to the defendant by mistake.
Money paid for consideration which has failed.	The plaintiff's claim is rs. for a return of money paid to the defendant for [work to be done, *or* work left undone; *or* a bill to be taken up, *or* a bill not taken up; *or* &c.]
	The plaintiff's claim is rs. for a return of money paid as a deposit upon shares to be allotted.
Money paid by surety for defendant.	The plaintiff's claim is rs. for money paid for the defendant as his surety.
Rent paid.	The plaintiff's claim is rs. for money paid for rent due by the defendant.
Money paid on accommodation-bill.	The plaintiff's claim is rs. upon a bill of exchange accepted [*or* indorsed] for the defendant's accommodation.
Contribution by surety.	The plaintiff's claim is rs. for a contribution in respect of money paid by the plaintiff as surety.

No. 111—(*contd.*)

By co-debtor. The plaintiff's claim is rs. for a contribution in respect of a joint debt of the plaintiff and the defendant paid by the plaintiff.

Money paid for calls. The plaintiff's claim is rs. for money paid for calls upon shares against which the defendant was bound to indemnify the plaintiff.

Money payable under award. The plaintiff's claim is rs. for money payable under an award.

Life-policy. The plaintiff's claim is rs. upon a policy of insurance upon the life of *X. Y.*, deceased.

Money-bond. The plaintiff's claim is rs. upon a bond to secure payment of rs. and interest.

Foreign judgment. The plaintiff's claim is rs. upon a judgment of the Court in [the empire of Russia].

Bills of exchange, &c. The plaintiff's claim is rs. upon a cheque drawn by the defendant.

The plaintiff's claim is rs. upon a bill of exchange accepted [*or* drawn, *or* indorsed] by the defendant.

The plaintiff's claim is rs. upon a promissory note made [*or* indorsed] by the defendant.

The plaintiff's claim is rs. against the defendant *A. B.*, as acceptor, and against the defendant *C. D.*, as drawer [*or* indorser], of a bill of exchange.

Surety. The plaintiff's claim is rs. against the defendant as surety for the price of goods sold.

The plaintiff's claim is rs. against the defendant *A. B.*, as principal, and against the defendant *C. D.* as surety, for the price of goods sold [*or* for arrears of rent, *or* for money lent, *or* for money received by the defendant *A. B.* as traveller for the plaintiff, *or* &c.]

Calls. The plaintiff's claim is rs. for calls upon shares.

Indorsement for Costs, &c.

[*Add to the above Forms*] and rs. for costs; and if the amount claimed be paid to the plaintiff or his pleader within days [*or if the summons is to be served out of the jurisdiction, insert the time for appearance limited by the order*] from the service hereof, further proceedings will be stayed.

Damages and other Claims.

Agent, &c. The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [and rs. for arrears of wages].

The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.

The plaintiff's claim is for damages for breach of duty as factor, [*or* &c.] of the plaintiff [and rs. for money received as factor, *or* &c.]

Apprentices. The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of *X. Y.* to the defendant [or plaintiff].

Arbitration. The plaintiff's claim is for damages for non-compliance with the award of *X. Y.*

Assault, &c. The plaintiff's claim is for damages for assault [and false imprisonment, and for malicious prosecution].

By husband and wife. The plaintiff's claims is for damages for assault and false imprisonment, of the plaintiff *C. D.*

Against husband and wife. The plaintiff's claim is for damages for assault by the defendant *C. D.*

Pleader. The plaintiff's claim is for damages for injury by the defendant's negligence as pleader of the plaintiff.

Bailment. The plaintiff's claim is for damages for negligence in the custody of goods [and for wrongfully detaining the same].

Pledge. The plaintiff's claim is for damages for negligence in the keeping of goods pawned [and for wrongfully detaining the same].

Hire. The plaintiff's claim is for damages for negligence in the custody of furniture [*or*, a carriage] lent on hire, [and for wrongfully, &c.]

Banker. The plaintiff's claim is for damages for wrongfully neglecting [*or* refusing] to pay the plaintiff's cheque.

Bill. The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.

No. 114—(*contd.*)

Bond.	The plaintiff's claim is upon a bond conditioned not to carry on the trade of a .
Carrier.	The plaintiff's claim is for damages for refusing to carry the plaintiff's goods by railway.
	The plaintiff's claim is for damages for refusing to carry the plaintiff by railway.
	The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of coals by railway.
	The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.
Charter-party.	The plaintiff's claim is for damages for breach of charter-party of ship [*Mary*].
Claim for return of goods; damages.	The plaintiff's claim is for return of household furniture [*or* &c.] or their value, and for damages for detaining the same.
Damages for depriving goods.	The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, &c.
Defamation.	The plaintiff's claim is for damages for libel.
	The plaintiff's claim is for damages for slander.
Wrongful distress.	The plaintiff's claim is for damages for improperly distraining.
	[*This Form shall be sufficient whether the distress complained of be wrongful, or excessive, or irregular.*]
Ejectment.	The plaintiff's claim is to recover possession of a house, No. in street, or of a farm called Blackacre, situate in the of in the of .
To establish title and recover rents.	The plaintiff's claim is to establish his title to [*here describe property*] and to recover the rents thereof.
	[*The two previous Forms may be combined.*]
Fishery.	The plaintiff's claim is for damages for infringement of the plaintiff's right of fishing.
Fraud.	The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [*or* a business, *or* shares, *or* &c.]
	The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of *A. B.*
	The plaintiff's claim is for damages for breach of a contract of guarantee for *A. B.*
Guarantee.	The plaintiff's claim is for damages for breach of a contract to indemnify the plaintiff as the defendant's agent to distrain.
Insurance.	The plaintiff's claim is for a loss under a policy upon the ship [*Royal Charter*] and freight of cargo [*or* for return of premiums].
	[*This Form shall be sufficient whether the loss claimed be total or partial.*]
Fire-insurance.	The plaintiff's claim is for a loss under a policy of fire-insurance upon house and furniture.
	The plaintiff's claim is for damages for breach of a contract to ensure a house.
Landlord and tenant.	The plaintiff's claim is for damages for breach of a contract to keep a house in repair.
	The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.
Medical man.	The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man.
Mischievous animal.	The plaintiff's claim is for damages for injury by the defendant's dog.
Negligence.	The plaintiff's claim is for damages for injury to the plaintiff by the negligent driving of the defendant or his servants.
	The plaintiff's claim is for damages for injury to the plaintiff while a passenger of the defendant's railway, by the negligence of the defendant's servants.
	The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station from the defective condition of the station.
Act XIII of 1855.	The plaintiff's claim is, as executor of *A. B.*, deceased, for damages for the death of the said *A. B.* from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants.
Promise of marriage.	The plaintiff's claim is for damages for breach of promise of marriage.

No. 114—(*contd.*)

Sale of goods. The plaintiff's claim is for damages for breach of contract to accept and pay for goods.

The plaintiff's claim is for damages for non-delivery [*or* short delivery *or* defective quality, *or other breach of contract of sale*] of cotton [*or* &c.]

The plaintiff's claim is for damages for breach of warranty of a horse.

Sale of land. The plaintiff's claim is for damages for breach of a contract to sell [*or* purchase] land.

The plaintiff's claim is for damages of breach of contract to let [*or* take] a house.

The plaintiff's claim is for damages for breach of a contract to sell [*or* purchase] the lease, with good-will, fixtures, and stock-in-trade of a public house.

The plaintiff's claim is for damages for breach of covenant for title [*or* for quiet enjoyment, *or* &c.] in a conveyance of land.

Trespass on land. The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [*or* cutting his grass, *or* felling his timber, *or* pulling down his fences, *or* removing his gate, *or* using his road or path, *or* crossing his field, *or* depositing sand there, *or* carrying away gravel from thence, *or* carrying away stones from his river].

Support. The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [*or* house, *or* mine].

Way. The plaintiff's claim is for damages for wrongfully obstructing a way [public highway, *or* private way].

Water-course, &c. The plaintiff's claim is for damages for wrongfully diverting [*or* obstructing, *or* polluting, *or* diverting water from] a water-course.

The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [*or* into the plaintiff's mine].

The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.

Pasture. The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture.

[*This Form shall be sufficient whatever the nature of the right to pasture be.*]

Light. The plaintiff's claim is for damages for obstructing the access of light to plaintiff's house.

Patent. The plaintiff's claim is for damages for the infringement of the plaintiff's patent.

Copyright. The plaintiff's claim is for damages for the infringement of the plaintiff's copyright.

Trade-mark. The plaintiff's claim is for damages for wrongfully using [*or* imitating] the plaintiff's trade-mark.

Work. The plaintiff's claim is for damages for breach of a contract to build a ship [*or* to repair], a house, &c.

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, &c.

Nuisance. The plaintiff's claim is for damages to his house, trees, crops, &c., caused by noxious vapours from the defendant's factory [*or* &c.]

The plaintiff's claim is for damages from nuisance by noise from the defendant's works [*or* stables, *or* &c.]

Injunction. [*Add to endorsement*] :—and for an injunction.

[*Add to endorsement where claim is to land, or to establish title, or both*] :—

Mesne profits. and for mesne profits.

Arrears of rent. and for an account of rents or arrears of rent.

Breach of covenant. and for breach of covenant for [repairs].

1. *Creditor to administer Estate.*

The plaintiff's claim is, as a creditor of *X. Y.*, of , deceased, to have the moveable and immoveable property of the said *X. Y.*, administered. The defendant, *C. D.*, is sued as the administrator of the said *X. Y.*, [and the defendants, *E. F.* and *G. H.*, as his co-heirs at law.]

2. *Legatee to administer Estate.*

The plaintiff's claim is, as a legatee under the will, dated the day of 18 , of *X. Y.*, deceased, to have the moveable and immoveable property of the said *X. Y.* administered. The defendant, *C. D.*, is sued as the executor of the said *X. Y.*, [and the defendants, *E. F.* and *G. H.*, as his devisees].

No. 114—(*contd.*)

3. *Partnership.*

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant [under articles of partnership, dated the day of], and to have the affairs of the partnership wound up.

4. *By Mortgagee.*

The plaintiff's claim is to have an account taken of what is due to him for principal, interest and costs on a mortgage, dated the day of , made between [*parties*] [*or* by deposit of title-deeds], and that the mortgage may be enforced by foreclosure or sale.

5. *By Mortgagor.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage, dated and made between [*parties*], and to redeem the property comprised therein.

6. *Raising Portions.*

The plaintiff's claim is that the sum of Rs., which, by a deed of settlement, dated , was provided for the portions of the younger children of , may be raised.

7. *Execution of Trusts.*

The plaintiff's claim is to have the trusts of an indenture, dated , and made between [*parties*], carried into execution.

8. *Cancellation or Rectification.*

The plaintiff's claim is to have a deed, dated , and made between [*parties*], set aside or rectified.

9. *Specific Performance.*

The plaintiff's claim is for specific performance of an agreement, dated the day of , for the sale by the plaintiff to the defendant of certain [freehold] hereditaments at .

No. 115.

PROBATE.

1. *By an executor or legatee propounding a will in solemn form.*

The plaintiff claims to be executor of the last will, dated the day of of *C. D.*, late of , deceased, who died on the day of and to have the said will established. This summons is issued against you as one of the next-of-kin of the said deceased [*or as the case may be*].

2. *By an executor or legatee of a former will, or a next-of-kin, &c., of the deceased, seeking to obtain the revocation of a probate granted in common form.*

The plaintiff claims to be executor of the last will, dated the day of of *C. D.*, late of , deceased, who died on the day of , and to have the probate of a pretended will of the said deceased, dated the day of , revoked. This summons is issued against you as the executor of the said pretended will [*or as the case may be*].

3. *By an executor or legatee of a will when letters of administration have been granted as in an intestacy.*

The plaintiff claims to be executor of the last will of *C. D.*, late of deceased, who died on the day of , dated the day of .

The plaintiff claims that the grant of letters of administration of the estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

4. *By a person claiming a grant of administration as a next-of-kin of the deceased, but whose interest as next-of-kin is disputed.*

The plaintiff claims to be the brother and sole next-of-kin of *C. D.*, of deceased, who died on the day of , intestate, and to have as such a grant of administration to the personal estate of the said intestate. This writ is issued against you, because you have entered a caveat, and have alleged that you are the next of-kin of the deceased [*or as the case may be*].

F.—MISCELLANEOUS.

No. 116.

Section 58 of the Code of Civil Procedure.

COURT OF THE OF HOLDEN AT

Register of Civil Suits in the year 18 .

Date of presentation of plaint.	No. of suit.	Plaintiff.			Defendant.			Claim.			Appearance.			Judgment.			Appeal.		Execution.					Return of Execution.		
		Name.	Description.	Place of abode.	Name.	Description.	Place of abode.	Particulars.	Amount of value.	When the cause of action accrued.	Day of parties to appear.	Plaintiff.	Defendant.	Date.	For whom.	For what, or amount.	Date of appeal.	Judgment in appeal.	Date of application.	Date of order.	Against whom.	For what, and amount if money.	Amount of costs.	Amount paid into Court.	Arrested.	Minute of other return than payment or arrest and date of every return.

No. 117.

SUMMONS FOR DISPOSAL OF SUIT.

Sections 64 and 68 of the Code of Civil Procedure.

(*Title.*)

To

dwelling at

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court at any time before the trial, onyour depositing the ir necessary subsistence m one y

2. If you admit the demand, you should pay the money into Court with the costs of the suit,to avoid the summary execution of the decree, which may be against your person or property, or both, if necessary.

WHEREAS has instituted a suit against you for ; you are hereby summoned to appear in this Court in person or by a duly authorized pleader of the Court, duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions, on the day of 18 , at o'clock in the forenoon, to answer the above-named plaintiff; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce all your witnesses on that day; and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence; and you will bring with you, or send by your pleader, which the plaintiff desires to inspect, and any documents on which you intend to rely in support of your defence.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

NOTE.—*If written statements are required, say*—You are [*or* such a party is *as the case may be*] required to put in a written statement by the day of

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No. 118.

SUMMONS FOR SETTLEMENT OF ISSUES.

Sections 64 and 68 of the Code of Civil Procedure.

(*Title.*)

To

dwelling at

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court at any time before the trial, on your depositing their necessary subsistence-money.

2. If you admit the demand, you should pay the money into Court with the costs of the suit, to avoid the

WHEREAS has instituted a suit againt you for you are hereby summoned to appear in this Court in person or by a duly authorized pleader of the Court, duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions, on the day of 18 , at o'clock in the forenoon, to answer the above-named plaintiff; and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the issues will be settled in your absence; and you will bring with you, or send by your pleader, , which the plaintiff desires to inspect, and any document on which you intend to rely in support of your defence.

No. 118—(*contd.*)

summary execution of the decree, which may be against your person or property, or both, if necessary.

GIVEN under my hand and the seal of the Court this day of 18 .

L. S.

Judge.

NOTE.—*If written statements are required, say*—You are [*or* such a party, is, *as the case may be*] required to put in a written statement by the day

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No. 119.

SUMMONS TO APPEAR.

Section 68 of the Code of Civil Procedure.

No. of Suit

IN THE COURT OF AT

Plaintiff.

Defendant.

To

(*Name, description and address.*)

WHEREAS [*here enter the name, description and adress of the plaintiff*] has instituted a suit in this Court against you [*here state the particulars of the claim as in the register ;*] you are hereby summoned to appear in this Court in person on the day of , at , in the forenoon [*if not specially required to appear in person, state*—" in person or by a pleader of the Court, duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions "] to answer the above-named plaintiff. [*If the summons be for the final disposal of the suit, this further direction shall be added here*— " and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce all your witnesses on that day "]; and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence ; and you will bring with you (or send by your agent) [*here mention any document, the production of which may be required by the plaintiff*], which the plaintiff desires to inspect, and any document on which you intend to rely in support of your defence.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 120.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT.

Section 85 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18

A. B., of
against
C. D. of

No. 120—(*contd.*)

The day of 18 .

WHEREAS it is stated in the plaint that , the defendant in the above suit , is at present residing in , but that the right to sue accrued within the jurisdiction of this Court; it is ordered that a summons returnable on the day of 18 , be forwarded for service on the said defendant, to the Court of with a duplicate of this proceeding.

L. S.

Judge.

No. 121.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT.

Section 85 of the Code of Civil Procedure.

IN THE COURT OF AT .

Civil Suit No. *of* 18 .

The day of 18 .

A. B. of
against
C. D. of

READ the proceeding from the forwarding for service on in civil No. of that Court.

Read bailiff's endorsement on the back of the process stating that the and proof of the above having been duly taken by me on the [oath *or*] affirmation of and ; it is ordered that the be returned to the with a copy of this proceeding.

L. S.

Judge.

NOTE.—This Form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

No. 122.

DEFENDANT'S STATEMENT.

Section 110 of the Code of Civil Procedure.

(*Title.*)

I, the undersigned defendant [*or* one of the defendants], disclaim all interest under the will of the said *E. F.*, in the plaint, named [*or* as heir-at-law, *or* as next-of-kin, *or* one of the next-of-kin, of *E. F.*, deceased, in the said plaint named].

Or I, the undersigned defendant, state that I admit [*or* deny] [*here repeat in the language of the plaint the statements admitted or denied*].

Or I, the undersigned defendant, submit that, upon the facts stated in the plaint, it does not appear that there is any agreement which can be legally enforced [*or* that it appears upon the said plaint that I am jointly liable with one *E. F.*, who is not a party to the suit, and not severally liable as by the plaint appears, *or* that it appears by the said plaint that *G. H.* should have been a joint plaintiff with the said *A. B.*, in the said suit, *or as the case may be*].

Or that the plaintiff has conveyed his interest in the said mortgage [*or* right to redeem] to one *I. J.*, [*or* that I have conveyed or assigned to *H. L.*, by way of further charge for securing the sum of Rs. , the right to redeem in the property sought by the suit to be foreclosed].

Or that, since the dissolution of the partnership, the plaintiff has executed an instrument whereby the plaintiff covenants to discharge all debts and liabilities of the partnership, and generally to release me from all claims and liabilities either by or to himself and others in respect of the said partnership trading [*or as the case may be*].

(Signed) C. D.,
Defendant.

No. 123.

INTERROGATORIES.

Section 121 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18 .

A. B.

against

C. D., *E. F.*, and *G. H.*

INTERROGATORIES on behalf of the above-named *A. B.* [*or C. D.*] for the examination of the above-named [*E. F.*, and *G. H.*, *or A. B.*]

1. Did not, &c.
2. Has not, &c.

The defendant *E. F.* is required to answer the interrogatories numbered

The defendant *G. H.* is required to answer the interrogatories numbered

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No. 124.

FORM OF NOTICE TO PRODUCE DOCUMENTS.

Section 131 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18

A. B.

against

C. D.

TAKE notice that the plaintiff [*or* defendant] requires you to produce for his inspection the following documents referred to in your plaint [*or* written statement, or affidavit], dated the day of 18 .

Describe documents required.

X. Y.

Pleader for the plaintiff [*or* the defendant].

To *Z.*

Pleader for the defendant [*or* plaintiff].

No. 125.

SUMMONS TO ATTEND AND GIVE EVIDENCE.

Sections 159 and 163 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS your attendance is required to on behalf of the in the above cause; you are hereby required [personally to appear before this Court] on the day of 18 , at the hour of A. M. [and] to bring with you or to send to this Court .

A sum of Rs. , being your travelling and other expenses and subsistence-allowance for one day, is herewith sent. If you do not comply with this order, you will be subject to the consequence of non-attendance laid down in the Code of Civil Procedure, section 170.

Notice—(1). If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

( ). If you are to be detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 126.

Another Form.

No. of Suit .

IN THE COURT OF AT

Plaintiff.
Defendant.

To

[*Name, description and address.*]

You are hereby summoned to appear in this Court in person on the day of , at in the forenoon, to give evidence on behalf of the plaintiff [*or* the defendant] in the above-mentioned suit, and to produce [*here describe with convenient certainty any document the production of which may be required. If the summons be only to give evidence, or if it be only to produce a document, it must be expressed accordingly*], and you are not to depart thence until you have been examined [*or* have produced the document], and the Court has risen, or unless you have obtained the leave of the Court.

FORMS OF DECREES.

No. 127.

SIMPLE MONEY-DECREE.

(*Title.*)

Claim for

THIS cause coming on for final disposal before , in the presence of , on the part of the plaintiff, and on the part of the defendant, it is ordered that the do pay to , the , the sum of Rs. , with interest thereon at the rate of per cent. per from to the date of realization of the said sum, and do also pay to the the costs of this suit as taxed by the officer of the Court, with interest thereon at the rate aforesaid from the date of taxation to the date of realization.

Costs of Suit.

PLAINTIFF.	Rs.	A.	P.	DEFENDANT.	Rs.	A.	P.
1. Stamp for plaint ...							
2. Do. for power ...				Stamp for power ...			
3. Do. exhibits ...				Do. petition ...			
4. Pleader's fees on Rs. . .				Pleader's fee ..			
5. Translation-fee ...				Subsistence for witnesses			
6. Subsistence for witness for attendance ..				Service of process ...			
				Translation-fee ...			
7. Commissioner's fee ...				Commissioner's fee ...			
8. Service of process ...							
9. &c. ...							
TOTAL ...				TOTAL ...			

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 128.

DECREE FOR SALE IN A SUIT BY A MORTGAGEE OR PERSON ENTITLED TO A LIEN.

(*Title.*)

IT is ordered that it be referred to the Registrar [*or* Taxing Officer] to take an account of what is due to the plaintiff for principal and interest on the mortgage [*or* lien] mentioned in the plaint, and to tax the plaintiff's costs of this suit, and that the Registrar [*or* Taxing Officer] do declare in Court on the day of what he shall find to be due for principal and interest as aforesaid, and for costs: And upon the defendant paying into Court what shall be certified to be due to the plaintiff for principal and interest as aforesaid, together with the said costs, within six months from the date of declaring in Court the amount so due,—it is ordered that the plaintiff do re-convey the said mortgaged premises free and clear from all incumbrances done by him, or any claiming by, from, or under, him, and do deliver up to the defendant or to such person as he appoints all documents in his custody or power relating thereto, and that upon such re-conveyance being made, and documents being delivered up, the Registrar (*or* Taxing Officer) shall pay out to the plaintiff the said sum so paid in as aforesaid for principal, interest and costs: but in default of the defendant paying into Court such principal, interest and costs as aforesaid by the time aforesaid, then it is ordered that the said mortgaged premises [*or* the premises subject to the said lien] be sold with the approbation of the Registrar [*or* Taxing Officer]. And it is ordered that the proceeds of such sale (after defraying thereout the expenses of the sale) be paid into Court, to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest and costs as aforesaid, and that the balance (if any) shall be paid to the defendant or other person entitled to receive the same.

No. 129.

*FINAL DECREE FOR FORECLOSURE.

(*Title.*)

WHEREAS it appears to the Court that the defendant has not paid into Court the sum which was, on the day of last, declared in Court to be due to the plaintiff for principal and interest upon the mortgage in the plaint mentioned and for costs, pursuant to the order made in this suit on the day of last, and that the period of six months has elapsed since the said day of .

It is ordered that the defendant do stand absolutely debarred of all right to redeem the said mortgaged premises.

* In No. 129, substitute the words "Decree Absolute" for "Final Decree" in places to which the Transfer of Property Act, 1882, extends see Act IV of 1882, s. 87, and *supra*, s. 3.

No. 130.

PRELIMINARY ORDER—ADMINISTRATION-SUIT.

Section 213 of the Code of Civil Procedure.

(*Title.*)

IT is ordered that the following accounts and enquiries be taken and made; that is to say:—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suit by legatees—

2. An account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

An inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next-of-kin [*or* one of the next-of-kin] of the intestate.

[*After the first paragraph, the Order will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph, and such of the others as may be necessary will follow, omitting the first formal words. The Form is continued as in a creditor's suit.*]

3. An account of the funeral and testamentary expenses.

4. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

5. An enquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

6. And it is further ordered that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or to his use.

No. 130—(*contd.*)

7. And that if the *Registrar* shall find it necessary, for carrying out the objects of the suit, to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

8. And that Mr. *E. F.* be Receiver in the suit [*or* proceeding], and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the Registrar [and shall give security by bond for the due performance of his duties to the amount of rupees].

9. And it is further ordered, that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say,—

(*a*) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death ;

(*b*) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased, or any part thereof ;

(*c*) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

10. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

11. And it is ordered that *G. H.* shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the Registrar, and that in case any doubt or difficulty shall arise, the papers shall be submitted to the Judge to settle.

12. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the Registrar shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the Registrar to give the most useful publicity to such inquiries.

13. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of and that the Registrar do certify the result of the inquiries and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

14. And, lastly it is ordered, that this suit [*or* matter] stand adjourned for making final decree to the day of .

[*Such part only of this order is to be used as is applicable to the particular case.*]

No. 131.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE.

Section 213 of the Code of Civil Procedure.

1. IT is ordered that the defendant do, on or before the day of , pay into Court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs. for interest at the rate of Rs. , per centum per annum, from the day of to the day of , amounting together to the sum of Rs. .

2. Let the Registrar [*or* Taxing Officer] of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said cost, when so taxed, be paid out of the said sum of Rs. ordered to be paid into Court as aforesaid as follows :—

(*a*) The costs of the plaintiff to Mr. , his attorney [*or* pleader], and the costs of the defendant to Mr. , his attorney [*or* pleader.]

(*b*) And (*if any debts are due*) with the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums found to be owing to the several creditors mentioned in the schedule to the Registrar's certificate, together with subsequent interest on such of the debts as bear interest, be paid ; and, after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

No. 131—(*contd.*)

DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

Section 213 of the Code of Civil Procedure.

1. DECLARE that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy;

3. And it also ordered that the defendant do, within weeks after the date of the Registrar's certificate, pay to the plaintiff the amount of what the Registrar shall certify to be due for principal and interest;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN.

Section 213 of the Code of Civil Procedure.

1. LET the Registrar of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E. F.*, the intestate, within one week after the taxation of the said costs by the said Registrar, and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows:—

(*a*) Let the defendant, within one week after the taxation of the said costs by the Registrar as aforesaid, pay one-third share of the said residue to the plaintiffs, *A. B.* and *C.*, his wife, in her right as the sister and one of the next-of-kin of the said *E. F.*, the intestate.

(*b*) Let the defendant retain for her own use one other third share of the said residue as the mother and one other of the next-of-kin of the said *E. F.*, the intestate.

(*c*) And let the defendant within one week after the taxation of the said cost by the Registrar as aforesaid, pay the remaining one-third share of the said residue to *G. H.*, as the brother and the other next-of-kin of the said *E. F.*, the intestate.

No. 132.

ORDER—DISSOLUTION OF PARTNERSHIP.

Section 215 of the Code of Civil Procedure.

(*Title.*)

IT is declared that the partnership in the plaint mentioned between the plaintiff and defendant ought to stand dissolved as from the day of , and it is ordered that the dissolution thereof, as from that day, be advertised in the *Gazette*, &c.

And it is ordered that be the Receiver of the partnership-estate and effects in this suit, and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken:—

1. An account of the credits, property and effects now belonging to the said partnership;

2. An account of the debts and liabilities of the said partnership;

3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and market (A), and not disturbing any subsequent settled accounts.

And it is ordered that the good-will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in trade, be sold on the premises, and that the Registrar may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken and all the other acts required to be done be completed before the day of , and that the Registrar do certify the result of the accounts and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

And lastly, it is ordered that this suit stand adjourned for making a final decree to the day of

No. 133.

PARTNERSHIP—FINAL DECREE.

Section 215 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No.
A. B. of
against
C. D. of

IT is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows :—

1. In payment of the debts due by the partnership set forth in the Registrar's certificate, amounting in the whole to Rs. .

2. In payment of the costs of all parties in this suit, amounting to Rs.

[*These costs must be ascertained before the decree is drawn up.*]

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership-assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership-assets.

[*Or*, And that the remainder of the said sum of Rs. be paid to the said plaintiff (*or* defendant) in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.]

And that the defendant [*or* plaintiff] do, on or before the day of , pay to the plaintiff [*or* defendant] the sum of Rs. , being the balance of the said sum of Rs. due to him, which will then remain due.

No. 134.

CERTIFICATE OF NON-SATISFACTION OF DECREE.

Section 224 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

CERTIFIED that no [*or* partial, *as the case may be, and if partial, state to what extent*] satisfaction of the decree of this Court, in Civil Suit No. of 18 , a copy of which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 135.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE.

Section 248 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18 .
Miscellaneous No. *of* 18
A. B. of
against
C. D. of

No. 135—(*contd.*)

To

WHEREAS has made application to this Court for execution of decree in Civil Suit No. of 18 , this is to give you notice that you are to appear before this Court, on the day of 18 , either in person, or by a pleader of this Court, or agent duly authorised and instructed, to show cause, if any, why execution should not be granted.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 136.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN DEFENDANT'S POSSESSION IN EXECUTION OF A DECREE FOR MONEY.

Section 254 of the Code of Civil Procedure.

(*Title.*)

TO THE BAILIFF OF THE COURT.

WHEREAS was ordered, by decree of this Court, passed on the day of 18 , in Suit No. of 18 , to pay to the plaintiff the sum of Rs. as noted in the margin; and whereas the said sum of Rs. has not been paid:

DECREE.	Rs.	As. P.
Principal ..		
Interest .		
Costs		
Costs of decree		
Interest thereon		
Total of attachment		
TOTAL		

THESE ARE TO COMMAND YOU to attach the moveable property of the said as set forth in the list hereunto annexed, or which shall be pointed out to you by the said , and unless the said shall pay to you the said sum of Rs. together with Rs. , the costs of this attachment, to hold the same until further orders from this Court.

YOU ARE FURTHER COMMANDED to return this warrant on or before the day of 18 , with an endorsement certifying the date and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court this day of 18

Schedule.

L. S.

Judge.

No. 137

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, &c.

Section 263 of the Code of Civil Procedure.

(*Title.*)

TO THE BAILIFF OF THE COURT.

WHEREAS , in the occupancy of has been decreed to , the plaintiff in this suit, you are hereby

No. 137.—(*contd.*)

directed to put the said in possession of the same, and you are hereby authorized to remove any person who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 138.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY, TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF.

Section 268 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 18 , in favour of for Rs. ; it is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said ; that is to say, to which the defendant is entitled, subject to any claim of the said , and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 139.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENT.

Section 268 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 18 , in Civil Suit No. of 18 , in favour of for Rs. ; it is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, and that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 140.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN A PUBLIC COMPANY, &c.

Section 268 of the Code of Civil Procedure.

(*Title.*)

To

Defendant, and to

Manager of Company.

WHEREAS has failed to satisfy a decree passed against on the day of 18 , in Civil Suit No. of 18 , in favour of for Rs. ; it is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of shares in the aforesaid Company, namely, , or from receiving payment of any dividends thereof; and you , the Manager of the said Company, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 141.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY.

Section 274 of the Code of Civil Procedure.

(*Title.*)

To Defendant

WHEREAS you have failed to satisfy a decree passed against you on the day of 18 , in Civil Suit No. of 18 , in favour of for Rs. ; it is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from alienating th · property specified in the schedule hereunto annexed, by sale, gift, or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift, or otherwise.

GIVEN under my hand and the seal of the Court this day of 18

Schedule.

L. S.

Judge.

No. 142.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE HANDS OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT.

Sections 272 and 486 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18

A. B., of

against

C. D. of

No. 142—(*contd.*)

To

SIR,

THE plaintiff having applied, under section of the Code of Civil Procedure, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, &c.*), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,
SIR,
Your most obedient servant.

L. S.

Judge.

Dated the day of 18

No. 143.

ORDER FOR PAYMENT TO THE PLAINTIFF, &c., OF MONEY, &c., IN THE HANDS OF A THIRD PARTY.

Section 277 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil suit No. *of* 18 .
Miscellaneous No. *of* 18 .
A. B. of
against
C. D. of

TO THE BAILIFF OF THE COURT AND TO

WHEREAS the following property has been attached in execution of a decree in Civil Suit No. of 18 , passed on the day of 18 , in favour of , for Rs. : it is ordered that the property so attached, consisting of Rs. in money and Rs. in currency notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you the said to , and that the said property, so far as may be necessary for the satisfaction of the said decree, shall be sold by you, the Bailiff of the Court, by public auction in the manner prescribed for sale in execution of decrees, and that the money which may be realized by such sale, or a sufficient part thereof to satisfy the said decree, shall be paid over to the said and the remainder, if any, shall be paid to you, the said .

GIVEN under my hand and the seal of the Court this day of 18 .

L. S.

Judge.

No. 144.

NOTICE TO ATTACHING CREDITOR.

Section 278 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18 .
Miscellaneous No. *of* 18 .
A. B. of
against
C. D. of

No. 144—(*contd.*)

To

WHEREAS has made application to this Court for the removal of attachment on placed at your instance in execution of the decree in Civil Suit No. of 18 ; this is to give you notice to appear before this Court on , the day of 18 , either in person or by a pleader of the Court duly instructed, to support your claim as attaching-creditor.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 145.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY.

Section 287 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18 .
Miscellaneous No. *of* 18 .
A. B. of
against
C. D. of

TO THE BAILIFF OF THE COURT.

THESE ARE TO COMMAND YOU to sell by auction, after giving days' previous notice, by affixing the same in this court-house, and after making due proclamation,* the property attached under a warrant from this Court, dated the day of 18 , in execution of a decree in favour of in Suit No. of 18 , or so much of the said property as shall realize the sum of Rs. , being the of the said decree and costs still remaining unsatisfied.

YOU ARE FURTHER COMMANDED to return this warrant on or before the day of 18 , with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 146.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN EXECUTION.

Section 300 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

---

* This proclamation shall specify the time, the place of sale, the property to be sold, the revenue assessed, should the property consist of land paying revenue to Government, and the amount for the recovery of which the sale is ordered, and as fairly and accurately as possible the other particulars required by section 287 to be specified.

To No. 146—(*contd.*)

WHEREAS has been the purchaser at a sale by auction in execution of the decree in the above suit of now in your possession, you are hereby prohibited from delivering possession of the said to any person except the said

GIVEN under my hand and the seal of the Court this day of . 18

L. S.

Judge.

No. 147.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY OTHER THAN THE PURCHASER.

Section 301 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
To *C. D.* of
and to

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of certain debt due from you to you , that is to say, ; it is ordered that you be, and you are hereby, prohibited from receiving, and you from making payment of the said debt to any person or persons except the said

GIVEN under my hand and the seal of the Court this day of

L. S.

Judge.

No. 148.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION.

Section 301 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
To *C. D.* of
and ,
Manager of Company.

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of certain shares in the above Company, that is to say, of standing in the name of you ; it is ordered that you be, and you are hereby, prohibited from making any transfer of the said shares to any person except the said , the purchaser aforesaid, or from receiving any dividends thereon; and you , Manager of the said Company, from permitting any such transfer, or making any such payment to any person except the said , the purchaser aforesaid.

GIVEN under my hand and the seal of the Court this day of 18 .

L. S.

Judge.

No. 149.

ORDER CONFIRMING SALE OF LAND, &c.

Section 312 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18 .
A. B. of
against
C. D. of

WHEREAS the following land [*or* immoveable property] was, on the day of 18 , sold by the Bailiff of this Court in execution of the decree in this suit; and whereas days have elapsed and no application has been made [*or* objection allowed] to the said sale, it is ordered that the said sale be, and the said sale is hereby, confirmed.

GIVEN under my hand and the seal of the Court this day of 18

Schedule.

L. S.

Judge.

No. 150.

CERTIFICATE OF SALE OF LAND.

Section 316 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18 .
A. B. of
against
C. D. of

THIS is to certify that has been declared the purchaser at sale by public auction on the day of 18 , of in execution of decree in this suit, and that the said sale has been duly confirmed by the Court.

GIVEN under my hand and the seal of the Court this day of

L. S.

Judge.

No. 151.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION

Section 318 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS has become the certified purchaser of at a sale in execution of the decree in Civil Suit No. of 18 ; and whereas such land is in the possession of , you are hereby ordered to put

151—(*contd.*)

the said , the certified purchaser as aforesaid, into possession of the said , and, if need be, to remove any person who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court this day of 18 .

L. S.

Judge.

No. 152.

AUTHORITY TO THE COLLECTOR TO STAY PUBLIC SALE OF LAND.

Section 326 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18 .
A. B. of
against
C. D. of

To *Collector of*

SIR,

IN answer to your communication No. , dated , representing that the sale in execution of the decree in this suit of , and lying within your district, paying revenue to Government, is objectionable, I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you instead of proceeding to a public sale of

I have the honour to be,
SIR,
Your obedient servant,

L. S.

Judge.

No. 153.

ORDER FOR COMMITTAL FOR RESISTING, &c., EXECUTION OF DECREE FOR LAND.

Section 329 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS it appears to the Court that has, without just cause, resisted [*or* obstructed] the execution of the decree of the Court passed against on the day of 18 , in Civil Suit No. of 18 , whereby certain land or immoveable property was adjudged to ; it is ordered that the said be committed to custody for a period of days.

GIVEN under my hand and the seal of the Court this day of 18 .

L. S.

Judge.

No. 154.

WARRANT OF ARREST IN EXECUTION.

Section 337 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18 .
Miscellaneous No. *of* 18
A. B. of
against
C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS was adjudged by a decree of the Court, in , No. of 18 , dated 18 , to pay to the plaintiff the sum of Rs. as noted in the margin; and whereas the said sum of Rs. has not been paid to the said plaintiff in satisfaction of the said decree, these are to command you to arrest the said defendant, and unless the said defendant shall pay to you the said sum of Rs. , together with Rs. for the costs of executing this process, to bring the said defendant before the Court with all convenient speed. You are further commanded to return this warrant on or before the day of 18 , with an endorsement certifying the day and manner in which it has been executed, or the reason why it has not been executed.

	Rs.	As.	P.
Principal			
Interest			
Costs			
Execution			
TOTAL ...			

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 155.

NOTICE OF PAYMENT INTO COURT.

Section 377 of the Code of Civil Procedure.

IN THE COURT OF 18 .

B. No.
A. B. v. *C. D.*

TAKE notice that the defendant has paid into Court Rs. , and says that that sum is enough to satisfy the plaintiff's claim [*or* the plaintiff's claim for, &c.]

To Mr. *X. Z.*,
the Plaintiff's Pleader,
Z.,
Defendant's Pleader.

No. 156.

COMMISSION TO EXAMINE ABSENT WITNESSES.

Section 386 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

No. 156—(*contd.*)

To

WHEREAS the evidence of is required by the in the above suit; and whereas , you are requested to take the examination on interrogatories [*or* vivâ voce] of such witnesses , and you are hereby appointed a commissioner for that purpose, and you are further requested to make return of such examination so soon as it may be taken [process to require the attendance of the witness will be issued by this Court on your application].*

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 157.

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS.

Sections 392 and 394 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for should be issued; you are hereby appointed commissioner for the purpose of [process to compel the attendance before you of any witnesses, or for the production of any documents which you may desire to examine or inspect, will be issued by this Court on your application].*

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 158.

WARRANT OF ARREST BEFORE JUDGMENT.

Section 478 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS , the plaintiff in the above suit, has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to ; these are to command you to take the said into custody, and to bring before the Court, in order that he may show cause why he should not furnish security to the amount of Rs. for personal appearance before the Court, until such time as the said suit

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* Not necessary where the commission goes to another Court.

No. 158—(*contd.*)

shall be fully and finally disposed of, and until execution or satisfaction of any decree that may be passed against in the suit.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 159.

ORDER FOR COMMITTAL.

Section 481 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18

A. B. of
against
C. D. of

To

WHEREAS , plaintiff in this suit, has made application to the Court that security be taken for the appearance of the defendant to answer any judgment that may be passed against in the suit; and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which has failed to do; it is ordered that the said defendant be committed to custody until the decision of the suit; or, if judgment be given against , until the execution of the decree.

GIVEN under my hand and the seal of the Court this day of 18 .

L. S.

Judge.

No. 160.

ATTACHMENT BEFORE JUDGMENT WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE.

Section 484 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A B. of
against
C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit ; these are to command you to call upon the said defendant , on or befor the day of , either to furnish security for the sum of Rs. to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to fulfil any decree that may be passed against

No. 160—(*contd.*)

or to appear and show cause why should not furnish security; and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court, and in what manner you shall have executed this warrant, make appear to the Court immediatly after the execution hereof and have you here then this warrant.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 161.

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF FAILURE TO FURNISH SECURITY.

Section 485 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18

A. B of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS , the plaintiff in this suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against in the suit, and whereas the Court has called upon the said to furnish such security which has failed to do ; these are to command you to attach , the property of the said , and keep the same under safe and secure custody until the further order of the Court, and in what manner you shall have executed this warrant, make appear to this Court immediately after the execution hereof, and have you here then this warrant.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 162.

ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY, TO WHICH THE DEFENDANT IS ENTITLED, SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSONS TO THE IMMEDIATE POSSESSION THEREOF.

Section 486 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18

A. B. of

against

C. D. of

To Defendant.

IT is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said that is to say, , to which the defendant is entitled, subject to any

No. 162—(*contd.*)

claim of the said , and the said is hereby prohibited and restrained until the further order of this Court, from delivering the said property to any persons whomsoever.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 163.

ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY.

Section 486 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

To Defendant.

IT is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from alienating the property specified in the schedule hereunto annexed, by sale, gift, or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift, or otherwise.

GIVEN under my hand and the seal of the Court this day of 18 .

Schedule.

L. S.

Judge.

No. 164.

ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY IN THE HANDS OF OTHER PERSONS, OR OF DEBTS NOT BEING NEGOTIABLE INSTRUMENTS,

Section 486 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

To

IT is ordered that the defendant be, and he is hereby, prohibited and restrained, until the further order of this Court, from receiving from the [money now in hands belonging to the said defendant *or* debts, *as the case may be, describing them*], and that the said be, and hereby, prohibited and restrained, until the

No. 164—(*contd.*)

urther order of this Court, from making payment of the said [money, &c.], or any part hereof, to any person whomsoever.

GIVEN under my hand and the seal of the Court this day of .

L. S.

Judge.

No. 165.

ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN A PUBLIC COMPANY, &C.

Section 486 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

To Defendant, and to
Manager of
Company.

IT is ordered that , the defendant, be, and hereby, prohibited and restrained, until the further order of the Court, from making any transfer of shares being in the aforesaid Company, or from receiving payment of any dividends thereof, and you , Manager of the said Company, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 166.

TEMPORARY INJUNCTIONS.

Section 492 of the Code of Civil Procedure.

UPON motion made unto this Court by , Pleader of [*or* Counsel for] the plaintiff *A. B.* and upon reading the petition of the said plaintiff in this matter filed [this day] [*or* the plaint filed in this cause on the day of , *or* the written statement of the said plaintiff filed on the day of], and upon hearing the evidence of and in support thereof [*if after notice and defendant not appearing; add*, and also the evidence of as to service of notice of this motion upon the defendant *C. D.*] This Court doth order that an injunction be awarded to restrain the defendant *C. D.*, his servants, workmen and agents from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [*or* in the written statement, *or* petition, of the plaintiff and evidence at the hearing of this motion mentioned] being No. 9, Oilmonger's Street, Hindupur, in the Taluq of , and from selling the materials whereof the said house is composed, until the hearing of this cause, or until the further order of this Court.

Dated this day of 18

Civil Judge.

No. 166—(*contd.*)

[*Where the injunction is sought to restrain the negotiation of a note or bill the ordering part of the order may run thus :—* to restrain the defendants and from parting with out of the custody of them or any of them, or endorsing, assigning or negotiating the promissory note [*or* bill of exchange] in question, dated on or about the , &c., mentioned in the plaintiff's plaint [*or* petition], and the evidence heard at this motion, until the hearing of this cause, or until the futher order of this Court.

[*In copyright cases*] to restrain the defendant *C. D.*, his servants, agents or workmen, from printing, publishing or vending a book, called , or any part thereof, until the, &c.

[*Where part only of a book is to be restrained*] to restrain the defendant *C. D.*, his servants, agents, or workmen, from printing, publishing, selling, or otherwise disposing of such parts of the book in the plaint [*or* petition and evidence, &c.] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled and , also that part which is entitled [*or* which is contained in page to page both inclusive] until the, &c.

[*In patent cases*] to restrain the defendant *C. D.*, his agents, servant and workmen, from making or vending any perforated bricks [*or as the case may be*] upon the principle of the inventions in the plaintiff's plaint [*or* petition, &c., *or* written statement, &c.,] mentioned, belonging to the plaintiff's or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [*or as the case may be*] mentioned. and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, &c.

[*In cases of trademarks*] to restrain the defendant *C. D.*, his servants, agents or workmen from selling, or exposing for sale, or procuring to be sold, any composition or blacking [*or as case may be*] described as, or purporting to be, blacking manufactured by the plaintiff *A. B.*, in bottles having affixed thereto such labels as in the plaintiff's plaint [*or* petition, &c.,] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff *A. B.*, and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff *A. B.*, until the, &c.

[*To restrain a partner from in any way interfering in the business.*] to restrain the defendant *C. D.*, his agents and servants, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security, in the name of the partnership-firm of *B.* and *D.* and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act in the name or on the credit of the said partnership firm of *B.* and *D.* or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking, until the, &c.

No. 167.

NOTICE OF APPLICATON FOR INJUNCTION.

Section 494 of the Code of Civil Procedure.

IN THE COURT OF AT

A. B., of
against
C. D., of

TAKE notice that I, *A. B.*, intend to apply at the sitting of the Court at aforesaid, on the day of , for an injunction to restrain *C. D.*, from further prosecuting a suit which he has commenced against me in , to recover damages for the breach of the contract for the specific performance of which this suit was commenced [*or* to restrain him from receiving and giving discharge for any of the debts due to the partnership in the matter of the partnership between us for the winding-up of which the suit was commenced, *or* from digging the turf from the land which was

No. 167—(*contd.*)

agreed to be sold by him to me by the agreement, the specific performance of which this suit is commenced to enforce [*or as the case may be*].

Dated this day of 18

To C. D. *A. B.*

[N.B.—*Where the injunction is to be applied for against a party whose name and address do not appear upon any proceeding already filed in the suit, such name and address must be stated in full to enable the proper officer to serve the notice.*]

No. 168.

APPOINTMENT OF A RECEIVER.

Section 503 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 18 , in favour of ; you are hereby [subject to your giving security to the satisfaction of the *Registrar*] appointed Receiver of the said property under section 503 of the Code of Civil Procedure, with full powers under the provisions of that section.

YOU are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 169.

BOND TO BE GIVEN BY RECEIVER.

Section 503 of the Code of Civil Procedure.

IN THE COURT OF AT

Civil Suit No. *of* 18
A. B. of
against
C. D. of

KNOW all men by these presents that we, *I. J.* of, &c., and *K. L.* of, &c., and *M. N.* of, &c., are jointly and severally bound to *G. H.*, *Registrar* of the Court of in Rs. , to be paid to the said *G. H.*, or his attorney, executors, administrators or assigns. For which payment to be made we bind ourselves, and each of us in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 18 .

And whereas a plaint has been filed in this Court by *A. B.*, against *C. D.*, for the purpose of [*here insert object of suit*].

No. 169—(*contd.*)

And whereas the said *I. J.* has been appointed, by order of the above-mentioned Court, to receive the rents and profits of the immoveable property, and to get in the outstanding moveable property of *O. P.*, the testator in the said plaint named.

Now the condition of this obligation is such, that if the above-bounden *I. J.* shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property of the said *O. P.* [*or as may be*] at such periods as the said Court shall appoint, and shall duly pay the balances which shall, from time to time, be certified to be due from him as the said Court hath directed, or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

I. J.
K. L.
M. N.

Signed and delivered by the above-bounden in the presence of

[NOTE.—*If deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond.*]

No. 170.

ORDER OF REFERENCE TO ARBITRATION UNDER AGREEMENT OF PARTIES.

Section 508 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS the above-mentioned plaintiff and defendant have agreed to refer the matter in difference between them in the above suit to your arbitration and award, you are hereby appointed accordingly to determine all the said matters in difference between the parties, and with power, by consent of the parties, to determine which party shall pay the costs of this reference.

You are required to deliver your award in writing to this Court on or before the day of 18 , or such other day as this Court may further fix.

Process to compel the attendance before you of any witnesses, or for the production of any documents which you may desire to examine or inspect, will be issued by this Court on your application, and you are empowered to administer to such witnesses oath or affirmation.

A sum of Rs. , being your fee in the above suit, is herewith forwarded.

GIVEN under my hand and the seal of the Court this day of 18 .

L. S.

Judge.

No. 171.

ORDER OF REFERENCE TO ARBITRATION BY COURT, WITH CONSENT.

Section 508 of the Code of Civil Procedure.

(*Title.*)

UPON reading a petition of the plaintiff, filed this day, and on the consent of for the defendant, and upon hearing for the plaintiff and for the defendant, it is ordered, by and with the consent of all the parties, that all matters in difference in this suit, including all dealings and transactions between all parties, be referred to the final determination of , who is to make his award in writing and submit the same to this Court, together with all proceedings, depositions and exhibits in this suit, within one month from the date hereof. And it is ordered further, by and with the like consent, that the said arbitrator is to be at liberty to examine the parties and their witnesses upon oath or affirmation, which he is empowered

No. 171—(*contd.*)

to administer, and that the said arbitrator shall have all such powers or authorities as are vested in arbitrators under the Code of Civil Procedure, including therein power to call for all books of account that he may consider necessary. And it is further ordered, by and with the like consent, that the costs of this suit, together with the costs of reference to arbitration, up to and including the award of the said arbitrator, and the enforcement thereof, do abide the result of the finding of the said arbitrator. And it is further ordered, by and with the like consent, that the said arbitrator be at liberty to appoint a competent accountant to assist him in the investigation of the several matters referred to him as aforesaid, and that the remuneration of such accountant and other charges attending thereto be in the discretion of the said arbitrator.

GIVEN under my hand and the seal of the Court this day of 18 .

L. S.

Judge.

No. 172.

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT.

Section 532 of the Code of Civil Procedure.

No. of Suit .

IN THE COURT OF AT

Plaintiff.

To Defendant.

[*Here enter the defendant's name, description and address*]

WHEREAS [*here enter the plaintiff's name, description and address*] has instituted a suit in this Court against you under Chapter XXXIX of the Code of Civil Procedure for Rs. , principal and interest [*or* Rs. , balance of principal and interest] due to him as the payee [*or* endorsee] of a bill of exchange [*or* hundi *or* promissory note,] of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof, inclusive of the day of such service, to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. [*here state the sum claimed*] and the sum of Rs. for costs.

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration, showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

[*Here copy the bill of exchange, hundy or promissory note, and all endorsements upon it.*]

No. 173.

MEMORANDUM OF APPEAL.

Section 541 of the Code of Civil Procedure.

MEMORANDUM OF APPEAL.

[*Name, &c., as in Register.*] Plaintiff—Appellant.

[*Name, &c., as in Register.*] Defendant—Respondent.

[*Name of Appellant*] [plaintiff *or* defendant] above-named appeals to the High Court at [*or* District Court at , *as the case may be*] against the decree of in the above suit, dated the , day of , for the following reasons, namely [*here state the grounds of objection.*]

No. 174.

REGISTER OF APPEALS.

Section 548 of the Code of Civil Procedure.

COURT (*or* HIGH COURT) AT

Register of Appeals from Decrees in the year 18

Date of memorandum.	No. of appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM.				APPEARANCE.			JUDGMENT.		
		Name.	Description.	Place of abode.	Name.	Description.	Place of abode.	Of what Court.	No. of original suit.	Particulars.	Amount or value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed or altered.	For what, or amount.

No. 175.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL.

Section 553 of the Code of Civil Procedure.

IN THE COURT OF AT .

, *Appellant*, v. , *Respondent*.

Appeal from the of the Court of dated the day of 18 .

To

, *Respondent*.

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 18 has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided *ex-parte* in your absence.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

[NOTE.—*If a stay of execution has been ordered, intimation should be given of the fact on this notice.*]

No. 176.

DECREE ON APPEAL.

Section 579 of the Code of Civil Procedure.

IN THE COURT OF AT . .

, *Appellant*, v. , *Respondent*.

Appeal from the of the Court of , dated the day of 18 .

Memorandum of Appeal.

, *Plaintiff*,
, *Defendant*.

PLAINTIFF (*or* defendant) above-named appeals to the Court at against the decree of in the above suit, dated the day of 18 , for the following reasons, namely :—

[*here state the reasons.*]

This appeal coming on for hearing on the day of 18 , before , in the presence of for the Appellant, and of for the Respondent, it is ordered—

[*here state the relief granted.*]

The costs of this appeal, amounting to , are to be paid by The costs of the original suit are to be paid by .

GIVEN under my hand this day of 18 .

L. S.

Judge.

No. 177.

REGISTER OF APPEALS FR APPELLATE DECREES.

Section 587 of the Code of Civil Procedure.

HIGH COURT AT

Register of Appeals from Appellate Decrees.

Date of memorandum.	No. of appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM.				APPEARANCE.			JUDGMENT.		
		Name.	Description.	Place of abode.	Name.	Description.	Place of abode.	Of what Court.	No. of original suit and of appeal.	Particulars.	Amount or value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed or altered.	For what, or amount.

No. 178.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED.

Section 626 of the Code of Civil Procedure.

IN THE COURT OF AT

, *Plaintiff*, v. , *Defendant*.

To

TAKE notice that has applied to this Court for a review of its judgment passed on the day of 18 , in the above case. The day of 18 is fixed for you to show cause why the Court should not grant a review of its judgment in this case.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

No. 179.

NOTICE OF CHANGE OF PLEADER.

IN THE COURT OF AT

A. B. of
against
C. D. of

TO THE REGISTRAR OF THE COURT.

TAKE notice that I, *A. B.* [*or C. D.*], have hitherto employed as my pleader *G. H.*, of in the above-mentioned cause, but that I have ceased to employ him, and that my present pleader is *J. K.* of

[*A. B.* or *C. D.*]

No. 180.

MEMORANDUM TO BE PLACED AT FOOT OF EVERY SUMMONS, NOTICE DECREE OR ORDER OF COURT, OR ANY OTHER PROCESS OF THE COURT.

HOURS of attendance at the office of the Registrar [*place of office*] from *ten* till *four* except on [*here insert the day on which the office will be closed*], when the office will be closed at *one*.

Appendix.

AN ACT FOR ESTABLISHING HIGH COURTS OF JUDICATURE IN INDIA. [*6th August* 1861.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

High Courts may be established in the several Presidencies of India.

1. It shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at *Fort William* in *Bengal* for the *Bengal* Division of the Presidency of *Fort William* aforesaid, and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those Presidencies, respectively Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit, and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf.

Constitution of High Court.

2. The High Court of Judicature at *Fort William* in *Bengal*, and at the Presidencies of *Madras* and *Bombay*, respectively, shall consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty may, from time to time, think fit and appoint, who shall be selected from—

1*st*. Barristers of not less than five years' standing ; or

2*nd*. Members of the Covenanted Civil Service of not less than ten years' standing, and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period ; or

3*rd*. Persons who have held Judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years ; or

4*th*. Persons who have been Pleaders of a Sudder Court or a High Court for a period of not less than ten years, if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court :

Provided that no less than one-third of the Judges of such High Courts respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be Members of the Covenanted Civil Service.

Certain existing Judges herein named to be the first Judges of the High Court.

3. Provided always, that the persons who at the time of the establishment of such High Court in any of the said Presidencies, are Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, shall be and become Judges of the High Court without further appointment for that purpose ; and the Chief Justice of such Supreme Court shall become the Chief Justice of such High Court.

Tenure of office of High Court.

4. All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure: Provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor-General of *India* in Council or Governor in Council of the Presidency in which such High Court is established.

Precedence of Judges of High Court.

5. The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court, and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court, and except as aforesaid, all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their Patents.

Salaries, &c., of Judges of the High Courts.

6. Any Chief Justice or Judge. transferred to any High Court from the Supreme Court, shall receive the like salary, and be entitled to the like retiring pension and advantage as he would have been entitled to for and in respect of service in the Supreme Court, if such Court had been continued, his service in the High Court being reckoned as service in the Supreme Court; and, except as aforesaid, it shall be lawful for the Secretary of State in Council of *India* to fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, from time to time to alter the same: Provided always that such alteration shall not affect the salary of any Judge appointed prior to the date thereof.

Provision for vacancy of the office of Chief Justice or other Judge.

7. Upon the happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice, the Governor-General in Council or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence; and upon the happening of a vacancy in the office of any other Judge of any such High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council, or Governor in Council, as the case may be, to appoint a person, with such qualifications as are required in persons to be appointed to the High Court, to act as a Judge of the said High Court, and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council, or Governor in Council, as aforesaid, shall see cause to cancel the appointment of such acting Judge.

Abolition of Supreme Court and Sudder Courts.

8. Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William* in *Bengal*, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut Adawlut at *Calcutta*, in the same Presidency, shall be abolished:

And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of Sudder Adawlut and Foujdarry Adawlut in the same Presidency shall be abolished:

And upon the establishment of such High Court in the Presidency of *Bombay*, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished:

And the records and documents of the several Courts so abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency.

Jurisdiction and powers of High Courts.

9. Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil, and criminal jurisdiction beyond the limits of the Presidency Town as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts.

The High Court ordered, under this section, the real plaintiffs, though strangers to the record, to pay costs—*Bama Soondurce Dossee* vs. *Anund Lal Bose.* Bourke, 45, 96; 14 W. R., O. App., 1; but see *Ram Coomar Coondoo* vs. *Chunder Cant Mookerjee*, 1 L. R., Ind App., 49.

High Courts to exercise same jurisdiction as Supreme Courts.

10. *Until the Crown shall otherwise provide under the powers of this Act, all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William, Madras and Bombay, shall be exercised by such High Courts respectively.*

Repealed by 28 Vict., c. 15, s. 2, *post.*

Existing provisions applicable to Supreme Courts to apply to High Courts.

11. Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in *India* of Acts of Parliament, or of any Orders of Her Majesty in Council, or Charters, or of any Acts of the Legislature of *India*, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at *Fort William* in *Bengal*, *Madras* and *Bombay*, respectively, or to the Judges of those Courts, shall be taken to be applicable to the said High Courts and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council.

Provision as to pending proceedings in abolished Courts.

12. From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said last-mentioned Courts shall be dealt with as if the same had been had in the said High Court save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively.

Power to High Courts to provide for exercise of jurisdiction of single Judges or Division Courts.

13. Subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

Chief Justice to determine what Judges shall sit alone or in the Division Court.

14. The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

High Court to superintend and to frame rules of practice for Subordinate Courts.

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Courts for which it shall think necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the officers, and also to settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts, and from time to time to alter any such rule or form or table; and the rules so made, and the forms so framed, and the tables so settled, shall be used and observed in the said Courts; provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall, before they are used, have received the sanction, in the Presidency of *Fort William*, of the Governor-General in Council, and in *Madras* or *Bombay*, of the Governor in Council, of the respective Presidencies.

Under this section, the High Court may direct the exercise of a power or jurisdiction disclaimed by a Court, or may interfere and set aside an order which the Court has no authority to make—*Nilmoni* vs. *Taranath Mukerjee*, I. L. R., 9 Cal., 295; following *In the matter of Gobind Koomar*, B. L. R. (F. B.), 714; but it cannot interfere on the ground that the judgment passed by a Court having jurisdiction is erroneous—*Tej Ram* vs. *Harsukh*, I. L. R., 1 Alla., 101, and the cases cited at p. 104: *In the matter of Lukhy Kant Bose*, I. L. R., 1 Cal., 180.

Refusal by District Judge to admit an application for review. High Court will not interfere under section 15 of the Charter Act—*Ram Lall Singh* vs. *Janki Mahatoon*, 4 C. L. R., 14.

Her Majesty may establish a High Court in the North-Western Provinces.

16. It shall be lawful for Her Majesty, if at any time hereafter Her Majesty see fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in *India*, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges, with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time may think fit and appoint; and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any jurisdiction, powers, and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent, all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court, and to the Governor-General or Governor of the Presidency in which such High Court is established, shall, as far as circumstances may permit, be applicable to the High Court established in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories.

Other or supplementary Charters may be granted within three years after establishment of a Court.

17. It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act by Her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit of the Letters Patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent, or without any such revocation as aforesaid, by

like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance.

The period within which fresh Letters might be granted was extended to the 1st January 1866 by section 1 of the 28 Vict., c. 15, *post*.

Territorial limits of jurisdiction of Court may be altered by order in Council.

18. *It shall be lawful for Her Majesty, from time to time, by Her Majesty's Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet.*

Repealed by 28 Vict., c. 15, sec. 2, *post*.

Interpretation of terms.

19. The word "Barrister" in this Act shall be deemed to include Barristers of *England* or *Ireland*, or Members of the Faculty of Advocates in *Scotland*; and the words "Governor-General and Governor" shall comprehend the officer administering the Government.

INDIA OFFICE,

Judicial, No. 24.

London, 14*th May* 1862.

To

HIS EXCELLENCY THE RIGHT HONORABLE
THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

MY LORD,

I HEREWITH transmit to you the Letters Patent or Charter, under the Royal Sign Manual, for the High Court of Judicature to be established in Bengal, in accordance with the provisions of the Act 24 and 25 Victoria, Chapter 104, for establishing High Courts of Judicature in India, and request that you will take immediate measures for instituting the Court, the first Judges of which, including those appointed under the 3rd Section of the Act, are designated in the second clause of the Charter. Those appointed by the Crown will be severally informed by me of their appointments to the Court.

2. This Charter will accomplish the great object which has so long been contemplated, of substituting for the Supreme and Sudder Courts abolished by the Act one High Court of Judicature, possessing the combined powers and authorities of the abolished Courts, and exercising jurisdiction, both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court.

3. Before I review the provisions in detail, it is necessary that I should direct your attention to the general scope and main provisions of the Act in question.

4. It abolishes, in the first place (as soon as the Charter shall issue), the Supreme Court and the Court of Sudder Dewany Adawlut. It vests in the High Court (by the last provision of Section 9) the powers and authorities of those Courts respectively, except so far as the Crown may by such Charter otherwise direct. And (by the first part of the same section) it invests the High Court with such Civil, Criminal, Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, and all such powers and authority in relation to the administration of justice in the Presidency, as the same Charter may confer. With respect, therefore, to the fusion of the Supreme and Sudder Courts, it appears obvious that the Act itself speaks, and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous. It has been,

consequently, deemed unnecessary that the Charter should exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion, as would have been the proper course if these powers and jurisdiction had been entirely new. Recourse has been had in some places in lieu of such explicit statement to reference to Statutory provisions, and, in others, to the Charter of the Supreme Court, when the object of clearness appeared to require it. But whenever the Charter does not otherwise specify, the High Court will use the powers and administer the jurisprudence appertaining to those Courts respectively to whose authority it now succeeds.

5. But the Charter is intended positively to declare all such Civil, Criminal, and other jurisdictions above specified, as the Crown thinks proper by this Charter to confer on it, supplementary or additional to its main purpose, namely, the fusion of the aforesaid Courts.

6. Moreover, the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of justice as the Crown may direct, appear very large, and such as, in point of fact, invest the Crown with extensive legislative powers, so far as "the administration of justice," within the meaning of the section, may require. It has been, however, thought best to use this power very sparingly, and simply as ancillary to the real purpose of the Act, namely, the establishment of new Courts.

7. Another reason for the form which the present Letters Patent assume, is to be found in the provisions of Section 17 of the Act of last Session. By that section power is given to the Crown to recall the Letters Patent establishing the Court, at any time within three years after its establishment, and to grant other Letters Patent in their stead. This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed. On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of the establishment of the Court, furnish me with any suggestions they may make, or any amendments they may propose in the Letters Patent now transmitted, and I shall be glad if, in proposing alterations, the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent.

8. I proceed to notice, in order, such of the provisions of the Charter as appear to me to call for special remark.

Clause 6.

9. By Clause 6, power is given to the Chief Justice to appoint the officers of the Court, and to fix their salaries, subject, however, in both cases, to the approval and confirmation of the Governor-General in Council. This provision does not refer to the settling of tables of fees, where fees are allowed, which, under Section 15 of the Act, is required to be done by the Court.

10. The Supreme Court exercises an authority entirely independent of the Government in regard to its ministerial officers. The Government, however, has always considered itself at liberty to receive representations from any of the officers of the Sudder or Subordinate Courts who felt themselves aggrieved by the orders of the Judicial Authorities, and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases. It will be expedient for you to take the question into your consideration, and, after communication with the Court, to adopt some rule in regard to it, which, of course, must be uniformly applicable to all the officers of the Court. Constituted as the High Court will be, it will merit all the confidence you can repose in it; but, as a question of policy, the extension of the liberty of application to the Government to those who have not hitherto enjoyed it appears to me preferable to taking it away from those who have heretofore been permitted to avail themselves of it, as a mode of obtaining redress against proceedings alleged by the applicants to be unjust and oppressive.

Clauses 7-10.

11. In regard to the admission of Advocates, Vakeels, and Attorneys, the recommendations of the Law Commissioners have been followed. Under the existing practice, the Advocate pleads, and the Attorney acts for the suitors of the Supreme Courts, and the Vakeel both pleads and acts for the suitors of the Sudder Court, of which Court the Advocate and Attorney of the Supreme Court are *ex officio* Vakeels. These terms are employed in the Charter simply to express the functions of these several classes of practitioners. The Advocate and Attorney will respectively plead and act in the High Court as he did in the Sudder Court. Any person may apply to be admitted either as an Advocate, or Vakeel, or Attorney, under the rules which the Court is authorized by the Charter to make, and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court, should the Judges consider such a course to be expedient.

12. The provision in the Act, Section 2, Clause 4, which declares that Pleaders of the Sudder Court, "who shall have been admitted as Pleaders of the High Court," shall be eligible, under certain conditions, to the Bench of the Court, implies that a discretionary power may be exercised as to the admission of the present Pleaders of the Sudder Court to the Bar of the High Court. This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court. I conclude, however, that unless, in any special cases, there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts, at the date of their abolition, to be the first Advocates, Vakeels, and Attorneys of the High Court.

Clause 10.

13. With reference to the concluding sentence of Clause 10, it is to be observed that the Letters Patent contain no provision reserving to the Attorneys of the present Supreme Court the right of pleading, after the issue of this Charter, in the Insolvent Court, as newly regulated by Clause 17. No such provision, however, is necessary, as the Insolvent Court is a separate tribunal, not affected by the Act authorising the Letters Patent, and will continue a separate Court, though, for the future, presided over by a Judge of the High Court. The Attorneys, therefore, will, as heretofore, practise in accordance with the rules of the Insolvent Court itself.

14. By the important provisions contained in the clauses of the Charter, 11 to 38 inclusive, effect is given to the 9th section of the Act, respecting the jurisdictions and powers to be exercised by the High Court.

Civil Jurisdiction, Clause 11.

15. The original civil jurisdiction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised, under the Charter, by the High Court, including in that term (Clause 36 of the Charter) a Judge or Division Court of the High Court, appointed or constituted under the provisions of the 13th section of the Act.

16. As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business, the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency Town, but within the limits of the Presidency or Division subject to the authority of the High Court, has not been vested in the High Court. The concluding provision of Clause 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the Presidency Town, with power, however, to the Court, under Clause 13, to call for and try any suit instituted in any Court subject to its superintendence, when, for reasons to be recorded, it shall think proper to do so.

Clause 12.

17. The terms of Clause 12, defining the original jurisdiction of the High Court as to suits, are nearly similar to those employed in Section 5 of the Code of Civil Procedure (Act VIII of

1859), and are intended to include every description of case over which the Mofussil Courts have jurisdiction. By the 8th section of the 21st George III, C. 70, the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue. Further, a decision * of the Judicial Committee of the Privy Council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitation as to whether that Court could administer a remedy in such cases on the Civil side. It is one object of the present Charter to do away with all such restrictions and limitations, as far as this can be done without trenching on the proper province of legislation. It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong, as are exercised by the Courts not established by Royal Charter, and thus to place the Courts of first instance in the Presidency Towns and in the interior of the country, in this respect, as nearly as may be, on the same footing.

* Ardaseer Cursetjee *vs.* Perozeboye.

18. I shall be glad to be furnished with your opinion, after consultation with the Judges of the Court, as to the concluding portion of Clause 12, excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta, in which the debt or damage or value of the property sued for does not exceed 100 Rupees. Hitherto, I believe, there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court; but should it appear that, under the new system, the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court, it may become a question for consideration whether the sum, excluding the jurisdiction of the High Court, might not be raised to, say, 300 or 500 Rupees.

19. It has been suggested that the Small Cause Court should be placed on the same footing as a Zillah Court, in its subjection to the High Court as a Court of appeal and general superintendence. But I do not consider that it was the purpose of the Act of Parliament of last Session that the Crown, in framing a Charter under it for the High Court, should interfere with the present position and jurisdiction of other and independent Courts. This object, if desirable, is properly to be attained by legislation. Should you be of opinion that the Small Cause Court ought to be placed in the same relation to the High Court as any other Court, subject to its appellate jurisdiction and general control, the measure can be carried into effect by an Act of the Governor-General in Council.

Clause 13.

20. As already observed, the effect of Clause 12 will be to confine the ordinary original Civil jurisdiction of the High Court within narrower limits than the Civil jurisdiction exercised by the Supreme Court. By Clause 13, however, the High Court is empowered to call for and to try, as a Court of first instance, any suit which the law requires to be instituted before some other tribunal. By the exercise of the power thus conferred on it, the High Court will be enabled to obviate all reasonable ground of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which, but for the change in the system, might have been instituted in the Supreme Court.

21. The introduction of the words "whether within or without the Bengal Division of the Presidency of Fort William" in this and in several other clauses, may appear to require explanation. The Court about to be established is called in Section 2 of the Act 24 and 25 Victoria, C. 104, a Court "for the Bengal Division of the Presidency of Fort William." That title is of course preserved in the Charter. By Section 8, the Supreme and Sudder Courts are abolished, and by Section 9 all their jurisdiction, power, and authority, except when otherwise provided, are vested in the High Court. But the Supreme Court has various original jurisdictions, extending over the whole of the Presidency of Fort

William, and also over some of the Non-Regulation Provinces under the Government of India, and the Sudder Court has various appellate jurisdictions extending over the Bengal Division of the Presidency, and also over the Province of Assam and others which are not properly parts of the Presidency. The result is, that the High Court "for the Bengal Division," succeeding to the powers of both the Supreme and Sudder Courts, has, in several respects, jurisdiction in territories not within the Bengal Division. As this is the result of the Act, it might not have been necessary to notice it in the Charter. But for the sake of clearness, and in order to show distinctly that the Charter is meant to apply to these extra local jurisdictions, as well as to the strictly local jurisdiction within the Bengal Division, it has been deemed advisable to introduce these words.

Clauses 14 and 15.

22. Clauses 14 and 15 give effect to the recommendation of the Law Commissioners, that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlut, and a new appellate jurisdiction in civil cases, from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of a full number of the Judges of the Court, the appeal shall lie to Her Majesty in Council.

23. It will appear, from a subsequent clause in the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India, of which Act XXIII of 1861 forms a part. By Section 23 of the last mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal. A difficulty, however, may occur when two Judges constituting a Division Court for the trial of cases in the exercise of original jurisdiction, differ as to the judgment to be given. For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance, presided over by single Judges only, contains no provision. To call in a third Judge, and to re-try the case, with a view to a judgment from which there may be an appeal to the High Court under Clause 14, would be productive of unnecessary delay and expense to the parties; and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th Section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgement shall be entered *pro forma*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose.

Clauses 18, 19, and 20.

24. The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme and Sudder Courts, respectively, will, until otherwise provided, continue as at present. This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect. And the clauses on which I am now commenting are probably superfluous. But they have been introduced to obviate any apprehension which might have been entertained that, in fusing the two Courts together it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation, not only in the tribunals for administration of the law, but of the law itself. I trust, however, that measures may be taken ere long for effecting great improvements in this respect, by enacting for the British possessions in India a body of substantive law, by which all classes shall be governed, and all transactions shall be regulated, except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects.

Clauses 21, 22, and 38.

25. Under clauses 21, 22, and 38, no change will be effected by the Charter in the administration of criminal justice in the Presidency Town, or in respect of persons subject to its criminal jurisdiction residing in the interior of the country. It appears, however, to Her Majesty's Government, that some modification of the

existing practice, both at the capital and in the provinces, is necessary, and on these points, I shall address you in a separate despatch.

Clause 23.

26. The Sudder Court exercises no original jurisdiction, but by Clause 23, original criminal jurisdiction, throughout the territories subject to its authority, has been given to the High Court, the principal object being to enable the Judges to hold trials for offences committed out of the Presidency Town, at which from their importance or for other special cause, it may be expedient that a Judge or Judges of the High Court should preside.

Clauses 24—28.

27. The remaining clauses of the Letters Patent, on the subject of the criminal jurisdiction of the High Court, do not call for any particular notice. They contain no special provisions respecting the transfer to that Court of the criminal jurisdiction exercised by the Supreme Court over inhabitants of such parts of India as are not comprised within the local limits of the Letters Patent, that having been fully provided for by Section 10 of the Act under the authority of which the High Court is established.

28. As in the case of the Small Cause Court, you wi l consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta.

Clause 30.

29. Clause 30, respecting the exercise of jurisdiction by the High Court elsewhere than at its ordinary place of sitting, is a very important provision, and one which I have no doubt, if judiciously carried into effect, will materially tend to the greater efficiency of all the judicatories subject to the superintendence and authority of the Court. Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency. For such cases the clause under consideration will enable the Government to provide by deputing one or more Judges from the High Court, who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties.

30. With reference to this clause, it has been considered whether the precedent of Section 14 of the Act of Parliament, should not be followed and the authority to make the necessary arrangements for exercise of the Court's jurisdiction out of the usual place of sitting vested in the Chief Justice. On the whole, it was thought that acts partaking so much of an administrative character might be more perfectly performed by the Governor-General in Council. But it is scarcely for me to add, that Her Majesty's Government entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter.

Clauses 31 and 32.

31. The Supreme Court exercises, at present, Admiralty Jurisdiction under its Charter. The Chief Justice has Vice-Admiralty Jurisdiction under Commission of the 19th July 1822, and all or any of the Judges of the Supreme Court may be appointed Commissioners, under the provisions of 39 and 40, George III, C. 79, Section 25, for the trial and adjudication of prize causes and other maritime questions arising in India. By the present Charter, the whole of these jurisdictions and powers will be vested in the High Court, and as in the Act above cited, the expression "other maritime questions" is general, mention is made of all the jurisdictions conferred as abovementioned, in the clauses of the Charter, providing both for the civil and criminal maritime jurisdiction of the High Court.

Clauses 33 and 34.

32. The clauses respecting testamentary and intestate jurisdiction do not call for any remark.

Clause 35.

33. Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court, as to "matters matrimonial" in general, as they now are under the Supreme Court, and this they believe to be

effected by Clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Court does not possess; in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of the Act 20 and 21 Vic., C. 85, and in regard to which further provisions were made by 22 and 23 Vic., C. 61, and 23 and 24 Vic., C. 144. The Act of Parliament for establishing the High Courts, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them the Crown clearly could not so import, such, for instance, as those which prescribe the period of re-marriage, or those which exempt from punishment clergymen refusing to re-marry adulterers. All these are, in truth, matters for Indian legislation, and I request that you will immediately take the subject into your consideration, and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

34. The object of the proviso at the end of Clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Courts within the division of the Presidency not established by Royal Charter, any jurisdiction which they might have in matters matrimonial, as, for instance, in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere.

Clause 36.

35. Clause 36 refers to the powers of single Judges and Division Courts, appointed or constituted under the provisions of the 13th Section of the Act. By Section 14 of the Act, the power of determining from time to time what Judge in each case shall sit alone, and what Judges shall constitute Division Courts, is placed in the hands of the Chief Justice. It will be observed that the law does not require that a Judge selected from the Bar shall necessarily form a part of every Division Court, and it will be for the Chief Justice to consider whether, in cases exclusively between Nat ves, it will not be desirable to follow, as far as possible, the course which has already been resolved upon in regard to the cases under appeal to the Sudder Court at the time of its abolition, and to constitute the Division Court of Judges trained in the country, whose knowledge of the Native language will obviate the expense and delay of translating the proceedings.

Clause 37.

36. Clause 37 is a very important one, and, there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Courts not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law, equity, and admiralty jurisdictions) which have been in operation in the Supreme Court since the date of its establishment.

37. In regard to the rules respecting appeals to the Privy Council, the object has been to avoid unnecessary innovation where so much of change, with its necessary inconvenience, is unavoidable. The existing rules which regulate these appeals are, therefore, left in force, with one or two additions only, which experience in the Court of the Judicial Committee has found advisable. For instance, Clause 40 is introduced as it had been commonly introduced of late years in the appeal rules of other dependencies of Great Britain, in order to remove all doubt as to the power of the High Court to allow an appeal to the Council from interlocutory judgments.

38. It will, however, be obvious to you that the rules, as now framed, will be liable to the reproach of confusion, and perhaps of uncertainty. They will be

compounded of those contained in this Charter and those already in force, which will necessitate reference to several documents. You will agree with me that a simple and intelligible Code of Rules, to regulate appeals to the Privy Council from the new High Courts, or rather from the High Courts in general which may be constituted under the Act of Parliament, will be of great advantage to the suitors and the public. I should wish, therefore, that one of the first objects of the Judges, as soon as the amount of labour thrown on them by their new position may allow it, might be to prepare suggestions for such a Code of Rules, which might then be reduced into a complete shape by the authority of the Privy Council at Home.

36. In forwarding the Letters Patent to the Judges of the High Court, you are requested to furnish them with a copy of this despatch. I trust that the Letters Patent taken in connection with the Act for establishing the Court, will be found to contain everything requisite for enabling the Court to proceed at once to the discharge of its important duties. It is possible that omissions may be discovered by the legal authorities in India, which may impede the proper action of the Court, and, should the Judges represent to you that such is the case, you will take immediate steps for supplying what is wanting by such legislative measures as you may consider most expedient for remedying the defects brought under your consideration.

40. I cannot conclude this despatch without expressing the deep interest felt by Her Majesty's Government in the success of this important measure. The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India, which in the trained learning of the Judges selected from the Bar, and in the knowledge of the language, feelings, and habits of the natives of that country possessed by the other members of the Court, combines the most material elements of success. And Her Majesty's Government look with confidence to the zealous exertions and cordial co-operation of the Judges to place the administration of Justice in India, under the controlling authority of the Court, in such a state of efficiency as will render it, in respect, adequate to its ends, and satisfactory to the people and to the Government

I have the honor to be,

My Lord,

Your Lordship's most obedient, humble Servant,

(Signed) C. WOOD.

LETTERS PATENT.

Constituting the High Court of Judicature for the Bengal Division of the Presidency of Fort William, dated 14th May, 1862, revoked by further Letters Patent, 28th December, 1865.

Recital of Acts 24 and 25 Vic., c. 104.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, To all to whom these presents shall come, greeting: Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our reign, entitled "An Act for establishing High Courts of Judicature in India," it was, amongst other things, enacted that it shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, and that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared: Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the

Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta, *in the said Presidency, should be abolished.*

And that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Town as might be prescribed thereby; and save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts:

Establishment of High Court of Fort William.

1. *Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge and mere motion, have thought fit to erect and establish, and by these presents We do, accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature at Fort William in Bengal, and We do hereby constitute the said Court to be a Court of Record.*

Constitution and first Judges of the High Court.

2. *And We do hereby appoint and ordain that the said High Court of Judicature at Fort William in Bengal shall, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and thirteen Judges, the first Chief Justice being Sir Barnes Peacock, Knight, and seven of the Judges, being Sir Charles Robert Mitchel Jackson, Knight, Sir Mordaunt Lawson Wells, Knight, Henry Thomas Raikes, Esq., Charles Binny Trevor, Esq., George Lock, Esq., Henry Vincent Bayley, Esq., and Charles Steer, Esq., according to the appointments made by the said Act: and We do hereby constitute and appoint John Paxton Norman, Esq., Walter Morgan, Esq., Francis Baring Kemp, Esq., Walter Scott Seton-Karr, Esq., and Louis Stuart Jackson, Esq., being respectively qualified, as in the said Act is declared, to be Judges of the said High Court.*

Declaration to be made by Judges.

3. *And We do hereby ordain that the Chief Justice and every Judge of the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:—*

"I, A. B., appointed Chief Justice [or a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment.

Seal.

4. *And We do hereby grant, ordain and appoint that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same, with this inscription: "The Seal of the High Court at Fort William in Bengal." And We do further grant, ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person*

appointed to act as Chief Justice under the provisions of Section 7 of the recited Act; and We do further grant, ordain and appoint that, whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

Writs, &c., to issue in name of the Crown and under Seal.

5. *And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders, and other mandatory process to be used, issued, or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court.*

Appointment of officers.

6. *And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointments shall be forthwith submitted to the approval of the Governor-General in Council, and shall be either confirmed or disallowed by the Governor-General in Council. And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct, and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right or any officer of clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during he term of such leave, in accordance with the said rules.*

Admission of Advocates, Vakeels, and Attorneys.

Powers of High Court in admitting Advocates, Vakeels, and Attorneys.

7. *And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Advocates as to the said High Court shall seem meet, who shall be and are hereby authorized to appear and plead for the suitors of the said High Court, subject to the rules and directions of such Court.*

8. *And We do further authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Vakeels as to the said High Court shall seem meet, who shall be and are hereby authorized to appear, plead and act for the suitors of this said High Court, subject to the rules and directions of such Court.*

9. *And We do further authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Attorneys-at-law as to the High Court shall seem meet, who shall be and are hereby authorized to appear and act for the suitors of the said High Court, subject to the rules and directions of such Court.*

In making rules for the qualifications, &c., of Advocates, Vakeels, and Attorneys.

10. *And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal, shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Court, and shall be empowered to remove, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law, and*

no person whatsoever, but such Advocates or Vakeels, shall be allowed to plead for, or on behalf of, any suitor in the said High Court; and no person or persons whatever, but such Vakeels or Attorneys-at-law, shall be allowed to act for any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf, or on behalf of aco-suitor.

Civil Jurisdiction of the High Court.

Local limits of the ordinary original jurisdiction of the High Court.

11. *And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law or regulation made by the Governor-General in Council, and until some local limits shall be so declared and prescribed, within the limits declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council on the 10th day of September in the year of Our Lord one thousand seven hundred and ninety-four, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.*

Original jurisdiction as to suits.

12. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land other immoveable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within the local limits of the ordinary original jurisdiction of the said High Court, except that it shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage or value of the property sued for, does not exceed one hundred rupees.*

Extraordinary original civil jurisdiction.

13. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper, to do so, either on the agreement of the parties to that effect, or for purposes of justice the reasons for so doing being recorded on the proceedings of the said High Court.*

Appeal from the Courts of originaal jurisdiction to the High Court in its appellate Jurisdiction.

14. *And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment in all cases of original civil jurisdiction, of one or more Judges of the said High Court, or of any Division Court, pursuant to section 13 of the said recited Act: Provided always that no such appeal shall lie to the High Court as aforesaid from any such decision made by a majority of the full number of Judges of the said High Court, but that the right of appeal in such case shall be to Us, Our heirs or successors, in Our or Their Privy Council in manner hereinafter provided.*

Appeal from Courts in the Provinces.

15. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of Appeal from the Civil Courts, of the Bengal Division of the Presidency of Fort William, and from all other Courts, whether within or without the said Bengal Division, from which there is now an appeal to the Court of Sudder Dewany Adawlut at Calcutta, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Dewany Adawlut, by virtue of any laws or regulations now in force, or shall become subject to appeal to the said High Court by virtue of such laws or regulations relating to Civil Procedure as shall be hereafter made by the Governor-General in Council.*

Jurisdiction as to infants and lunatics.

16. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Bengal Division of the Presidency of Fort William, as that which is now vested in the said Supreme Court at Calcutta.*

Provision with respect to the Insolvent Court.

17. *And We do further ordain that the Court for relief of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, whether within or without the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.*

Law to be administered by the High Court of the Bengal Division of the Presidency of Fort William in Civil Cases.

By the High Court in the exercise of ordinary original civil jurisdiction.

18. *We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall (until otherwise provided) be the law or equity which would have been applied by the said Supreme Court at Calcutta to such case if these Letters Patent had not issued.*

In the exercise of extraordinary original civil jurisdiction.

19. *And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.*

By High Court in the exercise of appellate jurisdiction.

20. *And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.*

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

21. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and in respect of all persons beyond such limits over whom the said Supreme Court at Calcutta now has criminal jurisdiction.*

Jurisdiction as to persons.

22. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.*

Extraordinary original criminal jurisdiction.

23. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut at Calcutta, whether within or without the Bengal Division of the Presidency of Fort William, and shall have authority to try, at its discretion, any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other Officer specially empowered by the Government in that behalf.*

No appeal from High Court exercising original jurisdiction.

Court may reserve points of law.

24. *And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal, from any sentence or order passed on any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.*

High Court to review on certificate of the Advocate-General.

25. *And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General, that in his judgment there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.*

Appeal from Criminal Courts in the Provinces.

26. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts, whether within or without the said Bengal Division, from which there is now an appeal to the Court of the Sudder Nizamut Adawlut at Calcutta, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Nizamut Adawlut, by virtue of any laws or regulations now in force, or shall become subject to appeal to the said High Court by virtue of such laws or regulations relating to Criminal Procedure as shall be hereafter made by the Governor-General in Council.*

Hearing of referred cases and revision of criminal trials.

27. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the Session Judges, or by any other Officers authorized to refer cases to the Sudder Nizamut Adawlut, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said Court of Sudder Nizamut Adawlut, whether within or without the Bengal Division of the Presidency of Fort William, or shall become subject to such reference to, or revision by, the said High Court by virtue of such laws or regulations relating to Criminal Procedure as shall be hereafter made by the Governor-General in Council.*

High Court may direct the transfer of a case form one Court to another.

28. *And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs, in ordinary course, to the jurisdiction of some other Officer or Court.*

Criminal Law.

Offenders to be punished under Indian Penal Code.

29. *And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as to a Court of Appeal, reference, or revision, charged with any offence for which provision is made by Act XLV of* 1860, *called the "Indian Penal Code," shall be liable to punishment under the said Act, and not otherwise, subject nevertheless to such alterations, modifications and additions in and to such Code as may have been or may be prescribed by any Acts or Regulations made by the Governor-General in Council.*

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

Judges may be authorized to sit in any places by way of circuit or special commission.

30. *And We do further ordain that, whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the Sudder Dewanny Adawlut or Sudder Nizamut Adawlut at Calcutta, whether within or without the Bengal Division of the Presidency of Fort William, other than the usual place of sitting of the said High Court or at several such places by way of circuit, and the Governor-General in Council shall, by his commission for that purpose, authorize and direct any of the Judges of such Court to hold sittings in such place or places accordingly at or within such times as by such commission may be authorized or directed, the Judge or Judges acting under such commission in the places and manner therein directed, shall have and exercise the same jurisdiction, power, and authority as would be had and exercised by a Judge or Judges of the said High Court, as the case may be, in its ordinary place of sitting.*

Admiralty and Vice-Admiralty Jurisdiction.

Civil.

31. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such Civil and Maritime jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty, or by any Judge of the said Court as Commissary to the Vice-Admiralty Court, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as is now vested in any Commissioner or Commissioners appointed by Us or Our predecessors under the powers given by an Act passed in the Session of Parliament, held in the thirty-ninth and fortieth years of the reign of His late Majesty King George the Third, "for establishing further Regulations for the government of the British territories in India, and the better administration of justice within the same."*

See *Garden* vs. *Dragoon*, 1 Hyde, 275.

Criminal.

32. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such criminal jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty, or by such Commissary to the Vice-Admiralty Court, or by any such Commissioner or Commissioners as aforesaid.*

Testamentary and Intestate Jurisdiction.

Repeal of certain parts of former Letters Patent as to ecclesiastical jurisdiction.

33. *And We do further ordain that so much of the Letters Patent bearing date the twenty-sixth day of March in the fourteenth year of the reign of His Majesty King George the Third, in the year of Our Lord one thousand seven hundred, and seventy-four, as authorizes and empowers the Supreme Court to take cognizance of, and proceed in, causes, suits, and business in the exercise of ecclesiastical jurisdiction, shall cease and determine except as hereinafter mentioned.*

Testamentary and intestate jurisdiction.

34. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power and authority as that which may now be exercised by the said Supreme Court, whether within or without the Bengal Division of the Presidency of Fort William, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division.*

Matrimonial Jurisdiction.

Matrimonial Jurisdiction.

35. *And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have jurisdiction in matters matrimonial between Our subjects professing the Christian religion, and that such jurisdiction shall extend to the local*

limits within which the Supreme Court now has ecclesiastical, jurisdiction: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

Powers of Single Judges and Division Courts.

Single Judges and Division Courts.

36. *And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof appointed or constituted for such purpose, under the provisions of the thirteenth section of, the aforesaid Act of the 24th and 25th years of Our reign.*

Civil Procedure.

Regulation of proceedings.

37. *And We do further ordain that the proceedings in all matters coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its testamentary and intestate jurisdiction, shall be regulated by the rules relating to the granting of probate and letters of administration contained in the aforesaid Letters Patent of His Majesty King George the Third, and by such further or other rules in respect thereof as are now in force; and that the proceedings in all matters coming before the said High Court in the exercise of its matrimonial jurisdiction shall be regulated, as nearly as may be, by the rules and proceedings of Our Court for Divorce and Matrimonial Causes in England; and that, save as hereinbefore in this clause otherwise provided, the proceedings in Civil suits of every description between party and party brought in the said High Court shall be regulated by the Code of Civil Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No. VIII of* 1859, *and by such further or other enactments of the Governor-General in Council in relation to Civil Procedure as are now in force: Provided always that the regulation of such proceedings, respectively, shall be subject to such laws and regulations as shall be hereafter made by the Governor-General in Council in relation to such proceedings respectively.*

Criminal Procedure.

Regulation of proceedings.

38. *And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said Supreme Court now has jurisdiction, shall be regulated by the procedure and practice now in use in the said Supreme Court, and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of* 1861, *or by such further or other enactments of the Governor-General in Council in regulation to Criminal Procedure as are now in force: Provided always that the regulation of such proceedings respectively shall be subject to such laws and relations as shall be hereafter made by the Governor-General in Council in relation to such proceedings respectively.*

Appeals to Privy Council.

Power to Appeal.

39. *And We do further ordain that any person or persons may appeal to Us Our heirs or successors, in Our or Their Privy Council in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal, made on appeal, and from any such final judgment, decree, or order made in the exercise of original jurisdiction by a majority of the full number of judges of the said High Court as hereinbefore mentioned: Provided, in either case, that the sum or matter of issue is above the amount or value of Rupees* 10,000, *or in case such judgment, decree, or order shall involve, directly or indirectly, any claim, demand, or question to or respecting property amounting to or of the value of Rupees* 10,000; *or from any other final judgment, decree, or order made either on appeal or otherwise*

as aforesaid, when the said High Court shall declare that the case a is fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council, subject always to such rules and orders as are now in force, or may, from time to time, be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency. Except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgments.

40. *And We further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion, on the motion, or if the said High Court be not sitting, then for any judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences.*

Appeal in criminal cases, &c.

41. *And We do further ordain that, from any judgment, order, or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved, for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as we may, with the advice of Our Privy Council, hereafter make in that behalf.*

Rules as to transmission of copies of evidence and other documents.

42. *And We do further ordain that, in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal, to Us, Our heirs, or successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against.*

And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree, or decretal orders, or other order or rule of the said High Court should or might have been executed.

Call for Records, &c., by the Government.

High Court to comply with requisition from Government for records, &c.

43. *And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal, shall comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner, as such Government may deem proper.*

Provisions of former Letters Patent, inconsistent with the Acts 24 and 25 Vict., c. 104, and with these Letters Patent, to be void on the establishment of the High Court.

44. *And it is Our further will and pleasure that from and after the establishment of the said High Court of Judicature at Fort William in Bengal, so much of the aforesaid Letters Patent granted by His Majesty King George the Third, as is inconsistent with the recited Act, and with these Letters Patent, shall cease, determine, and be utterly void to all intents and purposes whatsoever.*

IN WITNESS *whereof We have caused these our Letters to be made Patent. Witness Ourself at Westminster, the fourteenth day of May, in the twenty-fifth year of Our reign.*

By Warrant under the Queen's Sign Manual,

C. ROMILLY.

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28 VICTORIA, C. 15.

Act extending the time for granting fresh Letters Patent for the High Courts in India.

[*7th April*, 1865.]

XXIV and XXV Vic., c. 104.

WHEREAS it is expedient to extend the time fixed for granting fresh Letters Patent for the High Courts in *India*, under the provisions of an Act passed in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, entitled *an Act for establishing High Courts of Judicature in India*, and to make further provision than is in the said Act contained for empowering the alteration, from time to time, of the local limits of the said High Courts, and for the exercise, in places beyond the limits of the Presidencies, or places within and for which such High Courts are established, of the jurisdiction and powers conferred by Her Majesty's Letters Patent on the said High Court: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Extension of time for granting fresh Letters Patent.

1. The time fixed for granting fresh Letters Patent for the High Courts in *India*, by section 17 of the said recited Act, is hereby extended to the first day of *January*, one thousand eight hundred and sixty-six.

Sections 10 and 18 of XXIV and XXV Vic., c. 104, repealed.

2. Sections 10 and 18 of the said Act of the twenty-fourth and twenty-fifth years of Her present Majesty are hereby repealed.

Power to the Governor-General in Council, to alter local limits of jurisdiction of the High Courts.

3. It shall be lawful for the Governor-General of *India* in Council, by order, from time to time, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established or to be established under the said Act, and to authorize and empower any High Court to exercise all or any portion of the jurisdiction and powers conferred on it by Her Majesty's Letters Patent establishing the same, or any other Letters Patent issued by Her Majesty, under the provisions of the above recited Act of the twenty-fourth and twenty-fifth years of Her Majesty, within any such portions of Her Majesty's dominions in *India*, not included within the limits of the Presidency or place or places for which such High Court was established, as the said Governor-General in Council, may from time to time determine, and also to exercise any such jurisdiction in respect of Christian subjects of Her Majesty, resident within the dominions of such of the Princes and States of *India* in alliance with Her Majesty as the said Governor-General in Council may, in manner aforesaid, from time to time determine, anything in the said recited Act of the twenty-fourth and twenty-fifth years of Her present Majesty notwithstanding.

Power to Crown to disallow any order of the Governor-General for that purpose.

4. Whenever any such order has been passed by the Governor-General in Council, he shall transmit to the Secretary of State for *India*, an authentic copy thereof: and it shall be lawful for Her Majesty to signify, through the Secretary of State for *India* in Council, Her disallowance of such order; and such disallowance shall make void and annul such order from and after the day on which the Governor-General shall make known by proclamation, or by signification to his Council, that he has received the notification of

such disallowance by Her Majesty : Provided always that all acts, proceedings, and judgments done, taken, or given by such High Courts, and not set aside by any competent authority before the promulgation or signification as aforesaid of such disallowance by Her Majesty, shall be deemed to be and to have been valid and effectual for all purposes whatever, such disallowance notwithstanding.

Time when Act shall come into operation.

5. So much of this Act as relates to the jurisdiction of the High Courts shall commence and come into operation as soon as the same shall have been published by the Governor-General in Council.

Not to interfere with certain powers of Governor-General.

6. Nothing in this Act contained shall interfere with the powers of the Governor-General in Council, at meetings for the purpose of making Laws and Regulations.

LETTERS PATENT.

For the High Court of Judicature at Fort William in Bengal, dated 28th December 1865.

Recital of Acts 24 & 25 Vic., c. 104.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these presents shall come, greeting : Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our reign, entitled "An Act for establishing High Courts of Judicature in India," it was, amongst other things, enacted that it shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, and that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared : Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said Presidency, should be abolished :

And that the High Court of Judicature so to be established should have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Town as might be prescribed thereby ; and save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts :

Revocation of Letters Patent of 1862.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof as hereinafter provided, and subject to the provisions thereof) revoke Our said

Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third, dated the twenty-sixth March, one thousand seven hundred and seventy-four, establishing a Supreme Court of Judicature at Fort William in Bengal, were revoked or determined thereby.

High Court at Fort William to be continued.

2. And We do by these presents grant, direct, and ordain that notwithstanding the revocation of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, the High Court of Judicature, called the High Court of Judicature at Fort William in Bengal, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid; and that the said Court shall be and continue a Court of Record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent, shall be continued and depend in the said High Court, as if they had commenced in the said High Court, after the date of such publication, and that all rules and orders in force in the said High Court immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority.

Judges of the said High Court to be continued.

3. And We do hereby appoint and ordain that the person and persons, who shall immediately before the date of the publication of these Letters Patent, be the Chief Justice or Judges, or acting Chief Justice or Judges, if any, of the said High Court of Judicature at Fort William in Bengal, shall continue to be the Chief Justice and Judges, or acting Chief Justice or Judges of the said High Court, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the said recited Act for establishing High Courts of Judicature in India.

Clerks, &c., of the said High Court to be continued.

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, shall continue to hold and enjoy his office and employment, with the salary thereunto annexed, until he be removed from such office and employment; and he shall be subject to the like power of removal, regulations, and provisions as if he were appointed by virtue of these Letters Patent.

Declaration to be made by Judges.

5. And We do hereby ordain that the Chief Justice and every Judge of the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:—

"I, *A. B.*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge, and judgment."

Seal.

6. And We do hereby grant, ordain, and appoint that the said High Court of Judicature at Fort William in Bengal, shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same, with this inscription: "The Seal of the High Court at Fort William in Bengal." And We do further grant, ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be

delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the recited Act; and We do further grant, ordain, and appoint that, whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

Writs, &c., to issue in name of the Crown and under Seal.

7. And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders, and other mandatory process to be used, issued, or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court.

Appointment of officers.

8. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor-General in Council, and shall be either confirmed or disallowed by the Governor-General in Council. And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct, and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said rules.

Admission of Advocates, Vakeels, and Attorneys.

Powers of High Court in admitting Advocates, Vakeels and Attorneys.

9. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal, to approve, admit, and enrol such and so many Advocates, Vakeels, and Attorneys as to the said High Court shall seem meet; and such Advocates, Vakeels, and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

In making rules for the qualifications, &c., of Advocates, Vakeels and Attorneys.

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law; and no person whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor.

To Act. See *Moran* vs. *Dewan Ali*, 8 B. L. R., 418.

Civil Jurisdiction of the High Court.

Local limits of the ordinary original jurisdiction of the High Court.

11. And We hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law made by competent legislative authority for India, and until some local limits shall be so declared and prescribed, within the limits declared and prescribed by the proclamation fixing the limits of Calcutta, issued by the Governor-General in Council, on the 10th day of September, in the year of Our Lord, one thousand seven hundred and ninety-four, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

In the Madras and Bombay Letters Patent the words are "By any law made by the Governor in Council." In the Bombay/Madras Letters Patent, after the words "ninety-four," are inserted "within the limits of the local jurisdiction of the said High Court of Bombay/Madras at the date of the publication of these presents."

Original jurisdiction as to suits.

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits: except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees.

When the cause of action arises only partly within the local limits, the leave of the Court must be obtained before the institution of the suit—*Abdool Hamed* vs. *Promothonath Bose*, 1 Ind. Jur. (N. S.), 218, and leave to sue under this section cannot be implied from the fact that leave to sue as a pauper has been granted to plaintiff. Leave for the former purpose must be distinctly sought and obtained—*Jairam Narayan* vs. *Atmaram*, I. L. R., 4 Bom., 482. Moreover, the cause of action must be the cause of action in the plaint, and the leave does not cover an amended plaint —*Rampartab* vs. *Premsukh*, I. L. R., 15 Bom., 93. It will not be given when the plaintiff, defendant, and the witnesses reside at a long distance from Calcutta, and any decree that may be obtained can be satisfied from property outside local jurisdiction—*Radha Bibee* vs. *Mucksoodun*, 21 W. R., 204. An appeal lies from the order—*De Souza* vs. *Coles*, 3 Mad., 385. Leave to institute a suit was refused by one Judge on the 30th of June 1874. The unsuccessful party did not appeal, but made the same application to another Judge on the 15th December, and the leave was granted. *Held*, on appeal, that the order should not have been made and should be discharged—*Mudelly* vs. *Mudelly*, 8 Mad., 21.

Leave was granted in the following cases, namely—*Prasannamayi Dasi* vs. *Kadambini Dasi*, 3 B. L. R., 85; *Kartick Churn* vs. *Gopalkisto*, I. L. R., 3 Cal., 264; *Pragdas* vs. *Dowlatram*, I. L. R., 11 Bom., 257; *Bavah Meah* vs. *Khajee Meah*, 4 Mad., 218, and refused in the following cases—*De Souza* vs. *Coles*, 3 Mad., 384; *Radha Bibee* vs. *Mucksoodun*, 21 W. R., 204.

The plaintiff sued the defendant for partition of family property, which consisted both of moveable and immoveable property. The moveable property was within the jurisdiction, but all the immoveable property was outside the jurisdiction of the Court. *Held*, that the Court had no jurisdiction to hear the suit—*Jairam Narayn* vs. *Atmaram*, I. L. R., 4 Bom., 482. The words "*all other cases*" in section 12 do not include cases of suits for immoveable *plus* moveable property. They refer to cases in which immoveable property is not involved—*Ibid.*

It is not necessary to obtain the leave of the High Court under clause 12 of the Letters Patent, to sue to set aside a decree of that Court made upon a compromise to which the plaintiff has been induced by the misrepresentations of the defendant to agree, even when it appears from the plaint that the defendants are outside the jurisdiction of the Court—*Bibee Soloman* vs. *Abdool Aziz*, 4 C. L. R., 366.

PRACTICE.—When defendant objects to leave granted *ex-parte* the matter may be heard on summons before the case comes on for hearing—*Kessowji* vs. *Luckmidas*, I. L. R., 13 Bom., 404.

LIMITATION.—The limitation to set aside an *ex-parte* order under this section is governed by Art. 178, Schedule II of the Limitation Act—*Kessowji* vs. *Luckmidas*, I. L. R., 13 Bom., 404.

Extraordinary original civil jurisdiction.

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

The application should be made to the Judge sitting on the Original Side—*Doucett* vs. *Wise*, 4 W. R., Mis., 7. It will be granted when it has been shown to the satisfaction of the Court—*Courjon* vs. *Courjon*, 9 B. L. R., App. 10, that the lower Court has dealt harshly, and without discretion, with the applicant; and the decision turns mainly on points of law—*Kopilnauth Sahai* vs. *Government*, 10 B. L. R., 168; or that difficult points of law arise and where generally it appears to be a case that should not be tried in the Mofussil—*Doucett* vs. *Wise*, 1 Ind. Jur. (N. S.), 94, provided the interests of the applicant will be prejudiced if the case be not transferred—*Borradaile* vs. *Gregory*, Bourke, 1. See also *In the matter of Decree Suits in the Court of the Munsif of Debrooghur*, 7 B. L. R., 305; *Payn* vs. *Administrator-General*, 6 C. L. R., 221.

The substantive law applicable to the case will be the law of the Court from which it has been transferred—*Grose* vs. *Amirtamayi Dasi*, 4 B. L. R., 1.

Joinder of several causes of action.

14. And We do further ordain that, where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

15. And We do not further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment not being a sentence or order passed or made in any criminal trial of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors, in Our or Their Privy Council, as hereinafter provided.

This section is not affected by section 575 of the Civil Procedure Code—*Gossami Sri* vs. *Purushotam*, I. L. R., 10 Cal., 814; I. L. R., 17 Cal., 3, p. 7; 16 Ind. App., 137; but it is by section 629—*Achaya* vs. *Ratnavelu*, I. L. R., 9 Mad., 253; and by sections 588 and 592—*In re Rajagopal*, I. L. R., 9 Mad., 447: *Banno Bibi* vs. *Mehdi Hussain*, I. L. R., 11 Allo., 375.

Under this section an appeal has been allowed from any judgment (not being a sentence or order passed in a criminal trial) of a Division Court in the exercise of its appellate jurisdiction, when the Judges of the Court were equally divided in opinion and did not amount in number to a majority of all the Judges—*Shurno Moyee* vs. *Luchmeeput Doogur*, 7 W. R., 52, 512; *Gonami* vs. *Romanlalji*, I. L. R., 17 Cal., 3, p. 11; I. L. R., 10 Cal., 814; so an appeal has been allowed from a decision under Act VIII, 1859—*Nundaput Mahta* vs. *Urquhart*, 13 W. R., 209; and so also, though not without doubt, from an order passed by the English Committee dismissing a Munsif—*Hurrish Chunder Mitter*, Petitioner, 18 W. R., 209; and from a decision passed under Act VIII of 1859, section 338—*Ameer Ali* vs *Kassim Ali*, 13 W. R., 403; from a decision of a Judge in the Privy Council Department, refusing to execute a decree—I. L. R., 6 Cal., 594; but see *Lutf Ali* vs. *Asgur Reza*, I. L. R., 17 Cal., 455; from a decision in Vice-Admiralty jurisdiction—*In the matter of the ship "Champion,"* I. L. R., 17 Cal., 66; from an order deciding the claims of relatives to be guardian of a minor—*Kristo Kissor* vs. *Kadermoye*, 2 C. L. R., 583; *In the matter of Narrondas, a minor*, I. L. R., 14 Bom., 555.

To support an appeal it must be shown that the order appealed against is a judgment, that is a decision which affects the merits of the question between the parties determining some right or liability; but it may be final, preliminary or interlocutory—*The Justices of the Peace for Calcutta* vs. *The Oriental Gas Company*, 17 W. R, 364, and that the difference of opinion is as regards the final and complete disposal of the case—*Omrao Begum*, Petitioner, 13 W. R., 310; *Chunder Kant* vs. *Bindabun Chunder*, 7 W. R., 277. Thus, an appeal lies from an order rejecting a review—*Rughoo Bibee* vs. *Noor Jehan*, 12 W. R., 459; nor from an order issuing a *mandamus*—*The Justices of the Peace for Calcutta* vs. *The Oriental Gas Company*, 17 W. R., 364; nor from an order granting (?) or refusing a certificate to appeal to the Privy Council—*Mowla Buksh* vs. *Hodgkinson*, 24 W. R., 150; *Tara Chand Biswas* vs. *Radha Jeebun*, 24 W. R., 148; *Manley* vs. *Patterson*, I. L. R., 7 Cal., 339; *Lootf Ali* vs. *Asgur*, I. L. R., 17 Cal., 455; or refusing to extend time—*Kishen Pershad* vs. *Tilukdhari*, I. L. R., 18 Cal., 182; or refusing lease to appeal in *forma pauperis*—*Banno Bibi* vs. *Mehdi Husain*, I. L. R. 11 Alla., 375.

An application made to the High Court under this section was refused, the Judge saying that the plaintiff was not entitled to execute the decree. *Held*, that an appeal would lie under section 15 of the Letters Patent—*Kali Sundari Debi* vs. *Hurrish Chunder Choudhry*, 7 C. L. R., 543; I. L. R., 6 Cal., 594; I. L. R., 9 Cal., 482; 10 Ind. App., 4.

Points not raised before a Divisional Bench cannot be raised on appeal—*Hazara Begum* vs. *Hossein Ali*, 12 W. R., 498.

On second appeal before a single Judge of the High Court, an order was made directing the trial of certain issues of law and fact by the lower Appellate Court, the case being meanwhile directed to remain in the High Court file. *Held*, that there was no appeal from that order —*Kali Kristo Pal* vs. *Ram Chunder*, 9 C. L. R., 461.

Limitation.—The period of limitation has been held to be thirty days from the date of the judgment, unless good cause, such as that a copy of the judgment could not be obtained, be shown before the Appellate Bench to the contrary—*Huruck Singh*, Petitioner, 11 W. R., 107; 12 W. R., 458.

Appeal from Courts in the Provinces.

16. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

Jurisdiction as to infants and lunatics.

17. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, within the Bengal Division of the Presidency of Fort William, as that which is now vested in the said Supreme Court at Calcutta.

Provision with respect to the Insolvent Court.

18. And We do further ordain that the Court for Relief of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction, and otherwise, as are constituted by the laws relating to insolvent debtors in India.

This section narrows the jurisdiction of the Insolvent Court to the Bengal Division of the Presidency of Fort William—*In the matter of Tietkins*, 1 B. L. R., 84.

Law to be administered by the High Court of Judicature at Fort William in Bengal.

By the High Court in the exercise of ordinary original civil jurisdiction.

19. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

LAW AND EQUITY—See *Madhub Chunder Poramanick* vs. *Rajcoomar Doss*, 14 Ben., 76; *Ghose* vs. *Amertamaye Dasi*, 4 Ben., 14.

In the exercise of extraordinary original civil jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good

conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

By High Court in the exercise of appellate jurisdiction.

21. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits, and not within the limits of the criminal jurisdiction of any other High Court or Courts established by competent legislative authority for India, as the said High Court of Judicature at Fort William in Bengal, shall have criminal jurisdiction over at the date of the publication of these Presents *

* "And also in respect of all such persons beyond such limits, or over whom the said High Court of Judicature at $\frac{\text{Madras}}{\text{Bombay}}$ shall have criminal jurisdiction at the time of publication of these presents."—*Madras and Bombay Letters Patent.*

Jurisdiction as to persons.

23. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

24. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try, at its discretion, any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction.

Court may reserve points of law.

25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal, from any sentence or order passed or made on any criminal trial before the Courts of original criminal jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

High Court to review on certificate of the Advocate-General.

26. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General, that in his judgment there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

The Court can quash or confirm a conviction—*Reg.* vs. *Ghose*, 25 W. R., 36.

27. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Appeals from Criminal Courts in the Provinces.

28. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said High Court.

Hearing of referred cases and revision of criminal trials.

29. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs, in ordinary course, to the jurisdiction of some other Officer or Court.

High Court may direct the transfer of a case from one Court to another.

The High Court has power to transfer a criminal appeal—*Sitapathi* vs. *The Queen*, I. L. R., 6 Mad., 33; or the investigation or trial of any criminal offence committed in Calcutta to a Mofussil Court, or to direct the High Court to try any offence committed in the Mofussil—*Reg.* vs. *Nabadwip Gosami*, 1 B. L. R., Cr., 15. A single Judge on the Original Side has power to entertain an application for the removal of a case from the Mofussil to the High Court—*Reg.* vs. *Amir Khan*, 7 B. L. R., 240, p. 256.

Criminal Law.

30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference, or revision, charged with any offence for which provision is made by Act XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Offenders to be punished under Indian Penal Code.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

31. And We do further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceeding in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Judges may be authorized to sit in any places by way of circuit or special commission.

Admiralty and Vice-Admiralty Jurisdiction.

32. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such Civil and Maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India, as may now be exercised by the said High Court.

Civil.

Criminal.

33. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, or otherwise in connection with maritime matter or matters of prize.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

34. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power and authority as that which may now be lawfully exercised by the said High Courts, except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division, subject to the orders of the Governor-General in Council, as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established :* Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

* "And We do further ordain that the said High Court of Judicature at Bombay/Madras shall have the like power and authority as that which may be now lawfully exercised by the said High Court in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate whether within or without the Presidency of Bombay/Madras provided always:"—*Madras and Bombay Letters Patent.*

Matrimonial Jurisdiction.

Matrimonial Jurisdiction.

35. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have jurisdiction, within the Bengal Division of the Presidency of Fort William, in matters matrimonial between Our subjects professing the Christian religion : Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter, within the said Presidency lawfully possessed thereof.

Powers of Single Judges and Division Courts.

Single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose under the provisions of the thirteenth section of the aforesaid Act of the twenty-fourth and twenty-fifth years of Our reign ; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority ; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail.

The provisions of this section are modified by section 575, p. 513, *ante*—*Appaji* vs. *Shivlal*, I. L. R., 3 Bom., 204; *Balaji* vs. *Manager of Estate of Mohunlal*, I. L. R., 5 Bom., 680 ; and compare *Husaini* v. *The Collector of Muzufarnagar*, I. L. R., 11 Alla., 177.

Civil Procedure.

Regulation of proceedings.

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be

brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdictions, respectively. Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India.

Criminal Procedure.

Regulation of proceedings.

38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act XXV of 1861, or by such further or other law in relation to criminal proceedure as may have been or may be made by such authority as aforesaid.

Appeal to Privy Council.

Power to appeal.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal, made on appeal and from any final judgment, decree, or order made in the exercise of original jurisdiction by a majority of the full number of Judges of the said High Court [or of any Division Court, from which an appeal shall not lie to the said High Court, under the provisions contained in the 15th Clause of these presents]: Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rupees 10,000, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than Rupees 10,000; or from any other final judgment, decree, or order made either on appeal or otherwise aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council: subject always to such rules and orders as are now in force, or may, from time to time, be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency; except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgments.

40. And We further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences.

Appeal in criminal cases, &c.

41. And We do further ordain that, from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points

of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as we may, with the advice of Our Privy Council, hereafter make in that behalf.

Rules as to transmission of copies of evidence and other documents.

42. And We do further ordain that, in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal, to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against.

And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute or cause to be executed such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court should or might have been executed.

The Judges of the High Court are bound to record the reasons for their decisions—*Rungappa* vs. *Rungappa*, 12 Moore, 495, p. 502; these reasons should be stated publicly at the hearing, and not reserved to influence the Court of Appeal—*Richer* vs. *Voyer*, 5 L. R., P. C., 481. *See* Appeals to the Queen in Council, p. 532, *ante*.

Call for Records, &c., by the Government.

High Court to comply with requisition from Government for records, &c.

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal, shall comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner as such Government may deem proper.

Powers of Indian Legislature preserved.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making Laws and Regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of Our reign, Chapter sixty-seven, and may be in all respects amended and altered thereby.

Provisions of former Letters Patent inconsistent with these Letters Patent to be void.

45. And it is Our further will and pleasure that these Letters Patent, shall be published by the Governor-General in Council, and shall come into operation from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent, granted by His Majesty, King George the Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine and be utterly void, to all intents and purposes whatsoever.

In Witness thereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the twenty-eighth day of December, in the twenty-ninth year of Our reign.

(Sd.) C. ROMILLY.

LETTERS PATENT.

Establishing a HIGH COURT in the NORTH-WESTERNS PROVINCE of the Bengal Presidency, dated 17th March, 1866.

[The two first paragraphs of the Preamble are similar to those of the Calcutta Letters Patent of 1865, *ante.*]

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect and establish a High Court of Judicature in and for any portion of the territories, within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts, established at the said Presidencies, as We from time to time might think fit and appoint; and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act, relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor-General or Governor of the Presidency, in which such High Courts were established, shall, as far as circumstances may permit, be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the government of the said territories.

And whereas We did, upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, the fourteenth day of May, in the twenty-fifth year of Our reign, in the year of Our Lord, one thousand eight hundred and sixty-two, did accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal, and did thereby constitute the said Court to be a Court of Record:

Establishment of High Court for the North-Western Provinces.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly, for Us, Our heirs and successors, erect and establish, for the North-Western Provinces of the Presidency of Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature, for the North-Western Provinces, and We do hereby constitute the said Court to be a Court of Record:

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the said High Court of Judicature for the North-Western Provinces, shall until further or other provision shall be made by Us, or Our heirs and successors in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire, William Edwards, Esquire, William Roberts, Esquire, Francis Boyle Pearson, Esquire, and Charles Arthur Turner, Esquire, being respectively qualified, as in the said Act is declared.

Declaration to be made by Judges.

3. And We do ordain that the Chief Justice and every Judge of the said High Court of Judicature, for the North-Western Provinces, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:—

"I, *A. B*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature, for the North-Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

4 to 8. [These sections are similar to sections 6 to 10 of the Calcutta Letters Patent of 1865.]

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

10, 11. [These sections are similar to sections 15 and 16 of the Calcutta Letters Patent of 1865, *ante*.]

Jurisdiction as to infants and lunatics.

12. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William, by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force.

13, 14. [These sections are similar to sections 15 and 16 of the Calcutta Letters Patent of 1865 *ante*.]

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

15. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have ordinary original criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal, shall have criminal jurisdiction over at the date of the publication of these presents; and the criminal jurisdiction of the said last-mentioned High Court over such persons shall cease at such date: Provided, nevertheless, that criminal proceedings which shall at such date have been commenced in the said last-mentioned High Court shall continue as if these presents had not been issued.

Judicature as to persons.

16. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

17. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut, and shall have authority to try a its discretion any such persons brought before it on charges preferred by any Magistrate or other Officer specially empowered by the Government in that behalf.

18. [This section is similar to section 25 of the Letters Patent of 1865, *ante*.]

High Court to review cases on points of law reserved by one or more Judges of the said High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

Appeals from Criminal Courts in the Provinces.

20. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall be a Courtof Appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces, and shall exercise

appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force.

Hearing of referred cases, and revision of criminal trials.

21. And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officers now authorized to refer cases to the Court of Sudder Nizamut Adawlut of the North-Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut.

High Court may direct the transfer of a case from one Court to another.

22. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

23. [This section corresponds with section 30 of the Letters Patent of 1865, *ante.*]

Judges may be authorized to sit in any places by way of circuit, or special commission.

24. And We do further ordain that whenever it shall appear to the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court, now subject to the superintendence of any Sudder Dewany Adawlut or the Sudder Nizamut Adawlut of the North-Western Provinces, other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

25. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall have the like power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last-mentioned High Court in relation thereto shall cease from the date of the publication of these presents: Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last-mentioned High Court shall continue as if these presents had not been issued: Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

26, 27. [These sections correspond with sections 35 and 36 of the Calcutta Letters Patent of 1865, *ante.*]

See note under clause 36, p. 670, *ante.*

Civil Procedure.

Regulation of Proceedings.

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces from time to time to make rules and orders for the purpose of adapting, as far as possible, the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council

and being Act No. VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdictions respectively.

Criminal Procedure.

Regulation of proceedings.

29. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

Power to appeal.

30. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature for the North-Western Provinces, made on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court, under the provision contained in the 10th Clause of these presents: Provided, in either case, that the sum or matters at issue is of amount or value of not less than 10,000 rupees, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree, or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors in Our or Their Privy Council: subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the said Provinces except so far as the said existing rules and orders, respectively, are hereby varied, and subject also to such further rules and orders as we may, with the advice of Our Privy Council, hereafter make in that behalf.'

By Warrant under the Queen's Sign Manual,

C. ROMILLY.

BARRS *vs.* JACKSON.

In a suit instituted in the Court of Chancery for the distribution of the assets of an intestate the grant of letters of administration is not conclusive evidence upon the question who is the intestate's sole next of kin.

Harriet Martindale Smith died intestate and unmarried on the 19th April 1839.

Upon her decease, application for letters of administration of her personal estate was made to the Prerogative Court of the Archbishop of Canterbury by Sarah Harriet, the wife of John Barrs, and by Richard Jackson; the former by claiming as the niece and only next of kin, and the latter as the second cousin and only next of kin of the intestate. Richard Jackson also entered a *caveat* against the grant of letters of administration to Mrs. Barrs.

The cause came on for hearing in the Prerogative Court in July, 1840, when a decree was made to the effect that the Judge having read the evidence, and heard advocates and proctors (Wills and Pitcher) thereon on both sides at peti-

tion of Wills, by his final interlocutory decree, having the force and effect of a definite sentence in writing, pronounced, that, as far as it appeared from the evidence in this cause, Harriet Martindale Smith, the deceased in this cause, died a spinster without a parent, brother or sister, uncle or aunt, nephew or niece, or cousin-german, and intestate, leaving Richard Jackson, Wills' party, her lawful second cousin and next of kin; and that Pitcher had failed in proof that Sarah Harriet Barrs (wife of John Thomas Barrs), his (Pitcher's) party, was the lawful niece and next of kin of the said deceased; and decreed letters of administration of all and singular the goods, chattels, and credits of the said deceased to be committed and granted under usual security to the said Richard Jackson, the lawful second cousin and next of kin of the said deceased; but, at petition of Pitcher, directed the said administration not to pass the seal for fifteen days from the date of the decree.

In January, 1841, the present bill was filed by Barrs and his wife against Jackson, stating that Harriet Martindale Smith died intestate, possessed of considerable personal estate, and in particular of a sum of £3,800, New South Sea Annuities; setting forth the relationship of the plaintiff, Mrs. Barrs, to the intestate (which she claimed as being the only surviving child of Robert James Smith, the elder brother of the intestate by the half blood); stating the grant of letters of administration to the defendant, and praying the usual accounts and administration of the personal effects of the intestate; that a competent part of the residue might be settled upon the plaintiffs and their issue; that the surplus might be paid to the plaintiff Mrs. Barrs; and that the defendant might be restrained from selling out or transferring, and the South Sea Company from permitting the sale or transfer of the stock.

The defendant, by his answer, relied on proceedings in the Ecclesiastical Court, and suggested that Robert James Smith was illegitimate.

Circumstances tending to show the relationship of Mrs. Barrs to the intestate, and that such relationship was acknowledged by the intestate, were put in issue by the pleadings; and evidence was very fully entered into in those particulars on the part of the plaintiffs.

Mr. *Simkinson* and Mr. *Heathfield*, for the plaintiffs.

Mr. *Purvis* and Mr. *Hubback*, for the defendants.

The following authorities were cited: *Bouchier* vs. *Taylor* (4 Brs. P. C., 708, Toml. ed.); *Thomas* vs. *Ketteriche* (1 Vez. Sen., 333); *West* vs. *Willby* (3 Phill., 374); *Long* vs. *Wakeling* (1 Beav., 400); *Blackham's case* (1 Salk. 290); *Phill. Ev.* Vol. 2, Ch. 1, Sec. 4; Hargr. Law Tr., 473.

THE VICE-CHANCELLOR.—This is a suit for an account and payment to the plaintiffs of the residue of the personal estate of Harriet Martindale Smith, who died unmarried and intestate. The defendant is her administrator, and says he was her cousin and sole next of kin at her death. The plaintiffs, contending that the female plaintiff was the intestate, niece and sole next of kin at her death, sue in right of the female plaintiff in that alleged character. And, substantially, the only question of fact in the cause is, whether Robert James Smith, the father of the female plaintiff, was legitimate. He appears to have been, both by the intestate and her father, recognized and considered as the son, whether legitimate or illegitimate, of the intestate's father, and there seems little or no ground for doubt, that, if Robert James Smith was legitimate, Mrs. Barrs, who is admitted by the defendant to be the lawful child of Robert James Smith, was the sole next of kin of the intestate at her death.

I have already stated my opinion, that, subject to the question of the conclusiveness against the plaintiffs' alleged title of certain proceedings in the Ecclesiastical Court, to which I am about to advert (and upon which question alone my judgment was reserved), the evidence in the present suit is such as to render an inquiry proper as to the disputed fact of the relationship of Mrs. Barrs; and that, supposing the Court not at once to dismiss the bill, an issue ought, according to the desire, in that event, of the defendant, to be directed for the purpose of trying it; the present state of the evidence leaving the matter in a condition of considerable obscurity and doubt, as it appears to me.

The proceedings in the Ecclesiastical Court, to which I have referred, took place upon the occasion of a contest for the grant of administration, which was claimed on one hand by the defendant as sole next of kin, on the other hand by the plaintiff, Mrs. Barrs, as sole next of kin, the alleged title of each being inconsistent with the alleged title of the other. Upon these conflicting claims, the parties respectively entered into evidence in the Ecclesiastical Court, and upon that evidence the Ecclesiastical Court decided the contest by granting the administration to the present defendant, on the ground that the plaintiffs had failed in proving Robert James Smith to have been the lawful brother of the intestate. It has now been contended before me, that such adjudication of the Ecclesiastical Court in the regular exercise of its proper functions, founded, as the adjudication was, upon the question of pedigree, which is the question of fact raised in this Court, is conclusive upon that question of fact, so as to render any investigation of its truth here superfluous and improper; and being so, makes it the duty of this Court at once to dismiss the bill, whatever may be its own view of the truth, and that without any regard to new or additional evidence; it being admitted that the plaintiffs have more evidence here, in support of the alleged legitimacy of Robert James Smith, than was before the spiritual court. This is the point that I have had to consider, and am now to decide.

With the rule of the civil law rightly understood, which, in the language of *Ulpian*, says, "*Res judicatâ pro veritate accipitur,*" the law of England generally agrees. The sound reason of the rule can scarcely be better expressed than it is by *Paulus*, in the Digest, thus: "*Singulis controversiis singulas actiones, unamque judicati finem sufficere, probabili ratione placuit; ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem: maximè si diversa pronunciarentur.*" (Dig. lib. 44, tit. 2, sect. 6.)

Other passages in the same division of the Digest, are to this effect:—thus *Ulpian* says, "*Et generaliter* (*ut Julianus definit*) *exceptio rei judicata obstat, quoties inter easdem personas eadem quæstio revocatur, vel alio genere judicii.*" (Sect. 7.)

Paulus says, "*Cum quæritur, hæc exceptio noceat necne? Inspiciendem est an idem corpus sit* (Sect. 12). * * * *Et an eadem causa petendi, et eadem conditio personarum: quæ nisi omnia concurrunt, alia res est.*" (Sect. 14.) And again, "*Si quis interdicto egerit de possessione, postea in rem agens non repellitur per exceptionem; quoniam in interdicto possessio, in actione proprietas vertitur.*" (Sect. 14.)

And *Neratius*, "*Cum de hoc, an eadem res est, quæritur, hæc spectanda isunt: personæ; id ipsum de quo agitur; causa proxima actions: nec jam interest, quâ ratione quis eam causam actionis competere sibi existimâsset: perinde ac si quis, postea quam contra eum judicatum esset, nova instrumenta causæ suæ repperisset.*" (Sect. 27.)

Voet, in his commentary on this title, says, "*Non aliter tamen huic exceptioni locus est, quam si lis terminata denuò move atur inter easdem personas, de eâdem re, et ex eâdem petendi causâ; sic ut, uno ex his tribus deficiente, cesset. Eadem res intelligitur quotiens apud judiciem posteriorem id quæritur quod apud priorem quæsitum est.* * * * *Eadem petendi causa est etiam, licet non eâdem agatur actione, sed alio judicii genere eadem quæstio ventiletur; cum eandem causam non tam actio faciat, quam potius origo petitionis. Quâ ratione, cum propter rei emptæ vitium tale, propter quod eam emptor empturus non fuisset, et* redhibitoria et quanti minoris *actio competere possit, sic ut actio* quanti minoris *etiam redhibitionem tunc contineat, juliano placuit, eum qui alterutrâ earum egerit, si alterâ posteà agat, rei judicatæ exceptione submovendum esse.*"

Vinnius, in a note to the 13th title of the 4th book of the Institutes, upon the words "*per exceptionem rei judicatæ,*" says, "*Quæ ita agenti obstat, si eadem quæstio inter eosdem revocetur, id est si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum;*" and other commentators express themselves to a similar effect. (And see Quint. Inst. Orat. lib. 5, c. 2.)

It may be doubted, I think, reasonably, whether, having regard to the different objects and purposes of the two suits, if the present point were to be

tried by the language of the Digest, or of the principal commentators upon it (including *Voet*), the illegitimacy of Robert James Smith could be held *res judicatæ*, so as to expose the demand in the present suit to that exception. The law of England must however govern in this case, and the authority of the House of Lords in *Bouchier* vs. *Taylor* (4 Bro. P. C., 708, Toml. ed.) has been represented as being in unison with the opinions of two no less distinguished Judges than Lord *Mansfield* there, and Lord *Hardwicke* in the earlier case of *Thomas* vs. *Ketteriche* (1 Vez. Sen , 333), favourable to the defendant's contention; of which another very learned and eminent lawyer, Mr. *Hargrave*, certainly took that view in the argument for the *Duchess of Kingston's case*, published in his collection of Law Tracts, where his opinion upon the present point was against the side on which he was counsel. In a prior argument however of his, that for the Appellants in *Bouchier* vs *Taylor*, the interests of his clients were to sustain the *exceptio rei judicatæ;* and, perhaps, it may be thought that the side which he had to support, and did with signal ability and strenuousness support in that case so shortly before the other, may have influenced in some degree his judgment. His views of the conclusiveness of the sentence of the Ecclesiastical Court in the *Kingston case* were not, I apprehend, adopted by the House of Lords, and were certainly at variance with the unanimous opinion of the consulted Judges on that occasion. Of *Thomas* vs. *Ketteriche* (the case before Lord *Hardwicke*) it may be observed that no fact was there in dispute. The question was one merely of law, of civil law, which the Ecclesiastical Court had decided ; nor to the decree pronounced by Lord *Hardwicke* was it essential to hold the sentence of the Ecclesiastical Court conclusive or binding ; for his Lordship's opinion upon the point of law agreed with that of the Ecclesiastical Court. He says,—"The suit might have been in the Ecclesiastical Court for a distribution as well as here : and that Court could not have contradicted the sentence by which administration was granted. Then I am equally bound thereby ; being bound to determine by the same rules, like the case of legacy ; for the rule of law, by which the decision is to be made, cannot be changed by choosing the Court in which to sue. But to enter into the merits, if it was open to me to determine contrary, according to the rules by which this computation is to be made, the plaintiff is not nearer ; but in equal degree." (1 Vez. Sen., 334)

In *Bouchier* vs. *Taylor* several grounds of appeal were stated and insisted upon, as appears by the appellant's and respondent's printed cases, which Mr. *Swanston* was so good as to produce from his collection ; and it was contended that, whether the decision of the Ecclesiastical Court was conclusive or not conclusive, the appeal was well founded. It was said, that, independently of that question, the bill ought to have been dismissed upon the special circumstances. From the account given by Mr. *Hargrave*, who says that the decree was reversed on both grounds, without opposition by the *Lord Chancellor*, or any other lord, and that Lord *Mansfield* was the only speaker on the subject, it is to be gathered that Lord *Mansfield* thought, not only that the sentence of the Ecclesiastical Court as to the administration was conclusive as to the distribution, but that if the law were otherwise, the appeal ought equally to succeed. I suppose that the order or judgment of the House does not state the ground or reason of the reversal, and that the record and documents of that case are consistent with the possibility that the House collectively may not have judicially proceeded upon each branch or every part of the reasons assigned by Lord *Mansfield* for differing from the conclusions of the *Master of the Rolls* and the *Lord Chancellor*, in the Court below. In that case Dr. Bouchier was sued in the original bill, not by the personal representative of Alice Merchant, but by persons claiming beneficially under the trust of her will. The intestate had died in March, 1743. The proceedings in the Ecclesiastical Court having been in pendency for several years, were determined in January, 1754, after examination of a great number of witnesses. The original bill in this Court was not filed until October, 1758. The plea was heard in April, 1759, and the bill fully answered in the same year. The answers were replied to in 1760. A bill of revivor and supplement, filed in October, 1765, was answered in 1766, and not until the 11th of March, 1774, thirty-one years after the

intestate's decease, when all the witnesses who had been examined for Dr. Bouchier in the Ecclesiastical Court were also dead (he adduced no parol evidence in this Court on the question of pedigree), was the cause first brought on to be heard. Dr. Bouchier's relationship, it should be recollected, was clear and undisputed; but there was a strong body of testimony against that alleged by Alice Merchant.

Under such circumstances as these, if putting the argument of conclusiveness out of the question, the House of Lords, in possession of that evidence for and against Alice Merchant's pedigree upon which the spiritual court had decided against her claim of kindred, considered the decision well-founded, and not finding that evidence materially added to or varied, thought itself warranted in disbelieving the pedigree, or upon the other grounds in dismissing the bill, it is difficult to consider such a conclusion unreasonable.

If I might, without presumption or impropriety, express an opinion, I should, judging from the printed appeal papers, say that, assuming the sentence there not to have been conclusive, the decision of the House of Lords was, upon the whole case, a correct and right decision.

It must be borne in mind also that both *Thomas* vs. *Ketteriche* and *Bouchier* vs. *Taylor* were previous to the case of the *Duchess of Kingston* (20 How. St. Tr., 355). The Lord Chief Justice *De Grey* and the other consulted Judges were in that case, as is universally known, of opinion that a sentence (meaning that a sentence fairly and properly obtained) in the spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence so as to stop the Counsel for the Crown from proving the marriage in an indictment for polygamy. The ability and learning of the argument delivered by the Lord Chief Justice of the Common Pleas on that occasion are acknowledged by every one.

Lord *Camden*, Lord *Mansfield* and Lord Chancellor *Bathurst*, each of whom pronounced a vote of guilty on that trial, must have agreed with the Judges in their answers to one or both of the questions thus answered for them by Sir *W. De Grey*; and I am not aware of any reason for believing, that either of those noble and learned lords dissented from the Judges as to either question. The Lord Chief Justice said: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, that the judgment of a Court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive upon the same matter between the same parties coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. Upon the subject of marriage, the spiritual court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage, and of enforcing specifically the rights and obligations respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction. They do not want or require the aid of the spiritual courts; nor has the law provided any legal means of sending to them for their opinion, except where, in the case of marriage, an issue is joined upon the record in certain real writs upon the legality of a marriage, or its immediate consequence, 'general bastardy'; or in like manner, in some other particular instances lying in the peculiar knowledge of their courts, as profession, deprivation and some others. But even in these cases, if the ordinary should return no certificate, or an insufficient one; or, if the issue is accompanied with any special circumstances, as if a second issue, triable by a jury, is found upon the same record; or, if the effect of the same issue is put into another form, a jury is to decide, and not the ordinary to certify, the truth."

[His Honour, after reading some further passages in the same judgment, proceeded as follows]: —In *Outram* vs. *Morewood* (3 East., 346; see p. 357), we find Lord *Ellenborough* laying it down that a judgment is final only for its own proper purpose and object, and no further. In *Blackham's case* (1 Salk., 291) Lord *Holt* long before had said, speaking of the Ecclesiastical Courts: "A matter which has been directly determined by their sentence cannot be gainsaid; their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary. But that is to be intended only in the point directly tried; otherwise it is, if a collateral matter be collected or inferred from their sentence, as in this case: because the administration is granted to the defendant, therefore they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point there tried had been married or unmarried, and their sentence had been not married."

If the law as derived from these and other authentic sources, is, as I apprehend it to be, that generally the judgment, neither of a concurrent nor of an exclusive jurisdiction, is (whether receivable or not receivable) conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment; and that a judgment is final only for its proper purpose and object; it may be thought difficult to say why the sentence in the present case ought, upon the present question, to be deemed conclusive. The object of that proceeding, and of the sentence, was not distribution, but merely the appointment of an administrator, whose duty, when appointed, it would be to distribute the estate according to law. Nor was it of necessity that the next, or any of the next, of kin should be appointed to that office. There are cases, indeed, in which the sole next of kin of an intestate though adult, present, under no disability, and of unimpeached conduct, is excluded, notwithstanding the positive provisions of the legislature in that respect: *Young* vs. *Pierce* (1 Freem, 496); *Bridges* vs. *The Duke of Newcastle* (3 Phill., 381, cited); *Thomas* vs. *Butler* (1 Vent., 217; App. to Hagg., Vol. 2); *Fielder* vs. *Hanger* (3 Hagg., 769). It is plainly not of the essence of such a sentence that the preferred person should be the next of kin to the intestate. It happened here that such in truth and expressly was the particular ground of what the Ecclesiastical Court did. But suppose the case of the Ecclesiastical Court excluding the next of kin from the administration, on the ground of some alleged fact disqualifying him in the judgment of that jurisdiction, notwithstanding admitted proximity of blood; is the truth of that alleged fact for ever incontrovertibly established against him? Put the case of administration granted to a man as a creditor of an intestate, and the administration subsequently revoked after a contest, and new letters of administration granted to his opponent on the ground that there was no debt (if there may be such a course consistently with the rules and practice of that jurisdiction): is it to be said that the former is barred of his demand, and precluded from proving afterwards if he can, and recovering or receiving, his debt? Suppose a dispute for administration with the will annexed, between the sole residuary legatee and another, decided in favour of the latter, on the ground of the former having released or assigned, or being an alien-enemy, or an infant; is he precluded from shewing in a Court of Equity that there was no release or no assignment, or proving there his English birth or true age? Again, can it be said that a decision in lunacy upon a question of the committeeship of real estate between A and B, each claiming adversely to the other to be the lunatic's heir-apparent, though turning upon that point, concludes the fact of heirship between the contending parties after the ancestor's death? Or, suppose the case of a creditor's bill in equity by a simple contract creditor defeated on the ground of a general release, and admit the decree of dismissal to be final in this Court as to the debt demanded; would it be conclusive in another suit by the same plaintiff as a specialty creditor, so as to preclude him from denying the execution of the release, or shewing it void for fraud, or as founded on an illegal consideration? Lord *Ellenborough* certainly, and the Court of King's Bench in *Outram* vs. *Morewood*, decided most accurately with reference to the pleadings in that action at Common law, that an

allegation on record, upon which issue has been once taken and found, is, between the parties taking it, conclusive according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found. The action, however, in *Outram* vs. *Morewood* raised, as to the same property and for the same purpose, the same issue as was raised and tried in the action the judgment wherein was pleaded; and there are material points of distinction between the system of pleading of the English Courts of Common law and those of other Courts of justice. But it is, I think, to be collected, that the rule against re-agitating matter adjudicated is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate object of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority. I am not now referring to the law applicable to certain prize and admiralty questions, which are governed by principles in some respects peculiar. On the whole, I am not at present prepared to say that, according to the proper sense of the expression, the judgment of the Ecclesiastical Court between these parties was directly upon the point of the alleged illegitimacy of Robert James Smith, and had the establishment of that supposed fact for its proper purpose and object, so as to render his illegitimacy *rem judicatam* between the parties on a question of distribution.

But again, there seems to me much analogy for the present purpose between a sentence against the party libelled in a cause of jactitation, and the sentence in question here. As the former does not conclude the question of marriage, but decides merely that the party has, up to that time, failed in proving it, leaving him at liberty to prove it in any other proceeding, so in the present case, the spiritual court has done no more, I apprehend, than declare to the same effect with regard to the alleged kindred. I am aware that matrimonial causes may be said to have some peculiar privileges. *Oughton* thus expresses himself:- "*Sententia lata in causâ matrimoniali contra matrimonium nunquam transit in rem judicatam et habet multa privilegia. Et quoties Ecclesia decipitur pronunciando sententiam contra matrimonium ex novis probationibus (etiam aliquando ex eisdem) potest revocari prior sententia. Et ratio est ad evitandum peccatum, &c.*" Without insisting, however, too much on the application of that reason to the case of an administrator, whose duty it is to obey, as all Acts of Parliament, so especially the statutes of distribution, and who is sworn: "*Quod fideliter administrabit omnia et singula bona et quod reddet verum computum,*" it may be as well to compare the language of the two sentences. The sentence in the *Duchess of Kingston's case* was thus:—We, &c., have thought fit and do thus think fit to proceed to the giving and promulging our definitive or final decree in the same case (*i.e.*, *Chudleigh* vs. *Hervey*) in manner and form following (to wit): 'Forasmuch as by the acts enacted, alleged, exhibited, propounded, proved, and confessed in this cause, we have found and clearly discovered that the proctor of the said Honourable Elizabeth Chudleigh hath fully and sufficiently founded and proved his intention, deduced in a certain libel and allegation and other pleadings and exhibits given in, exhibited, and admitted on her behalf in the same cause, and now remaining in the registry of this Court (which libel and allegation and other pleadings and exhibits, we take and will have taken, as if herein repeated and inserted, for us to pronounce as hereinafter we shall pronounce); and that nothing, at least effectual in law hath on the part of the Right Honourable Augustus John Hervey been excepted, deduced, exhibited, propounded, proved, or confessed in the same cause, which may or ought in any wise to defeat, prejudice, or weaken the intention of the said Honourable Elizabeth Chudleigh deduced as aforesaid; and particularly that the said Right Honourable Augustus John Hervey hath totally failed in the proof of his allegation given in and admitted in this cause, whereby he pleaded and

propounded a pretended marriage to have been solemnized between him and the said Honourable Elizabeth Chudleigh, spinster: therefore we &c., do pronounce, decree, and declare that the said Honourable Elizabeth Chudleigh, at and during all the time mentioned in the said libel given in and admitted in this cause, and now remaining in the registry of this Court, was and now is a spinster, and free from all matrimonial contracts or espousals (as far as to us as yet appears), more especially with the said Right Honourable Augustus John Hervey; and that the said Right Honourable Augustus John Hervey, notwithstanding the premises, did, in the years and months libellate, wickedly and maliciously boast and publicly assert (though falsely) that he was contracted in marriage to the said Honourable Elizabeth Chudleigh, or that they were joined or contracted together in matrimony: wherefore we do pronounce, decree, and declare, that perpetual silence must and ought to be imposed and enjoined the said Right Honourable Augustus John Hervey as to the premises libellate, which we do impose and enjoin him by these presents, &c."

The sentence here was in these words:—[His Honour here read the sentence as before stated. (See *ante* p. 656.)]

I see no substantial difference, as I have said, for the present purpose; nor does it seem unreasonable that a party, where the only contest is for administration, should be allowed not to put forward the whole strength of his case, but should, especially if he believe his opponent honest or solvent, be able to retire early with a half-proved case from such a preliminary dispute for an office, without forfeiting his right of distribution. The defendant's counsel have in effect admitted, that it is competent to any person, who did not engage in that proceeding, to show that he is, if in truth he is, the intestate's husband, or sole next of kin, to the absolute exclusion of both the present parties from distribution; and have almost, if not quite, conceded that, without appealing or questioning the soundness of what the Ecclesiastical Court did when the case was before it, the present plaintiffs may adopt a proceeding in that jurisdiction, under which they may be let in to show, for the effectual purpose of distribution, the relationship which they allege, if they truly allege it. But the defendant contends, that it is an essential preliminary, in each case, to obtain a revocation or appeal of the existing grant of administration; and that though such a revocation or repeal might give the plaintiffs a title to sue in this Court, they have none previously. To this position I cannot agree. Without giving any opinion, indeed, without knowing what would be the particular course or formalities requisite in the Ecclesiatical Court were the plaintiffs again to resort to that jurisdiction, it is sufficient for me to be satisfied that the concurrent jurisdiction which I am now administering is not, in matters of form and procedure, bound by the regulations of other tribunals, and that to compel an administrator to perform an obligation and trust which the legislature has strictly commanded him to perform, is not less the duty of this Court, because the allegations by means of which he obtained that office were, if they were, false.

In *Blackham's case*, no such difficulty seems to have occurred to the mind of Lord *Holt*; and I am mistaken, if instances cannot be found in the Court of Chancery, where, without any repeal or revocation of the letters of administration, an administrator has been compelled to account and distribute in a manner at variance with the alleged title under which he obtained that character. I may before concluding, perhaps not improperly refer to the cases of *Bissel* vs. *Axtell* (2 Vern., 47); *Cross* vs. *Salter* (3 T. R., 639); *Hillyard* vs. *Graham* (Rep. temp. Hardw., 312, cited; 2 Vez. Sen., 245, cited; see Woddes. Lect., Vol. 3, p. 318, and the cases there cited), *Doe* vs. *Seaton* (2 Cr. M. & R., 728); *Shearam* vs. *Burnard* (10 Ad. & Ell., 593), in addition to those which I have already mentioned. Upon the several considerations to which I have alluded, being of opinion that it is not necessarily, and ought not without necessity, to be inferred from the judgment of the House of Lords in *Bouchier* vs. *Taylor*, that the House judicially held the sentence then in question conclusive; being also of opinion, that the decree in *Thomas* vs. *Ketteriche* and my decision may well stand together,—I feel it my duty rather to incur the charge of differing, if I am differing, from

the high and venerable authority of Lord *Hardwicke* and Lord *Mansfield*, than, in contradiction to my fixed belief of what the law of this country is, to say that the sentence of the Ecclesiastical Court, though unrevoked, is in the present suit conclusive on the question of distribution. I have considered and disposed of this case, as if the argument upon the point of the alleged conclusiveness of the sentence were clearly open to the defendant; but I wish to be understood, as not deciding whether, as the pleadings are framed, the point is or is not open to him.

Issue.—Whether at the time of the death of the testatrix, the plaintiff, Mrs. Barrs, was her sole next of kin.

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